

# POLISH PRACTICE IN INTERNATIONAL LAW

*Szymon Zaręba\**

## CHINA AND HONG KONG: THE ONE COUNTRY, TWO SYSTEMS PRINCIPLE AND ITS PRACTICAL IMPLICATIONS FOR POLISH CIVIL COURTS

**Comment on the decision of the Polish Supreme Court of 11 October 2013,  
Ref. No. I CSK 451/12 in the case brought by G.T.M.  
with the participation of V.M.**

By order issued on 6 March 2012, the Court of Appeal dismissed the complaint of V.M., filed against the order of the Regional Court in W. declaring the judgment of a District Court of the Special Administrative Region of Hong Kong to be enforceable in Poland. An appeal in cassation was lodged by V. M. with the Supreme Court against the former order.

The appeal was based on two major grounds: violation of Article 16 of the 1987 Agreement on legal assistance in civil and criminal cases concluded between the People's Republic of Poland and the People's Republic of China<sup>1</sup> in conjunction with Articles 27 and 29 of the Vienna Convention on the Law of Treaties;<sup>2</sup> and violation of the relevant provisions of the Polish Code of Civil Procedure<sup>3</sup> relating to the recognition and enforcement of foreign judgments. Whereas the remarks made by the Supreme Court on the former alleged violation deserve attention here, the ones relating to the

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\* Szymon Zaręba, Ph.D. Candidate and Assistant Researcher in the Institute of Law Studies of the Polish Academy of Sciences.

<sup>1</sup> Agreement on legal assistance in civil and criminal cases, 1493 UNTS 180.

<sup>2</sup> Vienna Convention on the Law of Treaties, 1155 UNTS 331.

<sup>3</sup> Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego [Polish Code of Civil Procedure], O.J. 1964, No. 43, item 296, as amended.

latter do not seem interesting from the international law perspective and will not be presented or analysed in this case comment.

The Court began by observing that the signing of the Agreement between Poland and China in 1987, a decade before the incorporation of Hong Kong into China in 1997, raises doubts as to whether the provisions of this Agreement could be applied to judgments of the courts of Hong Kong at all. Pursuant to Article 29 of the Agreement, it referred the issue to the Polish Ministry of Foreign Affairs in order to clarify it through diplomatic channels. As the information obtained proved inconclusive, the Court felt compelled to determine on its own the possibility of applying the 1987 Agreement to the area of Hong Kong.

According to the justices the Hong Kong Special Administrative Region, established upon the transfer of sovereignty over the Hong Kong area from the UK to China in accordance with the 1984 Joint Declaration of the governments of the United Kingdom and the People's Republic of China,<sup>4</sup> enjoys a high degree of autonomy, including its own judicial system, separate from that of China. Annex 1 to the Declaration and Article 153 of the Basic Law of the Hong Kong SAR<sup>5</sup> both provide that the Chinese government decides whether international agreements to which China is or becomes a party will apply to Hong Kong, taking into account the circumstances and the needs of Hong Kong and the views of its own government. A similar view on the matter has also been expressed in a Chinese notification to the UN Secretary General concerning the status of Hong Kong in relation to treaties deposited with the Secretary General on 20 June 1997.<sup>6</sup>

The Supreme Court expressly refused to address the questions of whether and how the Basic Law of the Hong Kong SAR as a national legislative act, the 1984 Joint Declaration as an international agreement between third parties, and the diplomatic note to the UN of 20 June 1997 may affect the legal relations between Poland and China. It held, however, that these documents demonstrate the unwillingness of the Chinese government to extend the territorial scope of application of the 1987 Agreement to the area of Hong Kong. In order to further substantiate its findings, the Court referred to the letter of the Polish Ministry of Foreign Affairs of 3 July 2013 which indicated that, as far as the Polish government was aware, China had made no decision on such an extension.<sup>7</sup> This opinion was confirmed, according to the Court, by the conclusion

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<sup>4</sup> Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, signed 19 December 1984, 1399 UNTS 61.

<sup>5</sup> The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted at the Third Session of the Seventh National People's Congress on 4 April 1990, promulgated by Order No. 26 of the President of the People's Republic of China on 4 April 1990, effective as of 1 July 1997, available at [http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw\\_full\\_text\\_en.pdf](http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf).

<sup>6</sup> Letter of notification of treaties applicable to Hong Kong after 1 July 1997, deposited by the Government of the People's Republic of China with the Secretary-General of the United Nations on 20 June 1997, 36(6) International Legal Materials (1997), pp. 1675-1691.

