LIMITATIONS ON THE CHOICE OF LAW RESULTING FROM THE PROTECTION OF THIRD PARTIES IN THE POLISH SYSTEM OF PRIVATE INTERNATIONAL LAW¹

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Summary: The article concerns the limitations of the freedom of shaping the legal relationship by the parties on the grounds of private international law binding in Poland. It is devoted to the specific issue of limitations of the effects of the choice of law on the grounds of the protection of third parties. The rules related to this issue have been included both in the sources of European law (“Rome I” and “Rome II” regulations, as well as in the Polish law – Private International Law of 2011). They concern the choice of law for contractual and non-contractual obligations, for a power of attorney and for matrimonial property regimes. The purpose of these rules is to protect the knowledge of a third party or the rights acquired by them. The article considers various possibilities to exclude the effectiveness of a law chosen for the protection of a third party, while respecting the wills of the parties to the legal relationship as much as possible.

Keywords: private international law, choice of law, party autonomy, third parties’ protection, power of attorney, property relations in marriage

1 Introduction

The choice of applicable law provided for many types of private law relationships² may be limited in different ways. Two main groups can be distinguished

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- 1 The article was prepared within the framework of the National Science Centre project no. 2011/01/N/HS5/02524.
 - 2 In the Polish system of private international law, the possibility of choice of law has been provided for in: Articles 16, 23, 32, 39, 52 of Polish Private International Law Act of 4.02.2011 (Dz. U. 2015, poz. 1792), Article 3 of the 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), Article 14 of the 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), Articles 7, 8 of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations and the article 22 of the Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement

among them. The essence of the first one consists in influencing the validity of the choice made.³ Such limitations concern both the content and the form of a legal act. The second major group of limitations to the choice of law concerns the consequences of choosing the law. The difference with the first group is that it retains the application of the chosen law and that the exclusion of its effectiveness concerns only some of its provisions. A special place among the latter type of limitations is occupied by limitations arising from the protection of third parties who are not parties to the legal relationship for which the choice of law is made. This article will be devoted to them.

2 A description of the limitations on the effect of the choice of law on the grounds of the protection of third parties

The need to protect third parties is a prominent feature of the numerous justifications cited for the limitations on the impact of the choice of law. Any person who is not a party to the legal relationship for which the law is chosen should be considered a third party in this context. Such persons include, in particular, the persons for whose benefit the agreement was concluded, guarantors, pledgees, etc.⁴

In the Polish system of private international law, the regulations relating to the effects that the choice of law may have on third parties can be divided into general and specific (case law) regulations. The former are primarily the general rules contained in Article 4(3) of the Act of 4 February 2011 – Private International Law (hereinafter referred to as the Act), but also similar rules contained in Article 3(2) of the Rome I Regulation and Article 14(1) of the Rome II Regulation. However, examples of protection of persons outside a given legal relationship by means of conflict-of-law mechanisms concern property relationships between spouses (Article 53 of the Act)⁵ and power of attorney (Article 23 of the Act).

of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

- 3 See more broadly. DORABIALSKA, Anna, Ograniczenia wyboru prawa w prawie kolizyjnym, *Przegląd Sądowy* 2018, no. 7–8, pp. 78 et seq.; CZEPELAK, Marcin, Autonomia woli w prawie prywatnym międzynarodowym Unii Europejskiej, Warszawa 2015, p. 305.
- 4 KONDRING, Jörg, Der Vertrag ist das Recht der Parteien” – Zur Verwirklichung des Parteiwillens durch nachträgliche Teilrechtswahl, *Praxis des Internationalen Privat- und Verfahrensrechts*, 2006, no. 5, p. 426.
- 5 Poland is not participating in the enhanced cooperation programme under which the Regulation was adopted Council Regulation (EU) No 2016/1103 of 24 June 2016 implementing enhanced cooperation in matters of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, see more KOZIOŁ Agata, ZRAŁEK Jacek, Skuteczność małżeńskiego ustroju majątkowego wobec osoby trzeciej w prawie prywatnym międzynarodowym [in:] GOŁACZYŃSKI J., POPIOŁEK W. (eds). *Kolizyjne i procesowe aspekty prawa rodzinnego*, Warsaw 2019. The application of the Regulation before the Polish courts by way of a reference was excluded

It follows from the very division set out above that the important issue is the determination of the relationship between the general and specific rules relating to this area. This problem refers only to the Act – Private International Law, because the regulations issued by the EU legislator are sector-specific regulations.

