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FOREIGN [NON-]AUTHENTIC INSTRUMENT FOR THE DISPOSITION OF IMMOVABLES LOCATED IN UKRAINE

Problem Statement. The war in Ukraine has been going on for almost three years now, but the problematic issues of the pre-war legal acts in force are still only now emerging as old film photographs. The issues related to foreign documents to be recognised, enforced, and used in Ukraine are not new. However, the number of cases of submission of such documents in various institutions and bodies in Ukraine has increased significantly under the influence of migration of the Ukrainian population to European countries forced by the war, which makes this study relevant. The issues surrounding the recognition, enforcement, and use of foreign official documents drafted by competent authorities of foreign states in Ukrainian notarial practice rarely become the subject of academic discussions in Ukraine. With the full-scale invasion of Ukraine and the resulting migration of the Ukrainian population to European countries, legal questions concerning the applicable law for such official documents have emerged. Citizens of Ukraine are more often sending to Ukraine various official documents drawn up under foreign law to perform various legal acts 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 a foreign country, namely Poland, for the disposal of immovable property located in Ukraine. This case is only one of those cases that require legal analysis and are subject to consideration in view of the 6,253,700 Ukrainian citizens who were forced to emigrate from Ukraine to Europe as a result of the full-scale invasion of Ukraine by russia [1].

State of Research. The issue of recognition and enforcement of foreign documents in Ukraine is usually related to court decisions and was studied by Kisil V. I. [2], Latynskyi M. E. and Nahnybida V. I. [3], Streltsova E. D. [4], Fursa S. Y. [5], and others. The issues of recognition and use of foreign documents in the Ukrainian notarial process were studied by Snidevych O. S. [6], Chuyeva O. D. [7], Fursa E. E. [8] and others.

The purpose of this article is to conduct a legal analysis of the current laws governing the applicable law for official documents issued by foreign authorities and their recognition, with the aim of determining the requirements such documents must meet.

Main research. In connection with the presence of an official document drawn up under foreign law, in accordance with subpara. 4, clause 2, part 1, Article 1 of the Law of Ukraine 'On Private International Law' [9] (hereinafter referred to as the PIL Law), such legal relations are considered to be complicated by a foreign element. According to the Article 13 of PIL Law documents issued by authorised agencies of foreign states in the prescribed form shall be recognised as valid in Ukraine if legalised unless otherwise provided for by law or an international treaty of Ukraine [9]. These legal relations are governed 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. At the same time, such agreements, treaties and conventions take precedence over the PIL Law [9]. It is these acts that should be used to answer the first question that is increasingly arising in practice of application of law by notaries: Which country's law should be applied to a power of attorney issued outside Ukraine by a principal for the disposal of immovable property in Ukraine?

If the power of attorney originates from the territory of the Republic of Poland, in order to carry out legal actions for the disposal of immovable property in Ukraine, one should pay attention to the Treaty between Ukraine and the Republic of

Poland on Legal Assistance and Legal Relations in Civil and Criminal Matters [10] (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 act with respect to immovable property. Pursuant to Article 34 of the Treaty, the form of legal act with respect to immovable property [10] 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 act 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 act in relation to immovable property' and 'form of legal act'.

If we assume that any legal act has, first and foremost, the features of an act that leads to legal consequences, then a power of attorney will be considered a legal act, but whether this act is a legal act with immovable property remains an unanswered question. The answer to this question depends on the concept of representation, the specifics of property law enshrined in the law of a particular country and whether the power of attorney is a legal act to transfer property rights to immovable property, transfer immovable property or transfer the right to dispose of immovable property. If the answer to this question is based on the provisions of the Civil Code of Ukraine (hereinafter referred to as the 'CCU'), the transfer of real estate does not take place on the basis of a power of attorney, but the transfer of property as such is provided for in a contractual form (for example, Article 655 of the CCU) [11]. A power of attorney may confirm the representative's authority to perform certain legal acts for the benefit, in the interests and on behalf of the principal, and in this case, it may grant the right to access immovable property in order to achieve the purpose for which the power of attorney was issued. The above argumentation and line of reasoning is merely an illustration of the fact that uncertainty about the content and essence of what is meant by the phrase 'legal act with respect to immovable property' in the Agreement may lead to different legal implications.

