A DODGY QUESTION OF THE LEGAL FORM: FORMALITY REQUIREMENTS FOR THE POA GRANTED ABROAD TO ACT ON THE TERRITORY OF POLAND

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Abstract

Ever increasing interest of foreign investors in establishing their businesses in Poland results in a build-up of problems concerning the legal form of taken actions. When it comes to acting and representing foreign entities before Polish authorities, including notaries, courts and public administrative bodies, the form of a power of attorney appears to be of a particular importance. The article deals with the issue of the due form of the power of attorney granted abroad to undertake actions on the territory of Poland. The author tries to address the most relevant problems relating to this issue, i.e. the issue of equivalence of forms, formal validity, application of an appropriate law and the legal power of legalisation and apostillisation of documents.

Keywords: Power of attorney, equal dignity rule, governing law, form of legal acts, apostillisation, legalisation of documents

Introduction

Depending on a given factual configuration, providing the formal validity (fr. *validité formelle*) of the authorisation with foreign element[93] (authorisation to represent or act on another's behalf) usually requires not only the knowledge of the collision rules[94], but also the provisions in force in the country where it is to be granted. However, even the most profound knowledge of the provisions of international private law rarely suffices to come up with unambiguous solutions. In practice, the existence of many iffy situations results in electing and applying the safest solutions available (in specified circumstances), i.e., obtaining the "highest" available legal form[95] and procuring the appropriate apostille (always).[96] Aside from the economics of such choices, even then, they do not guarantee that the obtained form is correct. On the other hand, despite obtaining the correct form, there arise problems of the practical nature, concerning the admission of the attorney-in-fact (in Polish: "*pełnomocnik*") to the particular legal action, whether by the notary[97] or the relevant public authority.

[93] Hereinafter: the power of attorney „PoA". The existence of the foreign element requires the application of the international private law (*conflict of law rules*).
[94] The rules provided for situations of the conflict of laws.
[95] The interested parties are trying to ensure that the level of formality is as high as possible.
[96] Irrespective of the fact whether it is needed or not.
[97] Czubik, P., *Odpowiedzialnosc notariusza za dokonanie czynności na podstawie dokumentow zagranicznych*, Nieruchomosci, No 12 (148)/2010, CH Beck, Warsaw, pp. 10-13; Czubik, P., *Pełnomocnictwa do przeniesienia własnosci nieruchomość sporządzane za granicą na obszarach objętych "ekstraterytorialnością jurysdykcyjną*", Rejent, No 5 (229)/2010, pp. 16-30.

The legal form for granting the PoA

The Polish act on the private international law[98] regulates the issue of the form of the legal action in Article 25. It constitutes the equivalent of Article 12 of the previously binding law on the private international law of 1965[99]. Under Article 25 of the PIL, the form of the legal act shall be governed by the law applicable to the act itself.[100] In case of the PoA, the applicable law is determined by application of Article 23 of the PIL (or possibly collision rules of some other countries as well). However, it should be remembered that securing the form prescribed by the law of the country, in which the activity is performed, is generally sufficient.[101]

For the formal validity of the PoA it is therefore necessary to procure the form required by the applicable law for the PoA ("*lex causae*") or the law of the place where the PoA is granted ("*lex loci actus*"). It is worth adding that actions indicated in Article 25 section 2 of the PIL concern only the actions *expressis verbis* indicated therein, i.e., limitations resulting from Article 25 section 2 of the PIL. do not concern the granting of the PoA. Basically, there are no provisions forcing the use of Polish requirements as to the form of the granted PoA[102]. It is always possible to grant the PoA without observing the Polish requirements as to the legal form.

The form of the PoA ex lege causae

Pursuant to Article 23 in conjunction with Article 4 section 1 of the PIL, the PoA has its own legal status.[103] Article 23 of the PIL explicitly foresees the possibility of selecting the applicable law ("*lex causae*") for the PoA. However, vis-à-vis the third party, with whom the attorney-in-fact made the legal action, he can rely on the law chosen only when this third party knew about the choice of law or could have easily found out about it.[104]

Usually it is recommended to include a clear statement in the text of the PoA concerning the selection of law (see Article 4 section 2 of the PIL). Similarly, towards the attorney-in-fact, the principal will be able to rely on the law selected, if the attorney-in-fact was or should have been aware of this.[105] Subject to securing appropriate acts of care (so that other people knew about the choice of law), the principal can select any applicable law he wishes to.[106]

In the absence of the applicable law selection by the principal, the PoA is subject, in sequence[107]: (i) to the law of the country of the attorney-in-fact's seat ("*lex locations"*), in

[98] The Act of February 4, 2011, Private International Law (J. L. 2011, No. 80, item 432), in force from May 16, 2011, hereinafter referred to as the „PIL".