However, in the Act – Private International Law, there is both a general rule, referring in principle to each type of legal relationship for which the Act provides for the possibility to choose a law (Article 4(3) of the Act), and specific rules relating to third parties having a specific relationship with parties to a specific type of legal relationship, i.e. to a third party with whom the attorney has performed an act in law (Article 23(1) of the Act)⁶ and to a third party who is a creditor of one of the spouses (Article 53 of the Act).

Pursuant to Article 23(1) of the Act, a power of attorney shall be governed by the law chosen by the principal⁷. This means that the principal may opt for any legal order. Furthermore, the general rule in Article 4 of the Act is that the choice should be explicit or implicit. There is nothing to prevent the choice of law by way of an agreement between the principal and the attorney or all three persons affected by the power of attorney relationship, but from the judicial point of view only the declaration of will made by the principal will be relevant⁸. The validity of the choice of law in relation to a third party was, however, dependent on whether the third party knew or could easily have known about the choice⁹.

by the general rule in Article 5 of the Act (see more KOZIOŁ Agata, ZRAŁEK Jacek, Article 53 [in:] *Prawo prywatne międzynarodowe. Komentarz*, PAZDAN M. (eds), Warsaw 2018. It could be considered possible only in case of opting for the jurisdiction of another member state which goes beyond the scope of this paper (see more broadly: GRIGIENE Jurgita, Jurisdiction in international matrimonial matters, *Baltic Journal of Law and Politics* 2009, vol. 1, p. 108–109).

- 6 It concerns any third party, not just the principal, cf. PAZDAN Maksymilian, Article 23 [in:] *Prawo prywatne międzynarodowe. Komentarz*. Warsaw 2018.
- 7 It should be noted that if the power of attorney results from a different legal relationship, e.g. a contract of obligation between the parties, the existence of the power of attorney will be determined by the law applicable to that relationship, e.g. regulated by the Rome I Regulation (see PAZDAN, Jadwiga, *Pełnomocnictwo* in: PAZDAN, Maksymilian (ed), *Prawo Prywatne Międzynarodowe. System Prawa Prywatnego* vol. 20a, Warszawa 2014, p. 860).
- 8 The possibility of concluding bilateral or trilateral agreements on the choice of law was postulated by J. Pazdan in her monograph: PAZDAN, Jadwiga, *Pełnomocnictwo w prawie prywatnym międzynarodowym*, Kraków 2003, p. 96.
- 9 Article 23 (1) of the Act: Power of attorney shall fall under the law chosen by the principal. However, in relation to a third party with whom an attorney performed an act in law, one may invoke the chosen law only in the case where such party knew or might have easily learned about such choice of law. A principal may invoke the chosen law in relation to the attorney only in the case where the latter knew or might have easily learned about the choice of law.

However, in accordance with Article 53 of the Act, “if a spouse and a third party being a creditor have their place of ordinary stay in the same state upon arising of the obligation, the law of such state shall apply to the assessment of effectiveness of the marital property system towards third parties, unless upon arising of the obligation a third party knew the character and substance of such system or might have known same when acting with due diligence or unless the requirements were fulfilled for public nature and entries stipulated in the law governing in respect of the marital property system or, in respect of rights in rem on immovable properties – in the law of the state in whose territory the immovable property is situated. The provision of paragraph 1 shall accordingly apply to the liability of a spouse for obligations incurred by the other spouse in matters resulting from satisfaction of a family’s ordinary needs”.

