EDITORIAL

Juristische Fiktionen sind faszinierend. Es geht aber weniger um eine legislatorische Technik, die es ermöglicht, einen gesetzlichen Text knapper und ohne Wiederholungen zu halten, sondern um Fiktionen in einer grandiosen Dimension. Es handelt sich um die Verrechtlichung der großen politischen Fiktionen, über die Staaten, die es nicht gibt, oder die Territorien, die faktisch woanders hingehören als juristisch. Wobei die juristische Sichtweise im Regelfall auch stark gespalten ist. Diese juristischen Fiktionen verursachen wahre juristische Probleme. In diesem Heft setzen wir die Problematik solcher „Nichtstaaten" fort – aus einer privatrechtlichen und einer völkerrechtlichen Perspektive.

Aber nicht nur die fiktiven Rechtsordnungen geben in der Region Anlass zur Sorge. Auch die Staaten, die bis vor kurzem in der westlichen Welt fest verankert zu sein schienen, werden wiederum zu einem „God's Playground". Die Justiz in Ungarn und die deutsche Justiz werden vergleichend untersucht. Es geht nicht nur um die Darstellung und Hervorhebung der Unterschiede oder Scheinähnlichkeiten. Ein Instrumentarium der Analyse der jüngsten Ereignisse muss entwickelt werden, um das Geschehen in vielen Ländern Europas präzise analysieren zu können.

Darüber hinaus stehen die Rechtsordnungen dieser Staaten nicht still und nicht alles wird sofort politisch. Die Reform des Insolvenzrechts in Polen verdient eine sorgfältige Betrachtung (auch im Vergleich zu Deutschland). Das Insolvenzrecht der anderen Staaten ist durch die Insolvenzverordnung eine allgemeine europäische Angelegenheit. Das Insolvenzrecht eines Nachbarstaates muss durch die verantwortlichen Juristen, die dieses Feld beackern, sorgfältig beobachtet werden.

In den Zeiten der neuen Völkerwanderung verdient auch die Rechtsprechung in Bezug auf Ausländer besonderes Augenmerk. Daher wird ein Versuch eines deutsch-polnischen Vergleiches im engen Feld des Übereinkommens über die Kindesentführung unternommen. Zugleich können hier Unterschiede im Begründungsstil der deutschen und polnischen Gerichte beobachtet werden.

Die Veränderungen in den modernen Gesellschaften werfen wichtige Fragen über die aktuelle Gestaltung des modernen Erbrechts auf – hierzu ein Beitrag aus Polen über das Verbot der gemeinschaftlichen Testamente.

Sie finden in diesem Heft auch eine Untersuchung der Freizeichnungsklauseln in Polen. Dabei handelt es sich um einen Teil eines größeren Projekts über das AGB-Recht in Europa im unternehmerischen Bereich.

Schließlich das Architektenrecht – das Europa der Dienstleistungen wird zu einem immer wichtigeren Forschungsbereich.

Es ist erfreulich, dass das Recht der „Oststaaten" nicht nur durch den engen Kreis der Osteuropaforscher untersucht wird, sondern auch immer häufiger einen Teil der regulären Rechtsvergleichung darstellt, die nicht nur lokal bedingte, sondern auch allgemein geltende Schlussfolgerungen ermöglicht.

Fryderyk Zoll

Katažyna Mikša

Consequences of Non-Recognition of State in Private International Law from the Polish Perspective

I. Introduction

For almost forty years after the Second World War, the issue of borders in Europe seemed to be stable. The turn of the eighties/nineties brought a revolutionary change in the political map of Europe. The dissolution of the Soviet Union and Yugoslavia were the cause of the appearance on the map of Europe (again or for the first time) of some countries. Moreover, the status of several territories remains controversial and leads to tensions in the international area. In this respect, the following territories should be mentioned: The Transdniestrian Moldavian Republic (hereinafter referred to as Transdniestria[1]), the Republic of Kosovo (hereinafter referred to as Kosovo), and the Autonomous Republic of Crimea (hereinafter referred to as Crimea). The first of the territories mentioned above proclaimed its independence from Moldova in 1990, but so far, no country has ever recognized it. The issue of Crimea has a different character. In an illegitimate referendum, which was held on 16 March 2014, the Crimean people voted for the integration of the region into the Russian Federation as a regional subject (i. e., a so-called субъект Российской Федерации). On 17 March 2014, the president of the Russian Federation Vladimir Putin signed a decree recognizing the Crimea secession.

