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A Category "Public Order" and Limitations on Party Autonomy in Contracts for the Carriage of Passengers by Sea

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ABSTRACT

This article attempts to research the purpose, the meaning and the essence of the category "public order" in the legal regulation and practice of law enforcement in the sphere of passengers' sea shipping. In the first part of the

article, the authors consider the role of the public (imperative) element in the legal regulation of passengers' sea shipping. It is paid attention to the significant segment of the state and the supranational administrative regulation in the modern legal basis of such shipping. It gets a manifestation in consolidating the possibilities of imperative influence on the system of private legal relations, including relations, complicated by a foreign element, particular on the sphere of passengers' sea shipping. In the second part of the article, the authors applied to the definition of the correlation connections of the category "public order" with the related legal categories "law and order", "civil order", "world order", made the distinction between the categories "order" and "regime". It is emphasized the attention on the legal regime is a process aimed at establishing public order. The third part of the article is devoted to brief research of the international public order in the projection on the problems of passengers' sea shipping. It is laid emphasis on the attempt of the world community to form a legal basis for countering illegal actions in the maritime spaces that violate the established international public order, aimed at reservation and protecting health and lives of people. It is noted that the sphere of human rights allows emphasizing more clearly the limits of the institute "public order", which remains underestimated in the Ukrainian doctrine of international private law. Finally, the authors examine the public order clause as one of the leading institutes of the international private law and the relevant legislation of most modern states. It is emphasized the lack of a definition of the category of "public order" under the conditions of the proper regulation in the laws of the relevant clause.

The key words: *sea shipping, passengers, public order, clause, imperative norms, super-imperative norms.*

Introduction

Maritime law is typically viewed as a particular example of a transnational legal order, which possesses a long tradition of international harmonization, however currently extensively relying upon the development of international instruments. At the same time, general, non-maritime contract law has started to find a way to broader harmonization, which principles may also become instrumental for the satisfactory functioning of maritime law (Van Hooydonk, 2014). With this regard, a public order clause that is common for international private law, presents a basis of the administrative regulation of passengers' sea carriage in promoting

the implementation of the state maritime policy and security, namely protection of the state sovereignty in the inland sea waters, the territorial sea, the airspace above them, on the sea-bottom and in the bosom within them; protection of the sovereign rights and the jurisdiction in its exclusive (maritime) economic zone, as well as in strategically important areas of the sea for the state; protection of the national interests in the World Ocean and protection of human life at sea and rescue of people, property and ships. The administrative regulation of passengers' sea shipping has a feature of restricting the application of foreign law. This type of restriction is public order. Considering that the sphere of passengers' sea shipping, as the private legal relations, is subject to contractual, i.e., decentralized regulation, from the point of view of the public law and the point of view of the international private law, the autonomy of the will of parties is to be limited by the presence of the norms of the internal public law, namely the imperative norms.

Ukrainian legislation on passengers' sea shipping contains norms of law that can restrict the principle of the autonomy of parties' will. The principle of the autonomy of the will applies to these restrictions by which the will of subjects of legal relations is not independent and should arise from the restrictions and prohibitions established by law. Limits of restrictions of the autonomy of the will are associated with the institutions of public order and imperative norms. The law chosen by parties should not be applied if its application leads to consequences incompatible with Ukrainian law and order, i.e., public order.

Despite the level of the legal regulation of the relations of passengers' sea shipping – national, regional, or international – there is always a significant influence of the state administratively-legal component, the imperative of which requirements cannot be "overcome" under an agreement of parties. The latter aims to maintain and guarantee the protection of the public law and order and promoting the protection of the rights of the subjects of international maritime transport.

Methodology

This research focuses on the definition of the impact of public order, as one of the types of restrictions on the application of foreign law, on the regulation of private legal relations in the sphere of international passengers' sea shipping. The public order and the related legal categories possess certain peculiarities established by the national legislation and the international agreements. They are substantiating a predominant role of a state and the supranational administrative regulation of passengers' sea shipping, aimed at fulfilling the international obligations in the sphere of merchant shipping and implementing a maritime policy of certain states and the world community.

1. "Public (Imperative) Element" in the Legal Regulation of Sea Shipping of Passengers

The public law (imperative) component of any direction of maritime activity is highly significant. The considerable peril, the unpredictable risks, etc., which are inherent in sea shipping, caused the consolidation of the main functions and powers on the states for the organizational and regulative provision of safety of navigation and other activities related to the use of the sea spaces. The states are obliged to ensure safety on seas by the norms of the UNCLOS'82 (Art. 94, etc.).

For a sea carriage of passengers, this factor is of particular importance due to their focus on meeting the needs of people. Indeed, in the passengers' sea shipping, the state's leading role, its imperative regulations, and the whole system of the administrative regulation and ensuring safety are generally recognized. Contractual relations on the implementation of sea shipping are largely restricted by the norms of the public, and primarily the administrative law. Even though a contract of any transportation is usually considered as a private law institution, however, in the case of passengers' transportation (by any type of transport), the imperative component is so significant that it practically "takes out" this sphere from the block of the private

law regulation, leaving it a minor segment (for example, regarding the choice of the class of transportation which is carried out).