In order to be able to determine the mutual relations between these rules, it is worth noting the subsequent division of regulations relating to the impact of the choice of law on third parties, which intersects with the division presented above. While Article 14(1) of the Rome II Regulation, Article 23(1) of the Act and Article 53 of the Act concern the choice of law in general, Article 4(3) of the Act and Article 3(2) of the Rome I Regulation concern only the change of the applicable law. More specifically, the choice of law made after the legal relationship has been established, i.e. the change from a statutory law to a newly chosen one or a previously chosen one. Doubts may arise as to whether the protection of third parties provided for in the above provisions extends to the situation of the subsequent abolition of the choice of law, i.e. a consistent declaration of the will of the parties that their earlier choice of law ceases to be binding and that the legal relationship between them is subject to statutory law.

There is no doubt, on the one hand, that the choice of law is also understood as a resignation from the previous choice, and on the other hand, the argument that a third party can easily learn about the statutory law seems important.

However, it would appear that in the cases mentioned, the object of protection is not the third party’s knowledge of the fact that he has made a choice for the legal relationship, but its status under the law to be applied to that relationship. There is some inconsistency here, because it emerges that, pursuant to Article 4(3) of the Act and Article 3(2) of the Rome I Regulation, a third party is protected against an unfavourable change in the law applicable in terms of a legal relationship even if the third party did not know which law was applicable to them at the time of formation. Given that those provisions also refer to the complete abolition of the choice of law in favour of the statutory law, we cannot rule out the possibility that the parties initially opted for a more favourable law for a third party, which they did not know about, and then abolished it in favour of a statutory law which the third party can always access.

However, the literal text of the rules in question states that, despite the third party's lack of knowledge, the protection may concern only specific rights previously acquired by that third party and not, as in Articles 6 or 8 of the Rome I Regulation, the general legal position of that person. Therefore, the Rome I Regulation uses the expression "any change in the law to be applied that is made after the conclusion of the contract", which includes the abolition of the choice of law. In view of the doctrinal recognition that the abolition of the choice of law is a common practice and the fact that Article 4 of the Act is based on the Rome Convention¹⁰, there is no reason for a different interpretation of the statutory provision.

The diversity of the way in which a third party is protected by the conflict-of-law rules is linked to the more precisely defined subject-matter of this protection. While in Article 4(3) of the Act and Article 3(2) of the Rome I Regulation, the rights acquired by a third party under the law that was originally applicable to the legal relationship are protected, the protection provided for in Article 23(1) of the Act and Article 53 of the Act concerns the third party's knowledge of the mere fact that the law was chosen by their contracting party. These first regulations emphasise the advantage accruing to the third party and do not attach much importance to the third party's knowledge of the choice of law. However, in the second group of these regulations, the emphasis was placed on the correct manner of notifying the third party of the choice made, and not on measurable benefits that could be derived from the application of either of the two competitive applicable laws. Against the background of these considerations, the regulation from Article 14(1) of the Rome II Regulation is interesting. Pursuant to that provision, the mere fact of the choice of law, and not merely a change of the applicable law by way of choice, as is the case in Articles 4(3) of the Act and 3(2) of the Rome I Regulation, cannot adversely affect the rights of third parties. It is therefore a provision aimed at protecting acquired rights and, at the same time, similarly to the provisions concerning knowledge about the choice of law, refers to the choice of law itself.

The wording used in Article 3(2) of the Rome I Regulation and Article 4(3) of the Act gives rise to a reflection on which law should be applied if the situation of the third party has improved as a result of the subsequent choice of law. The mechanism for limiting the choice of law on the basis of the acquired rights of third parties is that, while the new law applicable applies to *inter partes* relations, the third party is subject to the law previously applicable. The views of authors on the automatic extension of the new law applicable to a third party as well, if the newly chosen law places the third party in a more favourable position, are divided¹¹.

10 1980 Rome Convention on the law applicable to contractual obligations, *OJC* 27, 26.1.1998, p. 34–53.