The country mentioned last – Kosovo – declared its independence from Serbia on 17 February 2008. In the Advisory opinion on the accordance with international law of the Kosovo's unilateral declaration of independence from Serbia, the International Court of Justice stated that the declaration did not violate general international law. Nevertheless, only a little bit more than 100 countries recognized Kosovo so far, among others – Poland. Therefore, the status of Kosovo is still considered as controversial. All above-mentioned territorial changes are not recognized by the international community, or are only partly recognized.

Regardless of their uncertain international status, all these "states" are involved in business, in civil transactions. Hence questions regarding the recognition of legal acts carried out in these territories, and recognition of official or private documents issued there may arise. Furthermore, choice of law rules of the forum country may refer to a territory the international legal status of which is uncertain. Consequently, the non-recognition of states is important as well from a private international law perspective. The following paper focuses on the issues of private international law, leaving aspects of public international law beyond it. Thus, all previous considerations referring to the status of Crimea, Kosovo and Transdniestria, are of an introductory character and are not intended to discuss the issues of public international law.

The principal purposes of this paper are the following: to establish whether the unrecognized state falls within the scope of the term "state", to a law of which the conflict of law rule refers. What is the international and national practice in this regard? Are there any clues in conflict of law rules in this regard?

[1] There are different names used to describe Transdniestria, namely Transnistria, and Pridnestrovie. The author chose the name used in the jurisprudence of the European Court of Human Rights.

What is the relation between international recognition of a state and the possibility to apply its law and to recognize documents issued in this state? Moreover, the paper aims to answer the question whether there are effective legal systems on the territories of Crimea, Kosovo and Transdniestria that may be applied.

II. Application of the law of a non-recognized state

Grotius in his "The Right of War and Peace"[2] wrote:

> […] next concerning Usurpers. We speak now of a Usurper of the kingdom, not after he has by long possession or treaty acquired a Right, but so long as his possession remains illegitimate. And during such possession, the acts of government which he exercises may have an obligatory force, not from his Bight, which is null, but because it is probable that the legitimate governor would wish that it should be so, rather than that laws and tribunals should be abolished and confusion ensue. Cicero says that the laws of Scylla were highly cruel, yet he thought it necessary to preserve them. So also Florus judges.

This quotation also reflects a contemporary private international law approach to the law of a non-recognized state.

The conflict of law rules refer to a law of a "state". Thus, rules issued by private persons do not fall within the definition of "law". Therefore, it is important to explain the term "state" from the point of view of private international law. In public international law "state" means a subject of international law which exercises jurisdiction over a geographical territory[3]. In private international law "state" means an organizational entity with an effective legal system in a geographical territory, regardless of the fact of being a subject of international law or not[4].

It is true that maintaining harmony between public and private international law definitions of a "state" may prevent tensions in this area. The question of statehood would be treated as a preliminary question[5]. Nevertheless, representatives of private international law incline towards an independent definition of a "state" for the private international law[6]. The purposes of private international law justify the following standpoint: while public international law refers to inter-state relations and therefore political issues are important, private international law aims to resolve the legal problems between individuals. Therefore, only by application of an effective legal system this goal can be achieved. Moreover it is irrelevant whether the applicable law is adopted by the legitimate government or not[7]. It is sufficient that the government has a power to implement the legal system in the area concerned. International recognition of a state is not a prerequisite for the application of its law. Application of the effective law, even if it is adopted by an

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2 *Hugo Grotius*, The Rights of War and Peace, including the Law of Nature and of Nations, translated from the Original Latin of Grotius, with Notes and Illustrations from Political and Legal Writers, by A. C. Campbell, A. M. with an Introduction by David J. Hill, New York 1901, p. 58.

3 *Carsten Thomas Ebenroth*, Staatensukzession und Internationales Privatrecht, in: Berichte der Deutschen Gesellschaft für Völkerrecht, Band 35, Karlsruhe 1996, p. 243.

4 Ibid., p. 252–253.

5 *Daniel Busse*, New Political Entities and the Conflict of Laws – A German View, in: New political entities in public and private international law: with special reference to the Palestinian entity, ed. by A. Shapira/M. Tabory, Kluwer Law International, The Hague 1999, p. 117.