[99] The Act of November 12, 1965, Private International Law (J.L. 1965, No 46, item 290).

[100] Czubik, P., *Artykuł 25 nowego ppm - przełom dla notariatu RP*, Nowy Przegląd Notarialny, No 1(47) /2011, pp. 30-46.

[101] If the contract is being concluded between persons who, at the time of declaring their intentions to be bound, are present in different countries, it shall be sufficient to comply with the form prescribed by the law of either of these countries.

[102] With this caveat though, that possible bilateral agreements concluded by Poland with some other countries might provide for different collision rules.

[103] Górecki, J., *Forma umów obligacyjnych i rzeczowych w prawie prywatnym międzynarodowym*, Katowice, Poland 2007.

[104] Article 23, section 1, sentence 2 of the PIL: "The chosen law may, however, be invoked in regard to the third person only where the latter knew or could readily have known about the choice."

[105] Article 23, section 1, sentence 3 of the PIL: "The principal may invoke the law chosen in regard to the representative only if the latter knew or could readily have known about the choice."

[106] However, it should be kept in mind that for the avoidance of doubt and security of contemplated transactions, it should be the law which is commonly recognized in international community; see: Czubik P., *Nowe prawo prywatne międzynarodowe w swietle praktyki notarialnej*, cz. II, Nieruchomości CH Beck – prawo, podatki, praktyka, No 3/2013, Warsaw, p. 21.

[107] See: Article 23, section 2 of the PIL.

which it continuously works (on a permanent basis). It must be held that for the application of this rule the attorney-in-fact should be a legal person, or at least a professional representative[108]; (ii) If the attorney-in-fact does not act continuously in his office or has no office (e.g. a natural person), the PoA is subject to the law of the country, in which the principal's place of business is situated, if the attorney-in-fact acts in this place on a permanent basis[109]; (iii) the law of the country, in which the attorney-in-fact actually acted, representing the principal, or in which he should have acted in accordance with the principal's will. The last of the mentioned rules is applied most frequently. Therefore, if the principal does not select the applicable law, usually this will be the law of the country, in which the attorney-in-fact works or should work (according to the intention of the principal).

Determination of the applicable law for the PoA enables us to determine the formal requirements (the level of formality) for granting the PoA ("*ex lege causae*"). The choice of the legal regime results in the possibility for the principal of availing himself of the legal form provided for the specified PoA under the selected regime. For securing the formal validity of the PoA, it is the safest for the principal to select the law he knows best and which conditions of the formal validity are familiar to him. For example, if for the applicable law the principal selects English law, the Polish regulations with respect to the legal form of actions will not be used. In particular, Article 99 § 1 of the Polish Civil Code will not be applied.[110] It is quite important since Article 99 § 1 of the Polish Civil Code introduces to the Polish law the "equal dignity rule", that is, requires the same legal form for the PoA, as for the legal action, to which the PoA authorises. Therefore, if the principal wants to sell the real estate situated in Poland, and for the PoA he has selected the law of the country, which for the PoA to sell the real estate does not require any particular form, then for the formal validity of such PoA no particular form is required (e.g. a normal written form can be used)[111].

It is worth adding that according to Article 25, section 1, sentence 2 of the PIL, even in case of the determination of the Polish law, as the applicable law (selected or indicated by the collision rules under Article 23 section 1 of the PIL) it will be sufficient to procure the form demanded by the law of the country, in which the PoA is being granted.

