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The seat of a commercial company incorporated under Polish law versus cross-border transmission of the company to another EU Member State

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***Abstract*— In the paper the author makes an attempt at defining and interpreting the notion of the seat of a commercial company. The issue is vital especially when the shareholders of a company decide to transfer its the seat to another country. The doctrine and judicature are not uniform in the way they define the notion of a company's seat what gives rise to qualification problems with respect to the fact whether the seat is transferred as subject to discretion or maybe the seat of the company is understood as its corporate (business) office where the actual business activity is being conducted, or perhaps it is its registered office. The problem in a direct way impacts the principle of freedom of business activity. The aim of the paper is to develop a uniform standing on when it is possible to proceed with cross-border transmission of a company's seat. The author conducts linguistic and functional analysis of Polish and European regulations, doctrinal views as well as judicature of Polish courts and the Court of Justice of the European Union (CJEU). The author of the paper suggests that it should be assumed that the seat of a commercial company is, in fact, its registered office, what in consequence will cause fewer problems in the process of its transfer to another country. The paper tries to confirm this assumption through the analysis of relevant domestic and EU regulations, the judicature of Polish courts and of CJEU.**

Index Terms— the registered office of a commercial company, transfer of the seat of the company, the corporate office, the head office.

I. INTRODUCTION

The notion of the 'seat of a commercial company' may have multiple interpretations. According to E. Skibińska, in the doctrine of civil, commercial as well as private international law there is a predominant belief that the seat should be understood as the 'actual seat' where the management board of the company resides, it may also be the place where the actual business activities are conducted ('corporate office'), or the place where the board takes decisions vital for the existence of the company ('head office'). The term 'registered office' of a commercial company must be understood as the place indicated in the statute or in the Articles of Association and then revealed in the National Court Register.

The seat of a general partnership may also be interpreted as the place of actual activities of organs appointed for management and representation of the company. With respect to commercial partnerships, the actual seat is the place of residence of partners who conduct the company's affairs and represent it. If the partners live in different cities, towns or villages, the seat is the place which is the centre of management or where the main business activity is performed, or it is the place of residence of the person or persons who conduct a specific legal act. It should be remembered that the actual seat of a commercial company is determined by factual circumstances (Popiołek, 2008).

Following E. Skibińska, for the sake of transparency and security of the turnover, it would be advisable to adopt a uniform criterion for determination of the seat of a commercial company. An effective solution would be specifying the term 'seat of a company' as the place where the enterprise is registered i.e. the place mentioned in the Articles of Association and in the registers. The author of the paper believes that such a solution would guarantee predictability of results of application of the regulations of the civil code, of the code of commercial companies (hereinafter referred to as 'CCC') and of the Act on Private International Law, including, especially, the conflict-of-law rules (Skibińska and Mróz 2012).

II. POLISH COMMERCIAL COMPANY AND RELATED IMPLICATIONS

According to A. Kidyba, article 41 of the civil code regarding the notion of the seat of a legal entity, is a regulation of dispositive nature. Only when the provisions of the article do

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not change the adopted rule, the seat is determined in accordance with the regulations stipulated in article 41 of the civil code. An exception to this rule may be based on provisions of acts regulating the status of respective legal entities which are established in the system of acts of the state organs. Provisions of article 41 of the civil code, in the light of article 331 of the civil code, refer also *mutatis mutandis* to organisational units without legal personality, and thus, also to general partnerships also with respect to their seats. As a rule, the seat is determined constitutively the moment the company is entered into the register. When it comes to organisational units without legal status (article 33^1 paragraph 1 of the civil code), article 41 of the civil code applies.

The seat of a commercial company is the place (city, town, village) where the partners manage the affairs of the company. When the partners conduct their affairs and live in the same place, the situation is clear. However, if they live in different towns or villages, the seat should be indicated in the Articles of Association. Of decisive importance here may be the localization of the main plant where the majority of decision makers conducting the affairs of the company operate, and should this prove difficult, the place of permanent residence of the person or persons who perform a given act (Kidyba, 2012). According to a pre-war opinion of M. Allerhand, the seat of a commercial company is *the place where the management of the company sits (in case of a general partnership, in accordance with the principle of analogy, partners), it is not the place where the business activities such as manufacturing, processing or sales of goods are performed* (Allerhand, 1935).