6 *Michael Bogdan*, Private International Law as component of the law of the forum, Recueil des cours vol. 348 (2010), p. 212–213; *Busse*, fn. 5, p. 117–118; *Ebenroth*, fn. 3, p. 252–253; *Mateusz Pilich*, Zasada obywatelstwa w prawie prywatnym międzynarodowym: zagadnienia podstawowe, Warszawa 2015, p. 175.

7 *Bogdan*, fn. 6, p. 212.

unrecognized state, leads to an international harmony of decision-making. This ensures that the rights acquired by an individual under the law of an unrecognized state are effective also outside its borders.

Furthermore, the standpoint presented above is in accordance with the practice of international and national courts. Firstly, the International Court of Justice (ICJ) in its Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia[8] underlined the illegality of South Africa's actions in this regard. Consequently, all Member States of the United Nations were obliged not to enter into any economic, diplomatic or consular relations with South Africa acting on behalf of Namibia. Nonetheless, the ICJ pointed out that non-recognition should not deprive the people of Namibia of any advantages following from international co-operation. In particular, the illegality of the Government of South Africa acts in Namibia should not be extended to such acts as the registration of births, marriages and deaths, "the effects of which can be ignored only to the detriment of the inhabitants of the [t]erritory"[9]. More meaningful and comprehensive arguments were presented during the proceeding by some states in their written statements, and later in the separate opinions by the judges. In the written statement of the United States it was pointed out that "States should examine a particular act in light of the interest of the inhabitant or inhabitants of Namibia with respect to whom it was taken"[10]. *Judge F. de Castro* in his separate opinion expanded on this standpoint. He explained that a distinction must be made between private and public sector. Hence, acts of the de facto authorities relating to the rights of private persons should be regarded as valid. This concerns the validity of entries in the civil registers and in the Land Registry, validity of marriages, and validity of judgments of the civil courts.

The Namibian exception was upheld in the jurisprudence of the European Court of Human Rights (ECHR). The primary aim of the judgments of the ECHR was to assess the responsibility of the contracting states outside their national territory[11]. Nonetheless, other important questions were raised as well. The ECHR in the Cyprus v. Turkey case pointed out that the interest of the inhabitants requires some flexibility while assessing the acts of the de facto authorities regarding private law relationships. Otherwise the inhabitants of the territory would be deprived of all their rights to which they are entitled.

In summary, recognition of documents and application of law adopted by the illegitimate government could by justified only if it serves interests of the inhabitant of the unrecognized state. The ICJ, and later the ECHR in their jurisprudence accepted that in the interest of the parties' the de facto legal system in force (effective) in the geographical territory is considered. Therefore, national courts, while dealing with the cases concerning, for instance, facts that appeared in an unrecognized state or a legal person created under the law of such a state, should firstly evaluate the interests of the parties. Only then the court should decide whether and to what extent the law of the unrecognized state should be applied or the document recognized.

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8 The International Court of Justice in its Advisory Opinion of 21 June 1971 on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970).

9 Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), [1971] International Court of Justice Reports 16, p. 56, para. 125.

10 International Court of Justice. Pleadings, oral arguments, documents. Legal consequences for States of the Continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), vol. I, p.883, http://www.icj-cij.org/docket/files/53/9371.pdf.

11 Loizidou v. Turkey (Merits), Judgement of 18 December 1996, ECHR (1996) Series A, No. 4.; Case of Cyprus v. Turkey (Merits), Judgement of 10 May 2001, ECHR (2001) Series A, No. 4, 5. Case of Ilascu and Others v. Moldova and Russia, Application n. 48787/59, Judgement of 8 July 2004.

Analyzing the term "state" in private international law, one more disputable question arises. Private international law rules recognize the possibility of different legal systems within one state. So how should the court decide when to treat an unrecognized state as a separate state with its own legal system, and when just to treat it as part of another (legitimate) state with different legal systems in particular regions? The possibility of several legal systems within one state is recognized in article 9 of the Act on Private International Law of Poland[12]. Article 9 provides that, in situations when there are several distinctive legal systems in force within one country, the law of this country shall specify which of the systems shall apply. In the absence of such a specification, the most closely connected legal system shall apply. Hence, even if a national court refuses to treat an unrecognized state as a "state", there remains a possibility to apply the legal system that is in force on that territory. In such a case, this legal system shall be recognized and applied as the most closely connected with the case.