11 For example, S. Leible claims that the more favourable rights of a third party under the new law applicable abolish the limitation of choice of law under Article 3(2) of the Rome I

This particular provision of Article 14(1) of the Rome II Regulation seems to be more relevant when it comes to the way in which non-contractual obligations in the course of trade operate. Undoubtedly, the most common type of such obligations, i.e. liability for damage, more often than in other branches of civil law, is connected with the insurer's obligations under an insurance contract previously concluded by one of the parties to liability in tort. The insurer therefore appears as a third party, to a certain extent defined for a specific category of legal relations¹². For that very reason, the doctrine ruling on how the provisions of an insurance contract concluded by one of the parties to a future obligation relationship arising out of the tort may limit the effects of a subsequent choice of law, is one of the most important practical issues and may indirectly affect the choice frequency of the parties to liability in tort. In this regard, it should be noted that not every contractual term, especially in a contract so strongly linked to a specific risk such as an insurance contract, leads to the acquisition of a specific right by the insurer. Contrary to the regulation of consumer contracts and individual employment contracts contained in the Rome I Regulation, no mechanism has been introduced here based on a comparison of the overall legal position of one of the parties in the light of the law applicable indicated by an objective connecting factor and in the light of the law chosen¹³. The content of an insurance contract entered into by one of the parties to a future tort obligation will affect the effectiveness of the choice of law only to the extent that, under its terms, the insurer has already acquired a specific right which can be exercised by way of a claim. Only the existence of such a right at the time of making a choice can limit its effectiveness. However, the regulation on the protection of third parties is, to a certain extent, similar to the regulation on consumer protection. In order to determine whether a right acquired by a third party has been sufficiently safeguarded under the new law applicable, it is necessary to compare the content of the new regulation with the provisions of the law previously applicable¹⁴.

Regulation (see LEIBLE, Stefan., Kapitel II Einheitliche Kollisionsnormen, in: HÜßTEGE, Rainer, MANSEL Hans-Peter (ed) *Nomos Kommentare BGB*, Vol. 6, *Rom-Verordnungen*, Baden-Baden 2014, p. 78). B. Fuchs argues that the protection of a third party under the rules limiting the subsequent choice of law may also consist in taking account of that party's position where the new law applicable places him in a more favourable position and he has no interest in such a change (see FUCHS, Bernardetta, *Następczy wybór prawa*, in: *Valeat aequitas. Księga pamiątkowa ofiarowana Księdzu Profesorowi Remigiuszowi Sobańskiemu*, Katowice 2000, p. 120 and more widely quoted there REINHART, Georg, *Zur nachträglichen Änderung nach Art. 27 Abs. 2 EGBGB durch Parteivereinbarung im Prozeß*, *Praxis des internationalen Privatrechts* 1995, vol. 6).

- 12 See KADNER GRAZIANO, Alessandro. Freedom to choose the applicable law in tort – Articles 14 and 4(3) of the Rome II Regulation in BINCHY, William, AHERN, John (ed) *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New Tort Litigation Regime*, Leiden 2009, p. 121.
- 13 Unlike MÖLLENHOFF, Wolfgang., *Nachträgliche Rechtswahl und Rechte Dritter*, Berlin 1993, p. 104.
- 14 *Ibidem*, p. 144.

In the context of the Act – Private International Law, as already indicated, a solution regarding the relationship between two types of conflict-of-law rules aimed at the protection of third parties becomes necessary. It refers to the rule from Article 4(3) of the Act, whose aim is to protect acquired rights, and the rule from Article 23(1) and (53) of the Act, regulating the effective way of notifying contracting parties of the choice of law. Article 4(3) of the Act as a provision belonging to the general part applies to any choice of law provided for in the Polish national regulation of private international law¹⁵. It follows, *inter alia*, that a choice of law for a power of attorney (Article 23 of the Act), property relations between spouses (Article 52 of the Act), an arbitration agreement (Article 39 of the Act) cannot be modified if, between the making of the first choice and its change, a given third party has acquired a specific right under the law applicable to the specific relationship. In the case of a power of attorney and property relations between spouses, however, the manner of notifying about the first choice of law, if there is a need to invoke this law before a specific contracting party, is also subject to control.