Knowledge of foreign laws

If the attorney-in-fact is to operate on the territory of Poland, there is nothing to prevent the principal from granting the PoA in accordance with the provisions of another country's law (by selecting the foreign law as the applicable law). However, the problem will arise at the moment of performing the contemplated action/-s. The second party, or for that matter also the notary, the public administration body or the court, are not required to know the foreign law. Therefore, it might be difficult for them to establish what is the scope of the attorney's authorization, what kind of restrictions are imposed upon him and what are the consequences of the actions of the attorney-in-fact if he exceeds the scope of his authorization. To avoid this type of dilemmas, if the attorney-in-fact is to operate in Poland, the PoA is usually selected to be governed by Polish law.

[108] E.g. an attorney-in-fact acts on a permanent basis in Poland and has his office in Poland – Polish law will be governing.

[109] E.g. the Spanish entrepreneur grants the PoA to a person acting on a permanent basis in Spain – Spanish law is applicable.

[110] The Act of April 23, 1964 – Civil Code (J.L. No 16, item 93) with further amendments, hereinafter referred to as: the „Civil Code". Article 99 § 1: "Where a special form is required for the validity of a legal act, a power of attorney to perform such act shall be granted in the same form.".

[111] Provided that a possible bilateral agreement does not specify otherwise.

It is also worth mentioning that it is reasonable to directly indicate (in the text of the PoA) that Polish law is to be the governing law. If the principal fails to do this, it may turn out that the collision rules indicate the foreign law as the applicable law. If, on top of that, the PoA is also granted abroad, then even if the form of the PoA conforms to the requirements of Polish law, the PoA may be invalid. It will be like this if the foreign law for the given type of the PoA requires a legal form higher than the form demanded under Polish law.

The form ex lege loci actus

The choice of Polish law for the PoA does not exclude the possibility of granting it in compliance with the formal requirements applicable in the country, in which the principal operates. Despite the formal validity of such PoA, there will come up the problem of the evaluation of this by the principal's contractors and public authorities in Poland.

In case of judicial acts, the court may consult its experts who are the experts in a given (foreign) law/s. This is allowed under Article 1143 § 3 of the Polish Code of Civil Procedure.[112] However, when it comes to, among others, notaries, tax enforcement officers or court's bailiffs, they have no instrument which could help them to determine whether the conditions regarding the legal form applicable in the country of granting the PoA have been met or not. If the PoA has not been granted in the form required by Polish law, the notary may refuse the performance of the given action stating that he cannot verify the fulfilment of necessary requirements.

, it appears that despite the lack of such requirement in many cases the safest solution is the submission of the PoA to Polish law and fulfilment of the Polish demands regarding the form of the legal act prescribed for the PoA.

Legalisation and *apostille*

If, however, the PoA has been granted according to the requirements applicable in the country of its granting, it will be necessary to convince the Polish contractors (or the notary, public authorities, etc.), that the conditions regarding the form applicable for the PoA in this country were duly met. In such cases we can encounter the quite common practice of legalizing documents, as a way to demonstrate that the form of the PoA is valid.

The requirement of documents' legalisation

Pursuant to Article 1138, the first sentence, of the Polish Code of Civil Procedure, foreign official documents have the same probative value as Polish official documents. Then, according to Article 1138, the second sentence, if the document concerns the transfer of ownership of the real estate located in Poland, it should be authenticated by Polish diplomatic representative or the consular office". In the Polish legal doctrine dominates the notion that by "the document concerning the transfer of the ownership of the real estate" is should be also meant the document of the PoA authorising the attorney to enter into the agreement transferring the ownership of the property. It is commonly agreed that the PoA to other actions does not require legalisation.

It is worth adding that the legalisation is required only for the "official documents" (i.e. coming from/issued by entities having some administrative power). The provision of Article 1138, second sentence, of the Polish Code of Civil Procedure does not refer to private documents. So, if the foreign *lex loci actus* requires for the PoA (concerning the acquisition/sale of the real estate) only the normal written form (i.e. private document), the PoA granted in this form does not require legalisation.

[112] The Act of November 17, 1964 – the Code of Civil Procedure (J.L. No 43, item 296) with amendments; Article 1143 § 3: "The court may also use other means, such as consulting an expert, in order to determine the content of a foreign law or foreign judicial practice, or the existence of reciprocity.".