III. Recognition of the documents – general remarks

The daily life of the inhabitants of the territory continues despite the occupation. As a consequence of this fact many private and public documents are being issued. As it was previously pointed out, in order to protect the rights of the people living on the occupied territory it is recommended to take into account some of the documents. The ICJ, in its advisory opinion concerning Namibia, has distinguished the documents related to the civil status, namely acts of birth, marriage and death. All these documents are related to rights with no economic value. A problem arises in connection with the recognition and enforcement of judgments of the court of an occupied territory, or documents issued by other public authorities of that territory. Moreover, it is necessary to answer the following question: how should private documents from an occupied territory be treated? Last but not the least, there is the issue of the recognition of the judgments of the courts of a recognized state, related to a property or an act that is situated on the occupied territory.

Firstly, it is worth mentioning, that according to Polish law private documents, regardless of their origin, are treated in a same way, and they have the same probative value. The situation of foreign official documents is similar. The probative value of foreign and national official documents is the same. Nevertheless, in some cases, when the authenticity of such document is in doubt, legalization of the documents may be required. Without legalization, such a document can serve as a proof, e. g. in civil procedure, but its probative value will be the same as of a private document[13]. An official document from the unrecognized state is generally treated as a private document. However, there might be exceptions from the general rule. Usually these exceptions are motivated by the position of the state to which the concerned territory belongs[14].

Occasionally, the national court may be required to deal with the official document issued by the authority of a recognized state, but regarding the property situated in the territory, over which the control is lost. It can be in a case, when the territory is occupied by other country (e. g. Crimea) or in a case of the secession of a part of a state. The private international law doctrine has not developed a unanimous solution to such a situation. Nevertheless, the national court might look for clues in judicial practice of interna-

[12] Act of 4 February 2011 Private International Law (O.J. 2011 No. 80, item 432; in force from 16 May, 2011).

[13] *P. Czubik*, Dokumenty z państw nieuznanych w obrocie cywilnoprawnym, Problemy Współczesnego Prawa Międzynarodowego Europejskiego i Porównawczego, vol. VII, A. D. MMIX, p. 123.

[14] An occupied territory or an unrecognized state.

tional tribunals. A good example of jurisprudence dealing with the issue is the judgment of the Court of Justice of the European Union in the Apostolides case[15]. The CJEU had to answer the question whether the court of a member state is authorized to refuse recognition or enforcement of the judgment given by the court of another member state concerning property situated in a territory of the latter state over which its government does not exercise effective control. Furthermore, the CJEU had to answer whether it is important that such a judgment cannot be enforced where the concerned property is situated. The Court in a preliminary ruling stated that there are no objections to implement the following judgment in a member state, even if it cannot, as a practical matter, be enforced where the property is. The following ruling confirmed jurisdiction of the courts over the whole territory of a state, even if its government does not exercise effective control over a part of that state.

IV. Crimea – between the Russian Federation and Ukraine

The international community unanimously acknowledged the accession of Crimea to Russia as an occupation. The illegality of this accession follows from several premises. First of all, the referendum of Crimea's accession to Russia violated the Ukrainian constitution[16]. Secondly, the referendum relied on the illegal Russian intervention, as Russian military units had taken over the Crimean public infrastructure. Consequently, accordingly from the public international law perspective, Crimea is a part of integral territory of Ukraine. However, the control over the territory has been lost. Actually the Russian Federation controls the Crimean peninsula. What are the consequences of the following situation from the private international law point of view?

Despite the occupation, life in Crimea goes on: contracts are being concluded, births, marriages, death are being registered etc. One the one hand, from the private international law perspective the effective legal system should be taken into account. Thus, following the concept of application of the effective law, for private law issues Russian law is to be applied. Although the ultimate result seems to be the application of Russian law, which is in force in Crimea, one more issue should be raised: how a national court should determine the applicable law in a case regarding Crimea?