As for the understanding of the phrase 'form of legal act', it also remains ambiguous whether it should include only the forms of transactions specified by the CCU – oral and written (including electronic), or whether it should include the so-called qualified or complex written form of transaction, which is considered to be complied with not only in the presence of a written statement of the transaction, but also with its subsequent notarial authentication. The position on the insufficiency of the simple written form may be supported, for example, by the provisions of Article 655 of the CCU and Articles 219, 220 of the CCU [11]. Article 655 of the CCU states that notarial authentication is an intrinsic part of the written form, and Article 220 of the CCU stipulates that a contract concluded in non-compliance with the requirement for notarial authentication is void, with the subsequent possibility of its recognition as valid in court [11]. The nullity of such a contract means that its declaration of invalidity in court is not required (Article 215(2) of the CCU) [11]. The same applies to a unilateral deed made without complying with the requirement for notarial authentication (Article 219 of the CCU) [11]. Such a unilateral deed is void and may be declared valid by a 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 deed was prevented by a circumstance beyond the person's control. This concerns another legal question 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 a foreign notary in order for a Ukrainian notary to be able to use it as a sufficient legal basis for authenticating a contract for the transfer of immovable property into ownership or use? If we rely on Article 34 of the Treaty, the law of Ukraine applies, and therefore the requirements and legal implications 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 a notary. An alternative to notarial authentication, according to Ukrainian law, is the procedure of certification of the signature on the document, but the current legislation does not contain any definitions of authentication or certification. As noted by M. Dyakovych, a notarial authentication is, first and foremost, a set of actions that a notary, acting on behalf of the state, is obliged to perform [12]. Based on a systematic interpretation of Articles 5, 54, 55, 56, 58, 78 of the current Law of Ukraine 'On Notariat' [13] and Chapter 4 of Section II of the Procedure for Performing Notarial Acts by Notaries of Ukraine [14], authentication is characterised by notarial actions aimed at establishing the scope of legal capacity of an individual, verifying his/her true intentions

and correspondence between the expression of will and the internal intent, verifying compliance of the power of attorney with the requirements of the current law 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 power of attorney's content 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 third parties.

Instead, if it is argued that the scope of Article 34 of the Treaty [10] 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. These are Article 31(2) of the PIL Law and Article 34 of the PIL Law [9]. The legal interrelation of these provisions is a separate issue: Whether they correlate as a *lex generalis* and *lex specialis*, whether they are in a hierarchical order or not, etc. The distinction made by the Ukrainian legislator between the form of immovable property transaction and the law applicable to powers of attorney, and the separation of these issues into different norms, may indirectly serve as an additional evidence that the Treaty between Ukraine and Poland does not contain any special norms 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. At the same time, Article 31(2) of the PIL Law [9], like the Treaty between Ukraine and Poland, contains the expression '...in respect to immovable property' without providing a meaningful clarification of what this means in the legal sense and how this provision should be applied by those who are authorised to apply law. As for the content of Art. 34 of the PIL Law, it also does not explicitly refer to a notarial authentication or certification of a signature on a power of attorney, but rather mentions 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 [9]. The legal concept of 'procedure for issuing' already depends on the law of the country of origin of the power of attorney and may refer to both the form of the power of attorney and the procedure for authentication of the power of attorney. 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 CC, 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 [15]. In turn, pursuant to Article 158 of the Polish CC, an agreement creating an obligation to transfer ownership of immovable property must be executed in the form of a notarial deed [15]. In turn, the Polish Notary Act, in Articles 79–81, 96–101 [16], allows us to conclude that the so-called notarial deed under Polish law is analogous to a Ukrainian authentication, rather than a certification 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. Thus, the first question formulated in this study can be answered only based on the chosen way of interpreting the provisions of the Treaty between Ukraine and Poland and the PIL Law. Nevertheless, based on the analysis, both the application of Ukrainian law and the application of Polish law will still lead to the need to use an authenticated power of attorney for the disposal of immovable property in Ukraine. Therefore, the answer to the second question formulated in this study for the case of a power of attorney originating from Poland is positive – it must be authenticated by a notary.

When interpreting the national law of third countries and bilateral international treaties with the participation of Ukraine, special attention should be paid to the national legal terminology. Given that similar issues may arise with other countries, one should also take into account the extreme dependence on national legal terminology, which is due to both the law of that country and the language used in it. Sometimes it makes no sense to look for similar terminology or even equivalents in foreign law, as such legal phenomena or legal institutions simply do not exist and should be treated as autonomous concepts and no analogies should be sought. Just as it is difficult to translate and find

an equivalent in the national legal language of the concept of *acquis communataire* [17], which is why it is not translated and no analogues are sought but used 'as is'. The common denominator in the EU, which was once used to clarify the essence and distinguish between an official document created by an authorised person of the state and a document created by private individuals and which may well serve as an analogue of a authenticated document, rather than a document on which the signature is certified, is the concept of an *authentic instrument*. In turn, the analogue of the notarial authentication under Ukrainian law is authentication. It is considered that the concept of an authentic instrument first appeared in Article 50 of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters – Done at Lugano on 16 September 1988 (88/592/EEC) (hereinafter – the Convention) [18]. At that time, this concept was present only in Austrian law, and at the stage of drafting the Convention, the question arose as to what conditions must be met for an instrument to be considered authentic. These conditions included: 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 [19]. Further reference to this concept and its definition was made 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, having already officially interpreted Article 50 of the Convention [20].