Demonstrative value of legalized documents

Besides equipping the document with some feature of formality (document is rubber stamped by Polish officials), it is difficult to clearly state, what does it de facto mean that the document has been legalised. It is hard to establish what exactly is checked during the document's legalisation process. It is assumed that the legalisation is the confirmation that the document has been executed according to the law of the place of its execution.[113] Nonetheless, this cannot be a direct inference (result of reasoning) from Article 21 of the law on the functions of the Consuls of the Republic of Poland,[114] under which: "the consul legalizes official documents, executed or authorized in the accepting country or in the Republic of Poland". Also the Vienna Convention[115] does not give any indications what the document's legalisation really means[116].

It is chiefly agreed that the legalisation of the document means at least that the form of its preparation in the given country really exists.[117] Moreover, legalising documents the consul exercises its special competence (acts as public officer), what means that his notes and annotations have some special probative value. Therefore, it is advisable, during the legalisation process, to request the consul to place on the document an annotation stating that the submitted document satisfies all requirements regarding the legal form of the country, in which it was made. However, on the whole it is difficult to clearly state what is the probative value of this kind of annotation. More often than not, the consul will not verify whether the form of the legal action corresponds with the requirements of the country from which the submitted document originates.[118]

However, given the function of consuls and for the lack of any other possibility of the official verification of documents with foreign element, it can be argued that the legalised document has been executed in compliance with the formal requirements of the country that it was prepared in. However, this cannot mean that material-law conditions were satisfied or that it is not possible to negate the appropriateness of the form. Everyone should be allowed to prove that the procured form is not sufficient (for given purposes).

Apostillisation of documents

It should be pointed out that in practice foreign documents are rarely subjected to the procedure of legalisation. It is the result of the fact that the requirement of authorization (legalisation) drops out, if the provisions of international agreements abolish this requirement[119]. Among such contracts the most important is the Hague Convention from

[113] See: The judgment of the Polish Supreme Court, dated October 7, 2003, ref. no IV CK 23/02, LEX no 590838.

[114] The Act of February 13, 1984 on the functions of Consuls of the Republic of Poland (J.L. 2002, No 215, item 1823).

[115] The Vienna Convention on Consular Relations, signed in Vienna, 24 April 1963: [http://legal.un.org/avl/pdf/ha/vccr/vccr_e.pdf].

[116] In Article 5 of the Vienna Convention, among other consular functions, it is mentioned the following (point f): „acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State"; the legalisation is considered one of these functions.

[117] See: The judgment of the Polish Supreme Court, dated October 7, 2003, ref. no. IV CK 23/02, LEX no 590838.

[118] It might be the simple result of the lack of knowledge of the foreign law by the given consul.

[119] See more in: Czubik, P., *Konwencja haska o zniesieniu wymogu uwierzytelniania zagranicznych dokumentów publicznych*, Bydgoszcz, Poland 2005.

1961[120] currently in force in relation with 106 countries, which abolishes the requirement of the legalisation of the huge amount of documents.[121]

Due to a fairly simple way of obtaining apostille (it is affixed by competent authorities; in Poland by a special Department of the Ministry of Foreign Affairs) this kind of "seal of approval" somewhat became a transactional practice in Poland. It is used in all those instances where the foreign element is present. In most cases the apostille is procured even if a document is exempted from the requirement of legalisation[122]. Therefore, there arises a question whether the apostille clause (affixed to the document), even if it is not required, gives the document any particular demonstrative value. In particular, whether it certifies that the document has been executed in line with the formal conditions of the country in which it was prepared.

In accordance with Article 2 and 3 of the Hague Convention, the apostille is used just to certify: "the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears." There is no provision that would state that the apostille certification confirms the due form (formal validity) of the document.[123] The apostille however, certifies that the document was signed by the person performing particular public function (state official). Assuming that this person has verified that all formal conditions for formal validity of a given document, in the country of its preparation and for the given legal action have been met, it can be argued that the apostille certification provides certain factual presumption of the formal validity of the executed document.[124] This factual presumption is however based on a rather dubious assumption that the person signing (stamping) the document has taken due care and checked whether the specified formal conditions have been met. In many cases this will never happen. To conclude this topic; it is not possible to obtain a clear certification of the document's formal validity. Neither legalisation nor affixation of the apostille guarantees that the PoA was granted with satisfaction of all the requirements of the formal validity laid down in the law of the country of its granting.[125] In order to be more or less sure that nobody in Poland will raise the issue of the proper legal form, one should ensure that the Polish law is selected (as the governing law) and all the requirements of Polish law are met. If, however, the principal cannot come to Poland, and there is a requirement of the form higher than the

[120] The Hague Convention of 5 October 1961 Abolishing the Requirement for Legalisation for Foreign Public Documents; hereinafter referred to as the „Apostille Convention".