Article 3 para. 4 of the bilateral agreement between Poland and Ukraine on good neighborhood, friendly relations and cooperation[17] provides that in the event of a third-country armed attack on one of the parties, the other party shall not grant any military or political support to such a state. Hence, in the case of Crimea, Poland shall not recognize the accession of Crimea to the Russian Federation. Even though this provision concerns primarily public law questions, it does influence the application of private law as well. In order to determine the applicable law, the court applies conflict of law rules contained in international (e. g. bilateral) agreements, EU law or national legal acts. In the case of Ukraine, the primary source is the bilateral agreement between Poland and Ukraine on legal assistance and legal relations in civil and criminal matters signed in Kiev on 24 May 1993. Conflict of law rules of this agreement use nationality as the main connecting factor, and the matter of nationality of Crimean people is one of the most problematic issues. The Ukrainian law of 25 April 2014 on ensuring the rights and freedoms

[15] Judgment of the Court (Grand Chamber) of 28 April 2009, Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams, Case C-420/07, Reports of Cases 2009 I-03571.

[16] See article 138 (2) of the Constitution of Ukraine.

[17] Traktat między Rzecząpospolitą Polską a Ukrainą o dobrym sąsiedztwie, przyjaznych stosunkach i współpracy, sporządzony w Warszawie dnia 18 maja 1992 r.(O.J. 1993 nr 125 item 573).

of citizens and legal regime in the temporarily occupied territory of Ukraine[18] stipulates non-recognition of obligatory and automatic change of the nationality of Ukrainian nationals in Crimea. Thus, Ukrainian nationals who are living in Crimea, despite the fact that they receive the Russian passport, can also keep the Ukrainian one. In such a case there are no objections to treat the person as a Ukrainian national.

Other provisions of the abovementioned law are of great importance for private international law as well. The law provides that in the temporarily occupied territory the right of ownership is protected in accordance with Ukrainian legislation. Article 11 para. 3–5 provides that natural persons, legal persons, institutions and other organizations retain ownership and other property rights over immovable and movable property in the temporarily occupied territory, if acquired in accordance with laws of Ukraine. Moreover, for the acquisition and termination of ownership of immovable property, situated in the temporarily occupied territory, the law of Ukraine is applicable. Any transactions in respect of immovable property committed in violation of the abovementioned provisions or other laws of Ukraine shall be considered invalid from the moment of occurrence and do not create legal effects other than those related to their invalidity.

The law on ensuring the rights and freedoms of citizens and legal regime in the temporarily occupied territory of Ukraine provides special rules for ensuring the right of inheritance. Article 11-1 provides that if the last place of residence of the deceased was the temporarily occupied territory of Ukraine, the place of opening the inheritance is the place of filing of the first application, indicating the expression of will on the inherited property, heirs, executors, persons interested in the protection of the hereditary property, or the claims of creditors. Although the following regulation gives some clues how to deal with the situations concerning the territory of Crimea, it does not exhaust the range of the issues of private law. The questions of civil registration, contractual and non-contractual obligations, operations of legal persons and many other questions are left beyond the regulation. Therefore, the conflict of law rules included in the bilateral agreement are applicable. For instance, according to the agreement, contractual obligations are governed by the law of the state in whose territory the contract was concluded. Such a situation can be treated as in the event of a state with different legal systems in its regions. According to article 9 of the Polish act on private international law if the law of the state does not specify which of the laws shall be applied, the legal system which is most closely connected with the given relationship shall apply. The most closely connected will be the law in force in Crimea. Here the effective law that is in force in the concerned territory comes to the force.

Residents of Crimea after the occupation were granted the Russian citizenship. However, the new Russian passports issued by the Crimean authorities are not recognized in most of the European countries. Thus, if the connecting factor of the conflict of law rule is nationality, it is arguable whether this "Russian" citizenship of the Crimean people could be taken into account[19]. An argument in favor of taking into consideration the Russian citizenship is the need to protect the rights of the people living in Crimea. For instance, every person has a right to demand recognition of his or her legal personality or to get married etc. This is a way to avoid limping legal relationships. It is important to bear in mind that people living on an occupied territory are usually bound by the law that is applicable in that territory, even if it is the law of an occupier. Therefore, a complete

[18] Закон України „Про забезпечення прав і свобод громадян та правовий режим на тимчасово окупованій території України", http://zakon5.rada.gov.ua/laws/show/1207-18.

