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ПРИВАТНЕ ПРАВО, ЯК КОНЦЕПТ
В УМОВАХ ВІЙНИ:
ЛЮДСЬКИЙ ВИМІР**

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FOREIGN (NON-)AUTHENTIC INSTRUMENT IN UKRAINE: PRIVATE INTERNATIONAL LAW ISSUES

The war in Ukraine has been going on for almost three years now, but the problematic issues of the pre-war legal acts still continue to manifest themselves, only now, like old film photographs. The issues related to the recognition and enforcement of the foreign official documents in Ukraine are not new. However, the number of cases when such documents are presented to various institutions and authorities in Ukraine has increased significantly under the influence of the migration of the Ukrainian population to European countries forced by the war, which makes this topic relevant. Citizens of Ukraine are increasingly sending to Ukraine various official documents drawn up under foreign law to perform various legal actions on its territory aimed at creating, changing or terminating the rights and obligations of such Ukrainian citizens. This study will focus on only one type of such documents – powers of attorney originating from Poland, for the disposal of immovable property located in Ukraine. Due to the presence of a document drawn up under foreign law, in accordance with sub-clause 4, clause 2, part 1, Article 1 of the Law of Ukraine 'On Private International Law' [1] (hereinafter referred to as the 'PIL Law'), such legal relations are considered to be complicated by a foreign element. They are regulated either by the laws on private international law of the respective countries whose jurisdiction is in one way or another involved in a particular situation, or by bilateral or multilateral agreements, treaties and conventions to which Ukraine and the country of origin of the document are parties. Such agreements, treaties and conventions take precedence over the PIL Law.[1] It is the PIL Law that should be used to answer the question: Which country's law should be applied to a power of attorney issued by a principal for the disposal of immovable property in Ukraine?

In case the power of attorney originates from the territory of the Republic of Poland, in order to carry out legal actions on disposal of immovable property in the territory of Ukraine, attention should be paid to the Treaty between Ukraine and the Republic of Poland on Legal Assistance and

Legal Relations in Civil and Criminal Matters [2] (hereinafter referred to as the Treaty). The said Treaty does not contain a direct rule that would regulate the requirements for powers of attorney, but Article 34 contains a requirement for the *form of legal action in relation to immovable property*. Pursuant to Article 34 of the Treaty, the form of legal action in relation to immovable property [2] is determined by the law of the Contracting Party in whose territory the immovable property is located. Thus, when it comes to the performance of a legal action in Poland in relation to immovable property located in Ukraine, the requirements of Ukrainian law are applicable.

However, neither the treaty nor the PIL Law contains an interpretation of the concepts of '*legal action in relation to immovable property*' and '*form of legal action*'.

If we assume that any legal action has, first and foremost, the features of an action that leads to legal consequences, then a power of attorney will be considered a legal action, but whether this action is a legal action with immovable property remains a question without an unambiguous answer. As for the understanding of the phrase '*form of legal action*', it also remains ambiguous whether notarial authentication should be included in the form of legal action. The need to include notarial authentication is supported, for example, by the provisions of Article 655 of the Civil Code of Ukraine (hereinafter – CCU) and Articles 219, 220 of the CCU [3]. Article 655 of the CCU states that notarial authentication is an integral part of the written form, and Article 220 of the CCU stipulates that an agreement concluded in non-compliance with the requirement for notarisation is void, with the subsequent possibility of its recognition as valid in court [3]. The nullity of such an agreement means that declaration of its invalidation in court is not required (Article 215(2) of the CCU) [3]. The same applies to a unilateral deeds made without complying with the requirement for notarial authentication (Article 219 of the CCU) [3]. Such a unilateral deed is void and may be declared valid by the court if it is established that it was in accordance with the true will of the person who made it, and the notarial authentication of the transaction was prevented by a circumstance beyond the person's control. This concerns another legal issue related to foreign powers of attorney issued for the disposal of immovable property located in Ukraine: Does a foreign power of attorney for the disposal of immovable property located in Ukraine have to be authenticated by notary in order for a Ukrainian notary to be able to use it as a sufficient legal basis

for notarial authentication an agreement on the transfer of immovable property into ownership or rental? If we rely on Article 34 of the Treaty, the law of Ukraine is applicable, and therefore the requirements and legal consequences will be determined by the law of Ukraine for such powers of attorney, i.e. the power of attorney for the disposal of immovable property must be authenticated by notary. Based on the systematic interpretation of Articles 5, 54, 55, 56, 58, 78 of the current Law of Ukraine 'On Notaries' [4] and Chapter 4 of Section II of the Procedure for Performing Notarial Acts by Notaries of Ukraine[5], notarial authentication is characterised by the notary performing such actions as establishing the scope of legal capacity of an individual, verifying his or her true intentions and compliance of the expression of will with the internal will, verifying compliance of the content of the power of attorney with the requirements of the current legislation and the will of the principal. A defining and distinctive feature that is not inherent in the certification of a signature on a document is the verification of compliance of the content of power of attorney with the requirements of applicable law. The obligation of a notary to perform such verification makes him/her responsible for the content of the document, its compliance with the requirements of the law of a particular country and the absence of violation of the rights of other persons.