[121] However, the abolition of the requirement for legalization in the country of document's submission requires the affixation of so-called: "apostille".

[122] Under Article 3 of the Hague Convention: „(…) formality mentioned in the preceding paragraph cannot be required when either the laws, regulations, or practice in force in the State where the document is produced or an agreement between two or more Contracting States have abolished or simplified it, or exempt the document itself from legalisation.".

[123] See: The Resolution of the Polish Supreme Court dated April 13, 2007, ref. no III CZP 21/07. It was held that: After the accession of Poland to the Hague Convention abolishing the requirement of legalisation of foreign official documents the only formality that may be required in order to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears, is the addition of the certificate described in Article 4 of the Convention. However, it does not mean that the courts are excused from the obligation to check whether the document affixed with the apostille meets the requirements of the legal validity prescribed by the law of the country where the document was prepared; Biuletyn SN, No 2007/4/9.

[124] Czubik, P., *Glosa do uchwały Sądu Najwyższego z dnia 13 kwietnia 2007 r., III CZP 21/07*, Rejent No 12 (200)/2007, pp. 170-177.

[125] Hulist, M., Kot, T., *Jeszcze o formie pełnomocnictwa udzielonego za granicą*, Rejent No 6/2001, p. 109; Czubik, P., *Oddalenie wniosku o wpis w księdze wieczystej w związku z nieustaleniem zgodnosci formy pełnomocnictwa poświadczonego zagranicą – glosa do Postanowienia Sądu Rejonowego dla Krakowa-Podgórza, Wydział Ksiąg Wieczystych z 18 maja 2007, Dz.Kw.39185/06*, Nieruchomości CH Beck – prawo, podatki, praktyka, Warsaw No 8(108)/2007, pp. 21-22.

simple written one, the following question arises: what kind of requirements should be met by the document executed abroad, so that it can be considered as meeting all Polish requirements concerning the formal validity (legal form).

Equivalence of legal forms

Doubts arise mostly in case of the requirement of the form of a notarial deed. The following question pops up: is it even possible (and if so, when) to satisfy all the requirements of the Polish notarial deed, specified in the Polish law on notaries[126] through the agency of a foreign notary/notary public.

Some authors argue that in order to obtain the form of the notarial deed, the document must be made by the Polish notary operating in Poland[127]. Nonetheless, nowadays it seems that the prevailing view is different. Most authors claim that there are no obstacles for the Polish requirements concerning the form of the notarial deed to be met by the foreign notary128.

However, to conclude that the given document meets the conditions of the Polish notary deed, the act executed abroad must be "equivalent" to the act which would have been made by the Polish notary acting in Poland. Foremost, it means that the notaries should be of a kind. As it is generally accepted, the foreign notaries are on a par with Polish ones if they come from the country which belongs to the family of the so-called Latin Notaries.[129] In these countries, notaries have similar social status comparable both in terms of education and the position in the society.[130] Moreover, for obtaining "equivalence of form", it is necessary for the foreign notary to fulfil the requirements which are specified for notarial deeds in Polish law. The notarial act should be performed in a similar manner as it would have been performed in Poland under Article 92 of the law on notaries.

The request for the PoA prepared in the form "equivalent" to the Polish notarial deed may be quite perplexing for some foreign notaries.[131] The equal dignity rule resulting from Article 99 of the Polish Civil Code is rather uncommon in other European legal regimes. Therefore, it quite often happens that at the request of a principal to make the PoA in the form of notarial deed, a foreign notary prepares a document with just notarized signatures (believing that it is completely satisfactory regardless of the activities to which the PoA is to authorise). However, one should remember that usually the form "equivalent" to the Polish notary deed means the highest form available in the given country abroad.