[19] In Polish private international law doctrine, for the possibility to take into account a citizenship of an unrecognized territory opts: *Pilich*, fn. 6, p. 172–177.

disregard of the law effective in the occupied territory leads to imperfect relations and thus to a negation of the rights of people living there.

The determination of applicable law is not the only issue that arises in the case of co-operation with Crimea. Even more arguable is the question of documents from the occupied territory. Firstly, it is worth mentioning that Ukraine does not recognize any official documents issued by the new authorities of Crimea. Due to the fact that judiciary cannot function properly in Crimea, under the act on ensuring the rights and freedoms of citizens and legal regime in the temporarily occupied territory of Ukraine, the courts in Kiev have jurisdiction to rule in cases, in which normally the Crimean courts would have competence. Thus, the rulings of the Crimean courts in civil, criminal or administrative matters are invalid in Ukraine. Other countries should follow the position of Ukraine regarding official documents, particularly judgments given by Crimean courts and other authorities. However, the situation is not so easy in the case of documents regarding the civil status of individual persons. This entails, however, a rise of limping relations. That is why documents from Crimea – even if they cannot be perceived as official documents – should still be taken into consideration as proof in civil procedure or civil registration.

Another issue that shall be addressed is the recognition and enforcement of judgments given by the courts of Ukraine in cases regarding property or relations located in Crimea. In Poland, the basis for recognition and enforcement of the judgments given in Ukraine is the abovementioned bilateral agreement. Under article 50 of the bilateral agreement, a judgment has to be recognized and enforced if it is final and enforceable in the country of origin. It is quite evident that judgments given by the Ukrainian courts regarding, for example, the immovable property situated in Crimea cannot be, as a practical matter, enforced in Crimea. This issue can be discussed in the light of the CJEU ruling in the Apostolides case. Therefore it is enough, if the judgment is formally enforceable, and it is possible to enforce it in Poland. In such a case, mainly displaced owners would have a possibility to seek effectively a legal remedy against persons using their property without their consent, turning against their assets in other countries, e. g. in Poland.

V. Transdniestria – doubtful cooperation

Transdniestria has been outside the Moldovan control since 1992, but due to the lack of international recognition in the eyes of the international community it is a territory which belongs to Moldova. It is one of the so-called frozen conflicts. The longer such a situation of non-recognition lasts, the less likely it will change in the future. Despite the fact that several international mediators, namely the Russian Federation, the Organization of Security and Cooperation in Europe and Ukraine, are involved in the conflict resolution, the parties have not reached an agreement yet. However, such a situation does not preclude Transdniestria from international co-operation, particularly business co-operation.

Business co-operation with companies from unrecognized states such as Transdniestria may bring uncertainty, particularly when it comes to secure assets located in such a territory. Nonetheless, Transdniestria is not isolated from other countries and takes part in civil and commercial turnover. Transdniestria, due to the lack of internal resources, needs to find them outside[20]. The greatest support comes from the Russian Federation. Moreover, other unrecognized countries, namely South Ossetia and Abkhazia, are inter-

[20] *Marcin Kosienkowski*, Continuity and Change in Transnistria's Foreign Policy after the 2011 Presidential Elections, The Catholic University of Lublin Publishing House, Lublin 2012, p. 10.

ested in co-operation with Transdniestria. Other countries are chary about co-operation with this unrecognized state. These countries care primarily about relations with Moldova. However, the official position of the state is not always reflected in business relations. For instance, commercial co-operation between Poland and Transdniestria became more intensive in the nineties. First of all it was the export of foodstuff and construction from Poland to Transdniestria and base metals from Transdniestria to Poland[21]. The best known example of the business co-operation was the case of the coins, which were produced by the Mint of Poland for Transdniestria. It was very frowned upon by Moldova, so in 2005 the Mint of Poland withdrew from the production of coins.

Development of the social and economic co-operation gives rise to the need of application of the law that is in force in Transdniestria, and to deal with documents issued there. As pointed out at the outset, when it comes to the application of the foreign state's law, the effective law should be applied. Thus, regardless of the political recognition of the state itself, the law of Transdniestria should be applied, particularly when it is needed to protect the rights of the people living in Transdniestria. However, jurisprudence of the national courts does not always go in line with the doctrine. A very good example is a judgment of the Court of Appeal in Katowice[22] of 17 February 2015. The case concerned the acquisition of the claim against the companies from Transdniestria. The Court found unacceptable the application of the law of Transdniestria because Poland does not recognize this territory as a separate state. Hence, the law established by this unrecognized state cannot be the law applicable to the assessment of the effects of the legal actions.