A separate problem arises with regard to the resolution of similar issues with foreign powers of attorney originating from countries where notaries or other persons authorised to certify[1] powers of attorney do not have the authority to create an authentic instrument[2], that is analogous to a document authenticated by notary and/or with which there is no treaty on legal assistance.

In this case, the question of the correct interpretation of Art. 31(2) and Art. 34 of the PIL Law remains, since the latter article refers to the law of the state of origin of the power of attorney, but if we assume that the power of attorney is a legal act in respect of immovable property within the meaning of Art. 31(2) of the PIL Law, then the power of attorney in respect of immovable property must comply with the requirements of Ukrainian law, regardless of the country of origin of such power of attorney. If a power of attorney for the disposal of immovable property is not a legal act in relation to immovable property within the meaning of Article 31(2) of the PIL Law, the rules of the country of origin of the power of attorney shall apply (Article 34 of the PIL Law). Therefore, a notary of Ukraine is obliged to accept a power of attorney certified by an official of the country of origin of the document, whose signature and seal have been duly legalised or apostilled. Unless the law of the country of origin of such power of attorney does not provides for the creation of an authentic instrument, with all its consequences, as, for example, in the United States [22]. German court practice in this regard has experience of recognising the equivalent procedure for authentication of documents originating in Switzerland but denies such equivalence in relation to documents created by US public notaries [22]. This equivalence requirement means that when evaluating a document created by a third country notary, it is necessary to make sure that such a notary can be admitted to cross-border evidentiary actions in the same way as a German notary under §438 ZPO [21]. This involves a three-step test, where three questions must be answered: 1) does the foreign notary have an education equivalent to that of a German notary? 2) does the foreign notary hold a position in his or her legal system equivalent to that of a German notary in the German legal system? 3) Does the foreign notary follow procedural law that is equivalent to the basic provisions of German procedural law relating to the authentication process? [21].

On the other hand, if you rely on the fact that the power of attorney originates from a country with which Ukraine has concluded a legal assistance treaty that sets out special rules regarding the requirements for powers of attorney and determines that Ukrainian law is applicable, one should bear in mind the following:

– A foreign power of attorney to dispose of immovable property is void in accordance with Article 219 of the CCU if it does not meet the requirements for a notarial authentication (signature is certified) or does not represent an authentic instrument [11];

– A void power of attorney on the basis of which a contract for the transfer of immovable property, for example, into ownership, is concluded does not directly result in the invalidity of such a contract

[1] The term is used for differentiation purposes, and the author equates it with the Ukrainian concept of certifying the authenticity of a signature on a document.

[2] The EU countries that fall into this category include Ireland, Denmark, Sweden, Cyprus, and Finland [21].

or its voidance. The CCU does not contain a provision providing for legal consequences of a contract based on a void power of attorney;

– The conclusion of an agreement on the transfer of immovable property, for example, into ownership, on the basis of such a void power of attorney entails the contract being potentially challenged in accordance with part 3 of Article 215 of the CCU [11] and the right of the owner to reclaim the property from someone else's illegal possession (vindication) if it is proved that the person who entered into the contract on behalf of the owner did not have the authority to do so.

Conclusions. An important conclusion is that if a power of attorney is used to dispose of immovable property in Ukraine with origin in 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, since the procedure for certifying the authenticity of a signature on a power of attorney, neither under Ukrainian nor Polish law, provides for the notary's liability for the compliance of the content of such a power of attorney Thus, one of the mandatory conditions of an authentic instrument is no longer met.

At the same time, it is important to bear in mind that, in the current circumstances, the vast majority of powers of attorney issued by Ukrainian citizens abroad represent a necessary measure for individuals who may lack access to qualified legal advice regarding the requirements and applicable law governing such powers of attorney. This, in itself, should not serve as a basis for questioning the genuine intent of these citizens to dispose of their immovable property located in Ukraine, nor does it inherently result in a legal act, such as a contract for the transfer of immovable property ownership, being vitiated by defects of will.