The choice of the seat of the company is important due to the fact that *each legal entity is subject to the legal system of the state in which it is located* (article 17 paragraph 1 private international law). The founders of a company have the right to choose the location for its seat. According to A. Kidyba, there may be a situation *in which most of the partners are at the same time employees of the company but there are also other partners who are not. If in such a case most of the partners are deployed as employees in a facility different that than the office in which they perform their function of board members, from economic and organisational point of view the seat of the company is not the place where the management board is permanently seated* (Kidyba, 2009). In contrast, K. Kruczalak expressed an opinion that the seat of a company may be determined by means of a criterion of the so called exploitation centre. It is the place where the enterprise pursues its basic economic goals (Kruczalak, 2001). This view is shared by S. Sołtysiński who believes that article 41 of the civil code is of facultative nature and the absence of relevant regulation in the code of commercial companies ('CCC') justifies the opinion that the seat may be understood as the location of the main production or commercial facility.

In the view of the author of the paper, the statement 'seat of the management organ' is not precise enough and it should be seen as a certain shorthand because in the context of article 38 of the civil code, determination of the seat of an organ which has no personality nor legal status is impossible. In the process of determination of the seat of a legal entity it is important to point to a relevant management body because it is the body which, within its field of competence, performs also the representative function. However, in order to specify the seat precisely, it is critical to identify where the activities assigned to the competences of a specific organ such as, for example, the management board, are performed.

The seat of a company should not be mistaken with its address. The address serves the localization purposes only, it is the place where correspondence can be delivered (Klyta, 2001). The address is entered in the register of entrepreneurs regardless of the actual seat (Article 38 point 1 c of the Act on the National Court Register; see also paragraph 98 item 2 of the resolution of the Minister of Justice of 30 November 2011 on a detailed manner of keeping registers included in the National Court Register and detailed contents of registry entries, Journal of laws No 273, item 1616 as amended). The mere address of a company may at the same time be the concretization of the seat. The seat may also serve the individualisation function. This is also true for a company being a general partnership. Essentially, there are no obstacles for functioning of general partnerships of identical company but with different seats. A general partnership may conduct business activity in different places within the territory of the same country as separate subsidiaries or without isolating individual subsidiaries. There are no regulations which would oblige legal entities to register each individual subsidiary, as a subsidiary of an enterprise is not a separate entity. It is also legally impossible for a general partnership to have a number of seats (Sołtysiński, 2008).

In the process of determining the seat of a company, an important aspect would be the wording of the Articles of Association. Change of address within the same city, town or village, although it has to be reported, does not constitute the change of the seat, therefore the change of statute of the legal entity is not required. According to G. Gorczyński, current regulations in force rarely contain the requirement of authenticity of the seat. The requirement of the authenticity can be found in Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (EC). The second sentence of article 7 of the Regulation stipulates that the registered office of an EC shall be located within the Community, in the same Member State as its management board. A Member State may, in addition, impose on ECs registered in its territory the obligation of locating the seat of the management board and their registered office in the same place. Poland did not implement these provisions as they impact the freedom of European companies to choose their seat in its territory.

Before 1939, in the doctrine (Allerhand, 1993) and in judicature (the decision of the administrative court in Poznań of 14 November 1936, II CZ (X) 1060/1936), it was believed that the seat may not be chosen arbitrarily and intervention of the registry court was advocated in cases when the seat indicated in the statute turned out not to be authentic. The Act of *4 March 2005* on the *European Economic Interest Grouping* and the *European Company*, in article 4 on the jurisdiction of the registry court, assumes that the seat of a company is its registered office (Journal of laws 2015, item 2142 as amended).