More disputable is the issue of the recognition of documents from Transdniestria. On the one hand, in the eyes of the international community, Transdniestria is an integral part of Moldova. Therefore, documents from the entire country should be treated in the same way – they should be recognized according to international agreements binding with Moldova. Following this line of argumentation, when a question of the recognition of documents arises, national authorities have the possibility to apply the Hague Convention of 5 October 1961 abolishing the requirement of legalization of foreign public documents. Such a view may be supported by the fact that Moldova joining the Convention had not made any reservations. In contrast, for instance, Georgia has acted differently, when it declared that the Convention does not apply to documents issued by the de facto illegitimate authorities and officials of the regions of Georgia: the Autonomous Republic of Abkhazia and the former Autonomous District of South Ossetia. Moreover, there are no provisions of this kind in bilateral agreements binding with Moldova. Accordingly, it is left for the national court or other institution to decide whether to treat a document from Transdniestria as other ones from Moldova or not.

On the other hand, in practice, the official authorities of Transdniestria are applying its own legal system, which is different from the Moldovan one. These authorities are considered to be illegal, and this is the main reason for the non-recognition of documents issued by them, not the differences in legal systems. For instance, the Ministry of Science and Higher Education of Poland points out that diplomas acquired in Transdniestria cannot be recognized in Poland[23].

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[21] *Marcin Kosienkowski*, Polska a Mołdawia i Naddniestrze, Rocznik Instytutu Europy Środkowo-Wschodniej 10, no. 1 (2012), p. 105–106.

[22] Sąd Apelacyjny w Katowicach V Wydział Cywilny, Act sign. V ACa 579/14, http://orzeczenia.katowice.sa.gov.pl/content/$N/151500000002503_V_ACa_000579_2014_Uz_2015-02-17_001.

[23] Legal acts related to education, http://www.nauka.gov.pl/uznawanie-wyksztalcenia/akty-prawne.html.

As was already pointed out (III.), it is not possible to give official documents issued by the de facto regime the same probative value as to documents issued by the legitimate authority. Nevertheless, they can be considered as private documents, and should be treated as such.

VI. Kosovo – recognized or not recognized?

The position of Kosovo in the international area is not unambiguous. As was already pointed out at the outset, Poland recognized the independence of Kosovo on 26 February 2008. Thus, from Polish perspective, the law of Kosovo and documents issued in this country are treated in the same way as law and documents from other independent states. Nonetheless, the recognition of Kosovo by Poland may give rise to several problematic issues. Serbia has declared that it will never recognize Kosovo as an independent state. Poland and Serbia are bound by more than 20 bilateral agreements. One of them is the bilateral agreement on judicial assistance in civil and criminal matters[24].

The agreement provides the conflict of law rules, rules for recognition of judgments and rules related to the authentication and effect of official documents. The latter rules are more liberal than those established in the Hague Convention abolishing the requirement of legalization for foreign public documents[25]. Currently the Polish-Yugoslavian agreement is not applicable in the Poland-Kosovo relations. *P. Czubik* has presented an opinion, that due to the lack of full recognition of Kosovo in the international area, the succession of Kosovo in respect of the Hague Convention is unimaginable[26]. However, Kosovo has signed the Hague Convention, and it will be in force in Kosovo from 14 July 2016[27]. Accordingly, this convention should be applicable in cases where official documents from Kosovo are concerned. Nevertheless, article 12 of the Hague Convention provides that the Convention "shall have effect only as regards relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification". Any such objection shall be notified to the Ministry of Foreign Affairs of the Netherlands. Such objections were notified by namely: Azerbaijan, Belarus, China, Cyprus, Georgia, Mexico, Moldova, Romania, and Serbia. All aforementioned states do not recognize Kosovo as an independent state.