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Іноземний [не-]автентичний документ для розпорядження нерухомим майном, розташованим в Україні

Дослідження присвячене проблематиці використання іноземних довіреностей для розпорядження нерухомим майном на території України. Безпрецедентні масштаби міграції українського населення до країн Європи, спричинені повномасштабним вторгненням рф в Україну, продовжують провокувати правові питання, що потребують дослідження та відповіді. Серед таких — питання розпорядження нерухомим майном, що розташоване на території України, на підставі іноземних довіреностей.

У статті розглянуто такі питання: праву якої країни повинна відповідати така довіреність; чи повинна вона бути нотаріально посвідчена, чи достатньо нотаріального засвідчення справжності підпису на такій довіреності. Як один із можливих прикладів у статті розглядається ситуація довіреності, оформленої нотаріусом Польщі для розпорядження нерухомим майном на території України. Зроблено висновок, що така довіреність повинна бути нотаріально посвідчена, тобто складена у формі «нотаріального акту» за правом Польщі, який є еквівалентом нотаріального посвідчення за правом України.

Окрему увагу в статті приділено концепту «автентичного інструменту», який за своїми характеристиками є аналогом документа, посвідченого нотаріально за правом України. Автентичним визнається документ, виданий уповноваженим державою органом; автентичність такого документа стосується його змісту, а не лише підпису, і такий документ може бути примусово виконаний на території країни його походження.

У дослідженні звернута увагу на те, що право, якому повинна відповідати іноземна довіреність, залежить від тлумачення положень Закону України «Про міжнародне приватне право». Залежно від стратегії тлумачення цих положень, довіреність із країни, де відсутня концепція автентичного інструменту (Швеція, Ірландія, Данія, Кіпр, Фінляндія), може бути як визнана, так і невизнана.

Увагу також приділено правовим наслідкам використання іноземної довіреності, яка, відповідно до положень двостороннього міжнародного договору між Україною та третьою країною, повинна відповідати праву України, але не є нотаріально посвідченою. Така довіреність є нікчемною відповідно до статті 219 Цивільного кодексу України але її нікчемність не має прямим своїм наслідком недійсність або його нікчемність договору, який укладено на підставі нікчемної довіреності.

Ключові слова: автентичний інструмент, нотаріальне посвідчення, засвідчення справжності підпису, іноземна довіреність, міжнародне приватне право.

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Foreign [non-]authentic instrument for the disposition of immovables located in Ukraine

The study focuses on the issues of using foreign powers of attorney to dispose of immovable property located in Ukraine. The unprecedented scale of migration of the Ukrainian population to European countries caused by the full-scale invasion of Ukraine by the russian federation continues to provoke legal issues that require research and answers. Among them is the issue of disposal of immovable property located in Ukraine on the basis of foreign powers of attorney.

The article addresses the following issues: the law of which country such a power of attorney must comply with; whether it must be created in the form of authentic instrument; whether certification of the authenticity of the signature on such a power of attorney is sufficient. As one of the possible examples, the article considers the situation of a power of attorney issued by a Polish notary for disposal of immovable property located in Ukraine. It is concluded that such a power of attorney must be authenticated, i.e. drawn up in the form of a 'notarial act' under Polish law, which is equivalent to a notarial authentication under Ukrainian law.

The article pays special attention to the concept of an 'authentic instrument', which is analogous in its characteristics to a document authenticated by a notary under Ukrainian law. Authentic instrument is a document issued by a public

authority; this authenticity should relate to the content of the instrument and not only, for example, the signature; the instrument has to be enforceable in itself in the State in which it originates.

The study draws attention to the fact that the law to which a foreign power of attorney must comply depends on the interpretation of the provisions of the Law of Ukraine 'On Private International Law'. Depending on the strategy of interpretation of these provisions, a power of attorney from a country where the concept of an authentic instrument is not used (Sweden, Ireland, Denmark, Cyprus, Finland) may be either recognised or not recognised in Ukraine as a legally sufficient ground to dispose someone's immovable property.

Attention is also paid to the legal consequences of using a foreign power of attorney, which, in accordance with the provisions of a bilateral international agreement between Ukraine and a third country, must comply with the law of Ukraine, but is not authenticated. Such a power of attorney is void pursuant to Article 219 of the Civil Code of Ukraine, but its voidance does not directly result in the invalidity or nullity of the agreement concluded on the basis of the void power of attorney.

Key words: authentic instrument, notarial authentication, certification of signature, foreign power of attorney, private international law.