The significance of the seat for a legal person or a commercial partnership is basically the same as the significance

of the place of residence for a natural person. It helps to determine e.g.: jurisdiction of the courts (article 30 of the code of civil procedure), jurisdiction of public administration organ (article 21 paragraph 1 point 3 of the code of administrative procedure), jurisdiction of fiscal organs (article 17 paragraph 1 of the tax ordinance), the place where the contract was concluded (article 70 paragraph 2 of the civil code), the place of performance (article 454 paragraph 1 of the civil code), or generally applicable law (article 9 paragraph 2 of private international law). The mere unfamiliarity with the seat does not have any legal significance, unless a special regulation stipulates otherwise (Grzybowski, 1974). Consequently, if for example a debtor does not know the seat of the creditor, he or she may deposit the object of the performance in a court deposit pursuant to article 467 paragraph 1 of the civil code (Świderski, 2014).

Poland implemented a personal statute of a legal person and organisational unit without legal status, including a general partnership, in which the seat is a decisive factor in determining territorial jurisdiction of applicable law. In other words, the seat regulates if a given entity enjoys legal capacity and capacity to perform legal acts (Bagdan-Kurluta, 2011). Pursuant to article 17 paragraph 1 private international law, a legal entity shall be subject to the law of the country in which it is seated. In contrast, provisions of article 17 paragraph 2 private international law stipulate that in order to determine the personal statute of a legal entity it is necessary to apply the law of the country according to which this entity was established. Such a situation may occur when a country in its powers does not provide its jurisdiction and refers the company to the state where it was registered. The next exception to the general rule can be found in article 18 paragraph 1 private international law, according to which if a legal entity performs a legal act regarding the conducted business activity, it is sufficient that it has the capacity to perform this act under the law of the country where the company is run. Pursuant to article 18 paragraph 1 private international law, a legal entity may rely, with respect to the other party, on limitations regarding its capacity or representation resulting from provisions of article 17 paragraphs 1 and 2 private international law, only when the other party was aware of them, if such limitations are not provided in the law of the country where the legal act was performed (article 18 paragraph 1 and 2 private international law).

Moreover, personal statute of a legal entity also includes: formation, merger, division, transformation or dissolution of the legal person; legal character of the legal person; the individual name and the business name of the legal person; legal capacity of the legal person; sphere of competence and the rules of functioning as well as appointing and dismissing of the members of its organs; rules of representation; the acquisition and the loss of the status of the shareholder, or of the membership in the legal person, and the rights and obligations connected therewith; responsibility of the shareholders or of the members for the debts of the legal person; legal effects of the breach by a person representing the legal person of the law, Articles of Association or the statutes. It is not a closed catalogue, as evidenced by the words ‘in particular’, which means that this regulation may refer also to other threads (article 17 paragraphs 1-3.9 private international law). Although provisions of articles 17–20 private international law apply directly with respect to legal entities, on the basis of reference from article 21 private international law, they also properly apply to organisational units without legal personality which by law are granted legal capacity i.e. also to commercial partnerships and general partnerships. It seems that appropriate application of these regulations will translate into their direct application or slightly generalised application (the generalisations concern the correlations resulting e.g. from the fact that organs of a limited company are different than organs of a general partnership). Also the seat of an organisational unit without legal personality which by law is granted legal capacity (this includes general partnerships) which was established under Polish law, should be located, as a rule, in the territory of the Republic of Poland. It is directly expressed in the regulations referring to legal entities (article 2 paragraph 2 of the Act of 6 April 1984 on Foundations; consolidated text: Journal of laws of 1991 No 46, item 203 as amended), or by means of parallel provisions. An example here may be the condition of dissolution of a legal entity in the process of cross-border transfer (article 270 paragraph 2 and article 459 paragraph 2 ‘CCC’). It should be observed, that the aforementioned provisions of civil law, commercial law as well as private international law do not specify whether the seat is understood as the registered office or the actual seat.