Instead, if it is argued that the scope of Article 34 of the Treaty[2] does not cover the relations of representation as such and the relations arising from the power of attorney, then the PIL Law is applicable. There are two main provisions of the PIL Law that are directly related to immovable property transactions and the law applicable to powers of attorney. We are talking about Article 31(2) of the PIL Law and Article 34 of the PIL Law [1]. The legal relationship between these provisions is a separate issue: Whether they correlate as general and special rules, whether they are in a hierarchical relationship or not, etc. The distinction made by the Ukrainian legislator between the form of transaction of immovable property and the law applicable to powers of attorney, and the separation of these issues into different rules, may indirectly serve as an additional argument in favour of the fact that the Treaty between Ukraine and Poland does not contain any special rules regarding the requirements and law applicable to powers of attorney, and Article 34 of the Treaty does not refer to powers of attorney as such. Article 34 of the PIL Law does not explicitly refer to notarial authentication or certification of a power of attorney, but rather refers to the procedure for issuing, validity, termination and legal

consequences of termination of a power of attorney, which are determined by the law of the state of origin of the power of attorney. [1] This single article does not directly establish anything regarding the form of the power of attorney and, by referring to the law of the state of origin of the power of attorney, obliges to refer to the provisions of Polish law. In this regard, it is worth paying attention to the requirements to the form of a power of attorney set forth by the Polish Civil Code (hereinafter referred to as the Polish CC). Pursuant to Article 99 of the Polish Civil Code, if a certain form is required for the validity of a certain legal act, the power of attorney for the performance of such legal act must be in the same form as the legal act itself.[6] In turn, pursuant to Article 158 of the Polish Civil Code, an agreement creating an obligation to transfer ownership of immovable property must be executed in the form of a notarial deed. [6] In turn, the Polish Notary Act, in its entirety, in Articles 79-81, 96-101 [7], allows us to conclude that the so-called notarial deed under Polish law is analogous to a Ukrainian notarial authentication, rather than a certification of the authenticity of a signature, and provides that a notary is responsible for the content of the document he/she authenticates and its compliance with applicable law. Whereas the certification of a signature on a document is a separate type of notarial act and cannot be applied to powers of attorney for the disposal of immovable property. In the EU, the analogue of notarial authentication is the concept of an authentic instrument, which places a special emphasis on authenticating the content of the document. This concept was borrowed from Austrian law, where the authenticity of a document included three conditions: the authenticity of the instrument must be established by a public authority; this authenticity must relate to the content of the instrument and not only, for example, the signature; the instrument must be enforceable in itself in the State in which it originates.[8] Further mention of this concept and its definition was found in the Judgment of the Court of Justice of the European Union in case C-260/97 Unibank A/S v. Flemming G. Christensen, where the court in paragraph 17 drew attention to these three criteria as the criteria for the authenticity of an instrument.[9] Such a unified and harmonised approach in the EU allows to get rid of terminological uncertainty on this issue and rely on the concept of an authentic instrument as a common denominator for assessing the status of a document. An important conclusion is that in the case of using a power of attorney to dispose of immovable property in Ukraine with origin from Poland,

regardless of whether Polish or Ukrainian law applies, it must be authenticated by a notary, i.e. presented in the form of an authentic instrument, and not in the form of a certified signature on it.

LITERATURE:

1. *On Private International Law*. (2005). Official Website of the Parliament of Ukraine. <https://zakon.rada.gov.ua/laws/show/2709-15?lang=en#Text>
2. *Treaty between Ukraine and the Republic of Poland on Legal Assistance and Legal Relations in Civil and Criminal Matters*. (1994). Official Website of the Parliament of Ukraine. https://zakon.rada.gov.ua/laws/show/616_174?lang=en#Text
3. *The Civil Code of Ukraine*. (2003). Official Website of the Parliament of Ukraine. <https://zakon.rada.gov.ua/laws/show/435-15?lang=en#Text>
4. *On Notariate*. (1993). Official Website of the Parliament of Ukraine. <https://zakon.rada.gov.ua/laws/show/3425-12?lang=en#Text>
5. *On Approval of the Procedure for Performing Notarial Acts by Notaries of Ukraine*. (2012). Official Website of the Parliament of Ukraine. <https://zakon.rada.gov.ua/laws/show/z0282-12?lang=en#Text>
6. Kancelaria Sejmu. (1964). Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny. In *Dz. U. 1964 Nr 16* (pp. 1–235). <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19640160093/U/D19640093Lj.pdf>
7. Kancelaria. (1991). U S T A W A z dnia 14 lutego 1991 r. Prawo o notariacie. In *Dz. U. 1991 Nr 22 Poz. 91* (pp. 1–85) [Legal]. <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19910220091/U/D19910091Lj.pdf>
8. Jenard, P., & Möller, G. (1990). *Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988*. Retrieved from https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=OJ%3AJOC_1990_189_R_0057_01