<sup>7</sup> The letter in question is the one received in reply to the Court's request, made pursuant to Article 29 of the 1987 Agreement, available in the case file.

of a separate agreement on mutual legal assistance in criminal matters between Poland and Hong Kong in 2005.<sup>8</sup>

The judges also rejected the appellant's claim that the fact that Hong Kong had so far concluded agreements exclusively on mutual assistance in criminal matters indicated that assistance in civil matters should be provided based on the treaties concluded by China in its own name. They observed that the existence of an unspecified agreement between China and Hong Kong on mutual legal assistance, recognition and enforcement of judgments in civil and criminal matters, which, as its title implies, also covers civil matters, contradicted the appellant's argument. Moreover, as they pointed out, neither the 1984 Joint Declaration nor the Basic Law of the Hong Kong SAR make any distinction as regards the autonomy of Hong Kong in civil and criminal matters,<sup>9</sup> so no restrictions should be presumed. All these factors led them to conclude that the wide-ranging autonomy enjoyed by Hong Kong in legal and judicial matters precluded the Court from applying the 1987 Agreement between Poland and China to the area of Hong Kong absent a clear expression of intent to this effect by the Chinese government.

In the view of the Court, the international law concept of "moving treaty frontiers" – which provides that "in the event of a cession of territory, the territorial scope of a treaty binding the successor State should be extended to that territory" – could not be applied in the case because, as evidenced by the special status of the Hong Kong SAR, the cession of Hong Kong was "not a standard case of a cession" and hence should be treated differently. The Court also rejected the appellant's contention that the refusal to apply the 1987 Agreement by the courts that had heard the case constituted a violation of Article 29 of the 1969 Vienna Convention on the Law of Treaties<sup>10</sup> (VCLT). As it observed, although the provision in question provides, in principle, that a treaty is binding upon each party in respect of its entire territory, this rule does not apply if a different intention appears from the treaty, or is established otherwise. In the case at hand it was amply demonstrated that such intention could have been demonstrated and, therefore, the 1987 Agreement could not be binding upon China in respect of the area of Hong Kong. Surprisingly, the judges were completely silent as to the violation of Article 27 – presumably because the appellant failed to clearly explain what the alleged violation comprised of.

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The reasoning of the Court has some considerable merits. In the light of the circumstances surrounding the incorporation of Hong Kong, there can be no doubt that this area is an autonomous part of China, as repeatedly stated by the Court, and that its status is special, e.g. in that it is internationally guaranteed by the 1984 Joint Declaration, which means that any limitations on the autonomy of Hong Kong in

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<sup>8</sup> Agreement between the Government of the Republic of Poland and the Government of the Hong Kong Special Administrative Region of the People's Republic of China concerning mutual legal assistance in criminal matters, signed in Hong Kong 26 April 2005, O.J. 2007, No. 167, item 1175.

<sup>9</sup> See *supra* notes 4 and 5 respectively.

<sup>10</sup> See *supra* note 2.

violation of the Declaration would incur Chinese responsibility *vis-à-vis* the United Kingdom.

It is also unquestionable that, as a rule, a treaty to which China is or becomes a party does not apply to Hong Kong directly, but only after a decision of the Chinese government in this regard is made.<sup>11</sup> This is a necessary corollary of the principles governing the application of treaties to Hong Kong set out in the Chinese letter to the Secretary General of the UN of 20 June 1997. Although the legal significance of the letter is not entirely clear,<sup>12</sup> the absence of any response from the Polish authorities to it<sup>13</sup> may amount to acquiescence to the position of the Chinese government.<sup>14</sup> This acquiescence would be confirmed by the previously-mentioned letter of the Polish Ministry of Foreign Affairs to the Supreme Court of 3 July 2013 where, instead of arguing that the 1987 Agreement was directly applicable to Hong Kong, or, conversely, denying that any extension of the scope of application of the agreement to Hong Kong could have been possible, the Ministry replied that as far as it was aware China had not decided to extend the scope of application of the treaty.

In this context, the letter of the Ministry and the conclusion of the 2005 agreement between Poland and Hong Kong on mutual assistance in criminal matters, referred to by the Court, indeed provide a strong argument in favour of its position that the 1987 Agreement could not be applied in the case. The view can reasonably be taken that if China had made a decision to apply the 1987 Agreement to the Hong Kong area, it would have informed Poland, the only other party to that bilateral treaty, about its decision, e.g. by a notification.<sup>15</sup> The admitted lack of knowledge of any changes in this regard on the part of the Polish Ministry of Foreign Affairs implies that nothing of that sort took place. Moreover, it seems improbable that China would conclude another treaty partly addressing the same issue, i.e. the 2005 agreement, without providing any explanation of the scope of application of both treaties, if it considered both of

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<sup>11</sup> Provided that it is not listed in Annex 1 or Annex 2 to the Letter of notification of treaties applicable to Hong Kong after 1 July 1997 (*supra* note 6) – this is the case of the 1987 Agreement, to which the general rule provided in para. 4 of the Letter applies. However, the 1984 Joint Declaration (*supra* note 4) provides that the basic policies of the People's Republic of China regarding Hong Kong will remain unchanged for 50 years, so the possibility of changes in the future is left open.