W. Popiołek believes that it is necessary to strive, of course considering all the relevant circumstances of the case, to determine the country with whom this legal entity or the seat of an organisational unit without legal personality which by law is granted legal capacity, maintains the closest ties. It is important to track down the centre of power of the legal entity, in which the vast majority of the management organ operates (Kruczalak, 2001). Consequently, there may be cases in which it is difficult to unequivocally determine the seat of a company. This is a negative phenomenon which may trigger a number of various problems for entities maintaining relationships with a given organizational unit. As already mentioned, in Poland the actual seat of a company has a tendency to correspond to its registered office. However, the enforcement of this state is not sanctioned in the provisions of the code of commercial companies. What is important, the actual state, when it comes to the seat, may not be contrary to the legal state. When there is conflict with the nature of the company or lack of capacity, illegality or immorality, or there is an intention to circumvent the law, or when there is no justifying interest which deserves protection, the registry court may express reservations in this respect (Kruczalak, 2001). For example, pursuant to article 13a of the Banking Law Act, the management board of a bank operates and performs its functions in the seat specified in the statute of the bank. Therefore, the only possible seat here is the seat mentioned in the statute.

There are no formal obstacles for a situation in which the seat of a company is located in a different town or village than the place where the management board operates or where the business is actually run. Different decisions may be the result

of special regulations such as e.g. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 (Rome I- Official Journal of the European Union L 177 of 4 July 2008, pp. 6–16). The regulation addresses an important issue of the law applicable to contractual obligations. Article 39 of the said regulation stipulates that for the sake of legal certainty there should be a clear definition of habitual residence, in particular for companies and other bodies, corporate or unincorporated. Article 19 paragraph 1 private international law defines the place of habitual residence as the place where the main managing organ is located. Council regulation (EC) no 1346/2000 of 29 May 2000 on insolvency proceedings (article 3 paragraph 1) stipulates that the main center of a company's main interests is its registered office in the absence of proof to the contrary (decision of the Tribunal of Justice of 15 December 2011, case number C-191/10, *Rastelli Davide e C. snc v. J.C. Hidoux*, unpublished, point 32 and the judicature cited therein).

III.CROSS-BORDER TRANSFER OF THE SEAT OF A POLISH COMMERCIAL COMPANY

Provisions of articles 17–20 of private international law referring to the seat of a legal entity and organizational units without legal personality which by law are granted legal capacity, do not clarify whether the legislator meant the registered office or the actual seat. There is no doubt that this issue is of vital significance for commercial companies most of all in cross-border transmissions. Under the previous Act on Private International Law, the doctrine was inclined towards defining the seat as the actual seat (article 9 paragraph 2 of the Act of 12 November 1965 – Private International Law) but there were also voices that the registered office should be of fundamental significance (K. Oplustil, 2011).

Article 19 paragraph 1 private international law stipulates that after the seat of a legal person has been moved to another country, the legal person shall be subject to the law of this country since the moment of the transmission. Retention of the legal personality acquired in the original state is only possible if it is provided by the law of each of the countries concerned (article 19 paragraph 1 private international law). In contrast, transmission of the seat of a legal entity within the European Economic Area does not lead to the loss of legal personality pursuant to the third sentence of article 19 paragraph 1 private international law. According to E. Skibińska, the third sentence of article 19 paragraph 1 private international law refers not only to 'legal personality' but generally to legal existence of a legal person, therefore, according to the author, refers also to organizational units without legal personality but with legal capacity (Skibińska, 2012). In the light of article 19 paragraph 1 private international law, it can be assumed that a company while transmitting its seat to another Member State retains its existing legal personality but its personal statute is changed. The business is transformed into a company which is subject to the law of the country of immigration. An interpretation from a different perspective, may lead to the conclusion that a legal entity retains its existing personal statute and is still subject to legislation of its country of origin. In the view of E. Skibińska, the first interpretation is in line with the intention of the legislator. If the legislator would make it possible to retain the personal statute in the process of a company's transmission, article 17 private international law would be shaped in accordance with the theory of establishment and incorporation (Skibińska, 2012). It should be emphasized that such a standing leaves interpretation in this respect for the Member States. Following the case law of the Tribunal of Justice, it can be understood that the Member States are competent to determine the rules of the personal statute of a company (81/87, *Daily Mail*). Additionally, court decisions frequently feature an opinion that only the Member State is competent to determine the connecting criterion required from a company which wants to be acknowledged as one established in accordance with its internal legislation (C-210/06, *Cartesio*). With respect to the aforementioned court decision, the country of origin may limit the possibility of transmitting the seat of a company abroad if the company does not intend to change its personal statute (*Cartesio*, point 110).