It is worth considering whether the choice of law, about which the contracting party did not know, may shape the law so strongly that its formation becomes a barrier to the change of the law applicable determined by a subjective connecting factor. Pursuant to the second sentence of Article 23(1) of the Act, in relation to a third party, one may invoke the chosen law only in the case in which such a party knew or might have easily learned about such choice of law. In a situation in which a hypothetical third party with whom the attorney performs a legal act in favour of the principal would become aware of the choice made only after the change has been made, the literal wording of the provision does not preclude the assumption that the third party could rely on the rights acquired under the previous law applicable. This would be indicated by the phrase “in relation to a third party with whom an attorney performed an act in law”, which implies the right to invoke the right chosen (after certain information conditions have been fulfilled) only for one party to the act performed, a party other than the third party, i.e. the principal or the attorney. In the remaining scope, the power of attorney must, in accordance with the principle expressed in the first sentence of Article 23(1) of the Act, be subject to the law chosen by the principal, i.e., in the event of a change in the choice of law, to the law determined as a result of such change. Thus, despite the formal application to a power of attorney subject to the chosen law applicable to both rules protecting third parties, i.e. Article 4(3) of the Act and the second sentence of Article 23(1) of the Act, the actual effect of Article 4(3) of the Act on the subsequent choice is subordinate to the provision of the first sentence of Article 23(1) of the Act. The effects in relation to a third party may be caused only by a choice of law which was known to the third party or of which the party might easily have learned. Despite the literal wording of the

15 Article 4(3); The choice of law made after the legal relationship has arisen shall not violate third party rights.

second sentence of Article 23(1)(2) of the Act, this principle also applies where a third party wishes to invoke a right acquired under the previously chosen law applicable, which was not known to that party until the second choice of law.

Article 53 of the Act is based on a similar mechanism. According to this provision, if a spouse and his or her creditor have their place of ordinary stay in the same state upon the arising of the obligation, the law of such state shall apply to the assessment of the effectiveness of the marital property system towards the spouse and his or her creditor, unless upon the arising of the obligation the creditor knew the nature and substance of such system or might have known the same when acting with due diligence or unless the requirements were fulfilled for public nature and entries stipulated in the law governing in respect of the marital property system or, in respect of rights in rem on immovable properties – in the law of the state on territory of which the immovable property is situated. The provision protecting a third party (the creditor of one of the spouses) is worded in such a way that it is, in principle, an exception to the scope of the spouses' property regime. It introduces a new law applicable for a single legal act between one of the spouses and a third party – the law of their place of ordinary stay – in so far as the matrimonial property regime regulates the spouses' assumption of obligations and liability for their property¹⁶. The rule is that the resulting obligation, also with regard to the possible effects of the matrimonial property regime, is governed by this new law applicable and the jurisdiction of the law governing the property relations between the spouses is authorised by way of exception. The wording of a rule based on the "principle – exception" construction differs significantly from the wording used in Article 23(1) of the Act. In that provision, the rule is that the law chosen for the power of attorney is applicable, and invoking this right against a third party who has performed a legal act with an attorney is subject to additional requirements to be met. Another difference between the two provisions is the fact that in the case of Article 23(1) of the Act, knowledge or the possibility to obtain it easily concerns the choice of law as such, whereas in Article 53 of the Act, knowledge or the possibility to obtain it with due diligence concerns the law applicable to property relations between spouses, regardless of whether it was indicated by means of a connecting factor, subjective or objective; therefore, it has a broader scope. Moreover, Article 53 of the Act does not refer directly to the law applicable to property relations between spouses, but to the nature and substance of the property regime prevailing between them. This means that the mere knowledge of the law of which the matrimonial property regime is governed by is not sufficient to fulfil the statutory condition of sufficient knowledge. The information available to the creditor of one of the spouses must, therefore, relate to the specific rules of the system, or at least to its general characteristics. The model of property relations between spouses in a given sys-

16 KOZIOŁ, Agata. ZRAŁEK, Jacek. Skuteczność ustroju majątkowego małżeńskiego wobec osoby trzeciej w prawie prywatnym międzynarodowym, in: POCZOBUT, Jerzy (ed), *Współczesne wyzwania prawa prywatnego międzynarodowego*, Warsaw 2013, p. 135.

tem, i.e. regime of community or separate property, can be considered as a minimum of basic knowledge in this respect. Another issue is the question whether the mere knowledge of the law of which the property relations between spouses are governed by, not backed up by further searches for information on the nature of these relations, does not *per se* constitute a failure to exercise due diligence in this respect.