Poland hitherto has not made such an objection. Nevertheless, the Marshal of the Sejm of the Republic of Poland brought an interpellation concerning the objection to Kosovo's accession to the Hague Convention[28]. The Marshal raised questions regarding organized crime in Kosovo and a great threat to the countries of Central Europe. Therefore, every precaution should be taken before allowing documents from Kosovo to the Polish legal area. The Secretary of State in the Ministry of Foreign Affairs of the Republic of Poland in his answer to the interpellation noticed, that it is the competence of the

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[24] Umowa między Polską Rzecząpospolitą Ludową a Federacyjną Ludową Republiką Jugosławii o obrocie prawnym w sprawach cywilnych i karnych (O. J. 1963 Nr 27, item 162). Serbia is a successor of the agreement.

[25] The Hague Convention abolishing the requirement of legalization for foreign public documents concluded on 5 October 1961.

[26] *Czubik*, fn. 13, p. 129.

[27] Status table, https://www.hcch.net/en/instruments/conventions/status-table/?cid=41.

[28] Interpelacja nr 219 do ministra spraw zagranicznych w sprawie zgłoszenia sprzeciwu do akcesji Kosowa do konwencji haskiej o zniesieniu wymogu legalizacji zagranicznych dokumentów urzędowych, http://www.sejm.gov.pl/sejm8.nsf/InterpelacjaTresc.xsp?key=0474C004.

Minister of Foreign Affairs to make the following objection[29]. Moreover, it was pointed out that Polish Representation to the EU in Brussels was asked to collect and introduce the opinion of the EU member states about a possibility of Kosovo's accession to the Convention mentioned above. Pending, a decision on the application of the Hague Convention in relations with Kosovo, the usual rules for the legalization of foreign documents shall be applied. Article 1138 of the Civil Procedure Code of the Republic of Poland[30] provides that foreign public documents have the same probative value as Polish public documents. However, there are two exceptions, namely, public documents concerning the conveyance of property rights to immovables located in Poland and public documents doubtful as to their authenticity need legalization.

Legalization of the documents from Kosovo might be problematic inasmuch as Poland hitherto has not established diplomatic relations with Kosovo. Hence legalization of documents from Kosovo in Poland is impossible from a practical point of view. This provides a certain indirect safety valve against doubtful documents.

The issue of the application of the law of Kosovo seems to be less questionable. There are no general objections against its application. One shall bear in mind a possibility to apply ordre public exception if the applicability of Kosovo law is contrary to the fundamental principles of the legal system of Poland[31].

VII. Conclusions

The consequences of non-recognition of the state in international law may be of a very different nature. From the private international law perspective, the most important are the issues of the recognition of documents issued in unrecognized state and the application of its law. Most importantly, it must be recalled that the recognition of documents issued in such an unrecognized country and the application of its law shall not be regarded as direct or indirect recognition of that state. The "state" for the purposes of private international law shall be understood as an organizational entity with an effective legal system in a geographical territory. Hence, when the national conflict of law rule refers to the law of the state, there are no objections for the application of the legal system of an unrecognized state, whereas official documents from such a state in practice will be regarded as private documents.

However, in separate cases it may be difficult to establish whether on the specific territory an effective legal system exists, and what the content of this law is. For instance, in the case of Crimea the other difficulty arises namely whether the national court shall apply Russian law or Ukrainian law. Despite the fact that the annexation of Crimea was illegal, a complete disregard of the law effective in that territory leads to imperfect relations and thus to the negation of the rights of people living there. In the case of Transdniestria, generally, there are no doubts concerning the existence of the effective legal system. Nonetheless, the national court may refuse to apply that law because it has been established by illegal authority.

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[29] Odpowiedź na interpelację nr 219 w sprawie zgłoszenia sprzeciwu do akcesji Kosowa do konwencji haskiej o zniesieniu wymogu legalizacji zagranicznych dokumentów urzędowych, http://www.sejm.gov.pl/sejm8.nsf/InterpelacjaTresc.xsp?key=19069479.

[30] Ustawa z dnia 17 listopada 1964 r. - Kodeks postępowania cywilnego, O.J. 1964 nr 43 item 296.

[31] Article 7 of the Act of 4 February 2011 on Private International Law.

Finally the partial recognition of the state does not resolve all the aforementioned problematic issues. For instance, despite the recognition of Kosovo, states avoid to recognize documents issued there. This position is being realized, among others, by not establishing diplomatic relations, which causes the impossibility of legalization of documents.