It is also worth mentioning that article 4 paragraph 3 of the Treaty on the European Union, generates the obligation of pro-EU interpretation for organs of Member States. This obligation applies especially to courts. Therefore it is necessary to review Polish regulations in the light of provisions of articles 49 and 56 TFEU and the judicature of the European Court of Justice with respect to the required pro-EU tendency of interpretation. After all, the EU law has primacy over legal systems of individual Member States. In the process of transferring a Polish company abroad emerges the question regarding application of provisions of article 270 paragraph 2 'CCC', which stipulates that the resolution of the shareholders to transfer the company abroad requires dissolution of the company, while, pursuant to the third sentence of article 19 paragraph 1 private international law, a company which transfers its seat within EEA, does not lose its legal personality. According to E Skibińska, such a situation means, that the company's country of origin may not apply regulations on the basis of which the company loses its legal personality. Hence, provisions of article 270 paragraph 2 'CCC' may not apply for a company which transfers it seat to another country and the transfer may not lead to a mandatory dissolution of the company. What applies here is the third sentence of article 19 paragraph 1 private international law as *lex specialis* with respect to provisions of article 270 paragraph 2 'CCC' (Skibińska, 2012).

In the *Cartesio* case, the European Court of Justice had to deal with a situation of transmission of a company's seat to another Member State with the change to the company's personal statute i.e. a situation in which a company was transformed into a business entity which was subject to the law of the country of immigration. In the justification to the ruling in this case the court expressed a standing according to which the requirement of prior dissolution and liquidation of a company which wishes to transform itself into a company being a subject to the legal system of another Member State, would constitute limitation to the freedom of entrepreneurship and thus would be in conflict with article 49 TFEU. What is

important, provisions of article 270 paragraph 2 and article 459 paragraph 2 'CCC' will apply in the process of transferring the seat of a company outside EEA (Skibińska, 2012). Another example from the European Court of Justice is the *Überseering* case in which the CJEU ruled that it is a limitation to freedom of entrepreneurship if a Member State orders a company to be re-established in its territory and refuses to acknowledge its legal capacity although it was lawfully established under the legal system of another Member State where it has its registered office, and the refusal is issued on the grounds that the company moved its actual seat (which does not have capacity to bring proceedings) abroad as a result of acquisition of the entirety of shares by citizens of the host country. Yet another example may be the decision of the CJEU in the *Centros* case. The Danish authorities refused to register a subsidiary of *Centros*, which had its seat in the territory of Great Britain but did not conduct its affairs there. The refusal to register a subsidiary of the British partnership (Ltd.) in Denmark meant failure to acknowledge its legal personality. It made conducting business affairs in the country of immigration impossible for the British entrepreneurs (Skibińska, 2012). The Court found that the host Member State is obliged to acknowledge each business entity which was established in accordance with the legal system of another Member State. The refusal to do so violates provisions of articles 49 and 54 TFEU. The judgment of the CJEU proves that if a company was established in another Member State and it conducts its affairs only or almost only in the country in which its branch or subsidiary is located, it does not deprive it from enjoying the freedom of entrepreneurship, unless misappropriation occurs.