In Article 53 of the Act, an interesting procedure was used to prove the disclosure of the property regime prevailing between spouses, referring to information contained in public registers. It is questionable whether the requirements concerning public nature and entries provided for in the law applicable to the matrimonial property regime have been fulfilled. Since the protection of a contracting party of one of the spouses is to be based on the possibility of applying the law of their place of ordinary stay if the property regime between the spouses is not known to them, it is doubtful whether the contracting party will be aware of the requirements for public nature and entries provided for by a foreign law. Alternatively, an analogous reference to the registration requirements of the law of the place of ordinary stay of the creditor of one of the spouses might appear to be a more logical solution since the entire construction of Article 53 of the Act is based on the assumption that the law of the place of ordinary stay is the law best known to both contracting parties¹⁷.

The second possibility of invoking the law applicable to the matrimonial property regime, related to the fulfilment of the requirements concerning public nature and entries in relation to rights in rem in immovable property provided for in the law of the state on the territory of which the property is situated, does not raise similar doubts. In this case, the reference to the law of the place where the property is located, even if it is foreign from the point of view of the creditor of one of the spouses, seems to be fully justified.

However, when considering the issue of the relation of Article 53 of the Act to the general rule of Article 4(3) of the Act, it should be stated that it does not raise as many doubts as in the case of a power of attorney. This is due to the “principle – exception” mechanism already described in Article 53 of the Act. The invoking of a foreign (from the perspective defined by the place of ordinary stay of the creditor of one of the spouses) law, chosen or indicated by means of an objective connecting factor, is possible only if the contracting party of the spouse knew the nature of the law. Article 53 of the Act will, therefore, always take precedence over Article 4(3) of the Act, which merely adds a rule according to which, if the law applicable to the matrimonial property regime has been chosen twice and the creditor of one of the spouses has known the nature of the two chosen laws, the subsequent choice of law cannot deprive them of the rights acquired under the previously chosen law applicable.

17 Compare: CZEPELAK, Marcin, *op.cit.*, p. 384.

3 Mechanism for limiting the effectiveness of choice of law on grounds of the protection of third parties

Having examined the nature and mechanism of the conflict-of-law rules aimed at protecting a third party, it is worth moving on to the research on how those rules may limit the effectiveness of the chosen law. The question of whether the fulfilment of the conditions of protection regulated in the analysed provisions leads to the total or partial ineffectiveness of the law applicable indicated by the subjective connecting factor seems to be particularly important. In relation to this issue, it will also be helpful to divide it into rules aimed at the protection of acquired rights and rules concerning the appropriate level of knowledge of the contracting party regarding the law chosen for a specific relation between the other contracting party and another person, i.e. on the basis of the Polish system of conflict of laws: a power of attorney or a matrimonial property regime. In the latter case, the solution is relatively simple. The obligation shall be governed by the law chosen only if the contracting party has the required information about that law. Otherwise, the law applicable provided for in a specific provision will apply, i.e. for a power of attorney – the law applicable to the power of attorney in the absence of a choice of law; and for the effects of the obligation concluded with a third party arising from the matrimonial property regime between the spouses – the law of the place of ordinary stay of one of the spouses and his or her creditor. Therefore, the exclusion of the effectiveness of the chosen law in these cases is absolute and is subject to the fulfilment or non-fulfilment of the requirements of the conflict-of-law rules for the protection of third parties.

Despite the fact that if the requirements provided for in the second sentence of Article 23(1) of the Act or in Article 53 of the Act are not fulfilled, and the chosen law is excluded in its entirety, is a clear example of the ineffectiveness, not of the nullity of the choice made. The exclusion of the application of the chosen law applies only to the assessment of the spouse's or attorney's obligation under a contract with a third party¹⁸. However, in relations, respectively, between the principal and the attorney or between spouses, the chosen law remains fully effective.