<sup>12</sup> See R. Maison, *La situation internationale de Hong Kong: quelques questions d'actualité*, 46 *Annuaire français de droit international* 120 (2000).

<sup>13</sup> Notwithstanding the fact that it was brought to the attention of all UN Member States, including Poland, by the Secretary General, in accordance with the request expressed in the letter, see *supra* note 6.

<sup>14</sup> This is consistent with the ICJ's rulings in *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)* Judgment, ICJ Rep. 1984, para. 130 and, more recently, in *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)* Judgment, ICJ Rep. 2008, para. 121.

<sup>15</sup> This is what China did with respect to a number of international agreements, e.g. on 8 April 2003 the Government of the People's Republic of China notified the Secretary-General of the UN that from that moment on the UN Framework Convention on Climate Change would apply to the Hong Kong SAR, see Status of Ratification of the Kyoto Protocol, available at [https://unfccc.int/kyoto\\_protocol/status\\_of\\_ratification/items/2613.php](https://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php).

them applicable to Hong Kong, because such a move could lead to serious difficulties in practice. The latter is also unlikely in light of the recent Chinese practice, which demonstrates that bilateral treaties signed by China with a view to applying them both to the Mainland and Hong Kong contain an express clause to this effect.<sup>16</sup>

In the light of the above, the Court's rejection of the claim regarding the alleged violation of Article 29 of the VCLT is correct, since several different factors indicated that the whole case fell under the exception contained in this provision. Accordingly, it was rightly determined that the 1987 Agreement was not applicable in the case.

Still, the Court's reasoning is not free of drawbacks. What strikes an international lawyer at first sight is that it clearly lacks a more profound international law background. For the sake of clarity, the Court should have evaluated the whole issue of application of the 1987 Agreement to the case in light of the alleged violation of Article 29 of the VCLT. By refusing to engage in such an analysis, it was forced to employ mental shortcuts which severely affect the coherence of the judgment.

To give an example, the opinion of the Court that the 1984 Joint Declaration, the Basic Law of the Hong Kong SAR and the diplomatic note of 20 June 1997 demonstrate the unwillingness of the Chinese government to extend the territorial scope of application of the 1987 Agreement to the area of Hong Kong is in fact plainly wrong, because none of these documents relates to that particular treaty. Essentially, what they indicate is that China is obliged not to apply the majority of the treaties binding it to Hong Kong without a prior decision of its government, and that in the event that it deems it appropriate to apply a treaty belonging to that group to Hong Kong, it will separately carry out the formalities for such application.<sup>17</sup> Having regard to that, the judges should have assessed whether there was any evidence which could prove that Chinese government had decided to extend the territorial scope of the treaty in question. Finally, they should have ascertained whether all these factors were sufficient to establish the existence of a "different intention" and thus trigger the exception provided for in Article 29 of the VCLT, making it possible to consider China as bound by the 1987 Agreement only in respect to some part of its territory and not its entirety. To a certain extent, this is in fact what the Court eventually did, but it did so implicitly rather than explicitly.

Another flaw in the Court's reasoning is its recurring referrals to the "special" or "autonomous" character of the Hong Kong SAR. It is rather curious that the Court on the one hand refused to evaluate whether the 1984 Sino-British declaration or the Basic Law of the Hong Kong SAR might affect the legal relations between Poland and China, and, on the other hand engaged in an analysis of the provisions of both documents in order to compare the scope of autonomy of Hong Kong in civil and criminal matters.

<sup>16</sup> See the 2006 Agreement on consular relations between New Zealand and the People's Republic of China, 2523 UNTS 331, Article 22 and the Consular convention between the Socialist Republic of Vietnam and the People's Republic of China, signed in Beijing 19 October 1998, S.S. No. 5 TO Gazette No. 37/2001 E513, Article 54.

<sup>17</sup> See particularly para. 4 of the Letter of notification of treaties applicable to Hong Kong..., *supra* note 6.

What is more, the wide-ranging autonomy of the Hong Kong SAR thereby identified was a decisive factor which led the Court to draw its final conclusion, namely that the 1987 Agreement could not be applied to Hong Kong. However, the Court seemed to forget that it is not the autonomy as such which is important here, but the intent of the States-parties to the treaty. Once again, its considerations would have appeared more accurate had they been related to examining whether the conditions for the exception contained in Article 29 of the VCLT had been met.