It should be observed that the term 'seat of a company' should be understood as the centre of the company's activities, pursuant to the third sentence of article 19 paragraph 1 private international law, on the basis of which it is possible to transfer the seat of a company without the loss of legal personality in the EEA area. When a company from another EEA state transfers its actual seat into the territory of the Republic of Poland, its personal statute is shaped by the law of its country of origin. In this case the personal statute of the company does not change. Such understanding is in line with jurisdiction of the Court of Justice in cases *Centros* and *Inspire Art* (Skibińska, 2012). Interpretation of the notion of the 'seat of a commercial company' (also of a general partnership) in EEA related issues should take into account the EU law and particularly provisions of articles 49 and 54 TFUE as well as judicature of CJEU, especially in cases *Daily MailCentros*, *Überseering*, *Inspire Art* and *Cartesio*.

Pursuant to article 551 paragraph 1 'CCC' which contains rules for company transformations, general partnership, affiliated company, limited partnership, limited joint-stock partnership, limited liability company, public limited company (a transformed company) may be subject to transformation into another commercial company (the so called transformed company). Pursuant to paragraph 2 of this regulation, a civil law partnership may be transformed into a commercial company, but what is important, other than a general partnership. Additionally, paragraph 3 stipulates that that for the transformation mentioned in the first sentence of paragraph 2, regulations regarding transformation of a general partnership into another commercial company are used, applying in this respect provisions of article 26 'CCC' on filing a general partnership with the registry court. What is important, pursuant to paragraph 4, a company in liquidation proceedings which has already begun the process of division of assets or a company in bankruptcy proceedings cannot be subject to transformation. In addition, an entrepreneur, being a natural person conducting on his own behalf business activity, may transform the form of the conducted activity into a single shareholder capital company which means that transformation of the company into a partnership is not admissible (article 551 'CCC').

At this point it is worth recalling article 10 'CCC' which regulates the process of transfer of rights and obligations of partners in partnerships. Pursuant to paragraph 1 of this article, all rights and obligations of a partner of a partnership may be transferred on another person only when the Articles of Association so provide. Additionally, paragraph 2 stipulates that all rights and obligations of a partner in a partnership may be transferred onto another person only after acquisition of a written consent of all remaining partners unless the Articles of Association provide otherwise. In case of transfer of all rights and obligations of a partner on another person, the withdrawing partner and the acceding partner shall be jointly and severally liable for the obligations of the withdrawing partner arising in connection with his membership of the partnership and for the obligations of the partnership. For the transfer of all rights and obligations of a partner in a partnership whose Articles of Association were contracted using a template, interested parties may use the template available in the communication and information system. The statements of seller and buyer require in such a situation authorization in the form of a qualified electronic signature or a trusted signature. Declaration of will lodged through the communication and information system is equivalent to the declaration of will submitted in writing (article 10 of 'CCC').

IV. CONCLUSIONS

The analysis of court cases related to cross-border emigration and immigration of companies shows that assuming that the term 'seat' means either the actual seat or the registered office, may have different consequences when a company wishes to exercise its right to transfer its seat to another country. In the doctrines of civil law, commercial law and private international law there is a predominant opinion that the term 'seat of a commercial company' should be understood as the actual seat i.e. the place where the management board is located. According to E. Skibińska, for the benefit of transparency and security of the turnover, a uniform criterion of determining the seat of a commercial company should be adopted. The author believes that it would be more beneficial to assume that the seat of a Polish commercial company corresponds to its registered office, what in consequence causes fewer problems during the process of cross-border transmission. If it is assumed that the term 'seat of a commercial company' is, in fact, its registered

office, it becomes necessary to formulate regulations relevant for the process of cross-border transmission. The interpretation of the notion 'seat of a commercial company' in issues related to EEA, should take into account the EU law, especially provisions of articles 49 and 54 of the Treaty on the Functioning of the European Union and the CJEU judicature, especially cases of *Daily MailCentros*, *Überseering*, *Inspire Art* and *Cartesio*. The cases of cross-border emigration and immigration of companies presented in the paper show that the consequence of assuming that the seat of a commercial company is its registered office, proves much more useful and causes fewer problems from the point of view of the company itself as well as of administrative organs of respective Member States and the European Union as a whole.

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