The ineffectiveness related to the protection of acquired rights should be assessed in a slightly different way, both the one related exclusively to the subsequent choice (Article 4(3) of the Act and Article 3(2) of the Rome I Regulation) and the one related to every choice of law (Article 14(1), second sentence, of the Rome II Regulation). In accordance with the aforementioned provisions, the subsequent choice of law does not affect the rights acquired by the third party. That means that the choice itself remains fully effective as long as the nature of the chosen law does not result in the third party being deprived of a specific right under the previously applicable law. The effectiveness of the choice of law is, therefore, limited only after the nature of the newly chosen law is known. With-

18 KONDRING, Jörg, *op. cit.*, p. 426.

out this knowledge, it is not possible to decide whether the limitation will apply at all in a given case. In addition, two legal systems may be cumulatively applied if the subsequently chosen legal system provides for additional rights for a third party without any acquired rights under the previous law applicable¹⁹.

While the nature of the law applicable indicated by the subsequent choice of law determines the application of the limitation itself, the comparison of the nature of both laws applicable – previously binding and subsequently chosen – determines the scope of the limitation. In principle, there is no obstacle to supplementing only the rules of the newly chosen law by those rules of the law previously in force under which the right is acquired and preserved in the event of the deprivation of a third party of a right acquired under the previous law applicable. However, it is not always possible to implement additional rules in practice. The added provisions may result in a contradiction or lack of coherence with the newly chosen law. In this case, two solutions are possible.

Firstly, one of the legal institutions developed by the conflict-of-law jurisprudence can be applied, in this case the alignment (*Anpassung*). However, reaching for this construction threatens to create a new legal rule, which does not appear in either of the two laws applicable.

Secondly, it is possible to completely exclude the operation of the subsequent right in relation to the third party and to apply only the laws applicable to which the legal relationship was subject to before the subsequent choice was made. In this situation, it would also only be a kind of deprivation of the effectiveness of the law chosen to a certain extent, namely in relation to a specific third party, while the other aspects of the relationship would be governed by the newly chosen law.

The third solution, supported by the authors, although not always achievable, is to remedy the negative consequences of a subsequent choice of law by obtaining the consent of a third party to that choice²⁰.

It is difficult to unequivocally state which of the available remedies is more appropriate in cases in which the third party does not agree to a subsequent choice of law. It is extremely difficult to make an arbitrary statement without analysing a specific case. However, there may be a generalisation, in other words, an attempt to establish a principle according to which this type of doubt should be resolved. It would appear that if the adaptation procedure could be carried out without infringing on the fundamental principles governing a particular field of law of either of the two systems involved, it would have to be used to respect both the right acquired by the third party and the subsequently expressed will of the parties to the legal relationship. However, if the rule created by the use of the

19 MÖLLENHOFF, Wolfgang., *op. cit.*, p. 143.

20 See e.g. 4) MÖLLENHOFF, Wolfgang., *op. cit.*, p. 140, 2) KADNER GRAZIANO, Alessandro, *op. cit.*, p. 122.

adaptation would interfere too much with the internal coherence of any of the systems, it would be better to exclude the law that was subsequently chosen in its entirety and to apply the previous law applicable to the third party.

4 Conclusion

In the Polish system of private international law, third parties are protected by rules of a general nature relating to each third party and by specific rules relating to their specific categories. The reasons why the legislator introduced rules protecting third parties are also different. Some protect the rights acquired by a third party under the law that was originally applicable to the legal relationship, while others protect rights acquired by a third party under the law that was originally applicable to the legal relationship or they protect the third party's knowledge of the mere fact that the law was chosen by its contracting party. The need to take account of the legitimate interests of the third party involves the risk of undermining certainty regarding the applicable law. In order to assess whether the choice of law infringes on the acquired rights, it is necessary to compare the specific regulations of different legal systems, the outcome of which cannot be known *ex ante*.

The classification of a limitation of choice of law on grounds of the protection of the legitimate knowledge of a third party (Article 23(1), second sentence, and Article 53 of the Act) as a limitation of the effects of the choice of law may give rise to some doubt, since failure to comply with the information requirements contained in these provisions leads to the complete exclusion of the application of the chosen law. However, this completeness refers only to the narrow scope, which is determined by the rule itself protecting the third party. Otherwise, the chosen law shall apply.

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