It is also worth noting in this regard that in order to prove that the autonomy enjoyed by Hong Kong with respect to civil matters does not differ from its autonomy in criminal matters, the Court invoked a non-existent “agreement” between China and Hong Kong on mutual legal assistance, recognition and enforcement of judgments in civil and criminal matters. In fact, according to the information provided by the Department of Justice of the Government of the Hong Kong SAR, there is not one, but three “arrangements” between Hong Kong and China on mutual legal assistance in the broad sense.<sup>18</sup> The material scope of each one of them, and of all of them combined, is much narrower than the scope of the treaties on legal or judicial assistance in civil matters concluded between sovereign States,<sup>19</sup> and the words “assist” or “assistance” do not appear even once in the text of any of these three “arrangements”. This is because they relate only to the service of judicial documents and the reciprocal recognition and enforcement of judgments, leaving out some other important aspects of international judicial co-operation, particularly the taking of evidence. The Hong Kong officials admit that the reason why Hong Kong does not conclude any agreements on mutual assistance in civil matters is simply because it considers its own legislation and international conventions on private international law to be more or less sufficient.<sup>20</sup> Besides, setting

<sup>18</sup> Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and Hong Kong Courts, signed in Shenzhen on 14 January 1999; Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region, signed in Shenzhen on 21 June 1999; Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned, signed in Hong Kong on 14 July 2006, see Department of Justice, The Government of the Hong Kong SAR, Arrangements with the Mainland and the Macao SAR, available at <http://www.doj.gov.hk/eng/mainland/intracountry.html>.

<sup>19</sup> See e.g. Treaty between the United Kingdom of Great Britain and Northern Ireland and the United Arab Emirates on judicial assistance in civil and commercial matters 2588 UNTS 261 or Agreement between the Republic of Cyprus and Ukraine on legal assistance in civil matters 2368 UNTS 95.

<sup>20</sup> “As regards civil matters, eight conventions on private international law afford Hong Kong and its co-signatories the convenience of mutual recognition and benefit”, see Speech by the Secretary for Justice, Ms. Elsie Leung at the Seminar on Interregional Legal Issues of China in Beijing on 4 September 2005, <http://www.doj.gov.hk/eng/archive/pdf/sj20050904e.pdf>, p. 6. Ms. Leung mentions only eight treaties but since 2005 the total number has reached ten (these include the New York Convention on the Recognition and Enforcement of Arbitral Awards of 1958 and nine Hague Conference on Private International Law conventions, *inter alia* on the taking of evidence abroad in civil or commercial matters). Besides, there are also other conventions containing clauses relating to private international law, see M. Zhang, *Application of Private International Law Conventions in Hong Kong of China*, 7(3) *Frontiers of Law in China* 377 (2012).

the “arrangements” between Hong Kong and China, which are actually acts of national law,<sup>21</sup> and international agreements against one another and comparing them, as did the Court, is a risky endeavor at best. It would have been much better if the Court had not raised the argument at all.

Finally, the observations of the Court on the concept of “moving treaty frontiers” are a little disturbing. Contrary to what it said, the principle in question does not apply only to cession of territory but to all territorial changes.<sup>22</sup> Leaving that aside, the uniqueness of the cession of Hong Kong does not produce any legal effects in itself. Once again its importance is understandable only if it is placed in a wider context by reference to Article 29 of the VCLT. The problem is, however, that the Court failed to recognise that the “moving treaty frontiers” principle is in fact at least implicitly reflected in Article 29 itself,<sup>23</sup> and instead treated it as if it were a separate concept. Although it is argued that it also exists separately, as a general rule of international law, the latter is not without exceptions either.<sup>24</sup> These concerns have been, regrettably, overlooked, although the Court’s reluctance to go into a detailed analysis of the principle as a general rule of international law may be justified by the fact that it would pose a challenge even to an international court.

The true importance of the decision of the Supreme Court of 11 October 2013 lies in the fact that it is the first decision of a Polish civil law court regarding the applicability to Hong Kong of a treaty to which China is a party. Although the overall conclusions are correct, the part of the reasoning relating to international law shows that valid conclusions have been reached based on false or not-fully-correct premises. These deficiencies call for a more sophisticated approach.

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<sup>21</sup> See also U.G. Schroeter, *The Status of Hong Kong and Macao under the United Nations Convention on Contracts for the International Sale of Goods*, 16 (2) *Pace International Law Review* 319 (2004), who argues that the choice of title of “Arrangement” instead of “Agreement” “is a difference that might be supposed to distinguish intra-China instruments from international treaties”.

<sup>22</sup> See e.g. H. Waldock, *Second Report on Succession in Respect of Treaties*, 2 *Yearbook of the International Law Commission* 52 (1969).

<sup>23</sup> See e.g. K. Odendahl, *Article 29*, [in:] O. Dörr, K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, Springer-Verlag, Berlin-Heidelberg: 2012, p. 499.

<sup>24</sup> K. Doehring, *The Scope of the Territorial Application of Treaties*, 27 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 483 (1967), pp. 485, 489-490.