In practice though, e.g., the court registrars quite often make entries to the land and mortgage registers based on agreements executed by attorneys who held "notarized PoAs", however as a matter of fact issued only in the simple written form.[132] The registrars rarely

[126] The Act on Notaries, dated October 14, 2008 (J.L. No189, item 1158).

[127] See: Drozd, E., *Czynności notarialne z elementem zagranicznym w obrocie nieruchomościami* (in:) II Kongres Notariuszy Rzeczypospolitej Polskiej. Referaty i opracowania, Poznan-Kluczbork 1999, p. 19.

[128] See: Pazdan, J., *Pełnomocnictwo w prawie prywatnym międzynarodowym*, Kraków 2003, pp. 138-139.

[129] The countries belonging to the International Union of Latin Notaries (UINL, currently the International Union of Notaries). UINL is a non-governmental organisation. It aims to promote, co-ordinate and develop the function and activities of notaries throughout the world. It was formed by 19 countries at the time of its establishment in 1948. Nowadays the organisation includes 83 countries, of which 21 out of the 28 member countries of the European Union and 15 out of the 19 countries of the G20.

[130] Górecki, J., *Forma umów obligacyjnych i rzeczowych w prawie prywatnym międzynarodowym*, Katowice 2007, p. 175.

[131] Czubik, P., *Trudności w dokonywaniu na terytorium niektorych panstw czynności w formie wskazanej przez prawo polskie jako lex rei sitae*, Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego, Vol. IV/2006, pp. 24-32.

[132] Czubik, P., *Zachowanie formy aktu notarialnego w przypadku pełnomocnictwa udzielonego za granicą – kilka uwag w nawiązaniu do praktyki polskiej*, Rejent 2004, No 1, pp. 23-42., and *Konsularne poswiadczanie podpisow na pełnomocnictwach do przeniesienia własności nieruchomości sporządzonych zagranicą w zwykłej*

examine the issue of the "equivalence of forms". Therefore, many quite canny and ingenious ad-hoc solutions pop up:[133] e.g. the principal, granting the PoA in the normal written form, designates the document "notary deed" and submits it to the notary for signatures' certification. Polish courts (or notaries for that matter) usually pay close attention just to the name of the document. Therefore, when it comes to the recognition of the document before Polish authorities (courts or notaries) this form of the PoA is usually (surprisingly!) sufficient.

Conclusion

In theory, obtaining the proper form for the PoA granted to the attorney to act in Poland seems quite simple. However, the transactional and judicial practice brings some problems. Since it is not always easy to establish what type of document is good enough (for given purposes), parties or lawyers for that matter, reach for the highest available form or try to outsmart the authorities.

The business practice rarely helps to work out uniform solutions (the correct ones). Transactional lawyers just want to close the transaction as soon as viable and possibly without any bumps and holdups. Therefore, the idea is that it is better to pay more at the beginning for a higher legal form (and apostille), than have some problems down the road. It is the common line of reasoning. Furthermore, it is obvious that the formal validity of the PoA will not help a lot, if it cannot be effectively demonstrated to other parties or public authorities. As a result, all disputes regarding legal form of the PoA usually end up in procuring the highest available form.

It also cannot be denied that the selection of the safest solutions is usually prudent. The establishment of the minimal valid legal form is quite tricky. It requires not only the knowledge of collision-of-law rules, but also the rules being in force in foreign legal jurisdictions. Moreover, if the PoA is granted abroad, there is no reliable way to provide evidence for the full validity of the granted PoA. When some dispute arises at some point in the future it will be up to the court to decide whether the PoA was valid or not. However, nobody thinking reasonably wants to put the whole transaction on the line just because he is convinced that the given form of the PoA is sufficient.

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formie pisemnej, Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego, Vol. V/2007, pp. 174 -182.

[133] Czubik, P., *Kilka spostrzezen na temat związków formy czynności prawnej i legalizacji dokumentu*, Radca Prawny, No 4/2004, pp. 70-76, and *Zachowanie formy aktu notarialnego w przypadku pełnomocnictwa udzielonego zagranicą – kilka uwag w nawiązaniu do praktyki polskie*j, Rejent, No 1/(153)/ 2004, pp. 23-43.

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