At the international level, considering that sea shipping of passengers is rarely carried out within the same jurisdiction, such an imperative element is to coordinate wills of states regarding the possibility (in fact – the need) of ensuring its force. During the international sea shipping of passengers, their participants cross the maritime border of the coastal state and move through the territory of more than one country. The norm is confirmed by the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974:

> *"international carriage" means any carriage in which, according to the contract of carriage, the place of departure and the place of destination are situated in two different States, or in a single State if, according to the contract of carriage or the scheduled itinerary, there is an intermediate port of call in another State" (Art. 1).*

The main features of such shipping as an object of administrative regulations are:

1) a complex character manifested in the relationship between two components: economic and legal;

2) the dual private-public character, conditioned by the need to achieve an appropriate level of harmonization of private and public interests;

3) the intersectoral character, featuring the legal regulation carried out by the norms of the international law (control over the observance of which is entrusted to a state), the administrative law, the civil law, the economic law, the customs law;

4) state authorities are performing interference into shipping.

The peculiarity of an international passengers' sea shipping consists in the presence of foreign elements: 1) within the subjects of transport activity; 2) in carrying out transport activities within territorial jurisdictions of several countries.

Due to the public law nature of the imperative norms in the sphere of international maritime transport, they provide the state regulation

of this sphere, an opportunity for states (both on their territory and abroad) to ensure the protection and preservation of the highest value of humanity – safety and life of a human. The peculiarity of their application is manifested in the fact that being public in their nature guarantees the protection of public order and protection of the rights of subjects of the sphere of international maritime transport. The imperative norms in the sphere of international maritime transport have the characteristic feature to restrict the application of foreign law and the possibility of applying the principle of the autonomy of the will of parties in the contractual regulation of relations between participants of sea shipping of passengers, which is restricted by the action of such imperative norms.

The role of the imperative norms of the internal public law in the regulation of relations regarding sea shipping of passengers is to restrict the parties under the established conditions of sea shipping agreements, guaranteeing the parties' rights and establishing the prohibitions of particular importance. Such rules are applicable regardless of the collision norms of the international private law and are applied even when the participants choose the foreign law to regulate the sea shipping of passengers. The imperative norm of the internal public law is a legal norm that: has a strictly imperative character, that is, cannot be changed by any agreement of parties; consolidates the basic rights and establishes the prohibitions of particular importance; acts regardless of the imperative norms of the international private law (the Ukrainian collision norms) and is subject to application although foreign law is chosen based on Ukrainian collision norms.

On the need to regulate several problems in the sphere of international sea shipping, which exceeds the limits of the competence and capabilities of an individual state, and in resolving which each state implement only, conditionally speaking, the "administrative" functions for the realization of decisions taken at the international level, so far national states acquire new tasks (e.g., control of efforts

against global terrorism or global warming) that they could not possibly have gained in previous times, but that they are now obliged to share with other states (Cassese, 2012).

A notable feature of the regulation of the researched sphere is the practice of concluding multilateral agreements that provide for unified substantial law and collision norms that allow solving complex issues of trade shipping on the same basis and are the international sources of the administrative law as a component of the public law in the context of a law-making activity. In the absence of the international agreements, the participants of which are these countries, shipping is subject to the national rules under the collision norms of a respective country.

2. National Public Order and Public Policy

The category of "public order" or "public policy" is one of the instruments restricting parties' autonomy in international private law and is also inherent to maritime law. More precisely, there are two corresponding doctrines, the civil law doctrine of "ordre public" and the common law doctrine of public policy, supplemented by three legal institutions prescribed by law, public order clause and public order reservation or exception (Bagan-Kurluta, 2019). However, in practice those doctrines are interchangeable.

Typically, restrictions justified by "public order" or "public policy" doctrines are adopted in support of a variety of domestic policies including national conceptions of justice and fairness, and creating more certain and predictable legal order (Mills, 2008, p. 204).

There might be three main reasons behind such restrictions, including:

– the parties' freedom of contract cannot go beyond the dispositive norms of the relevant substantive law, as otherwise, the parties would have excessive power to circumvent any mandatory rules;

– the parties could not have as much power and discretion as a legislature;

– the existence and validity of parties' consent as to the choice of the applicable law ought to be judged by a certain law (Nishitani, 2016, p. 306).

Whilst the potential limitations on the three types of party autonomy (procedural, material or substantial, and conflictual) (Fernandez, 2021, p. 11), the public order clause primarily affects the last two, i.e., parties' abilities to establish specific contractual rules and to choose the law applicable to contracts of carriage by sea.

Before considering the public order as one of the types of restriction in the application of foreign law, it is necessary to determine the ratio of close to it the concepts of "law and order" and "civil order". In theory, these concepts are separated. Law and order are inherent in the following features: 1) law and order is a state of the orderliness of public relations, provided by the norms of law. The antipode of law and order is the arbitrariness of the subjects of law to each other, generated by arbitrary chaos; 2) law and order is the result of putting the principle of legality and other principles of law into effect; 3) the content of law and order is the legitimate behavior of subjects of law; 4) a state ensures law and order. Law and order as a system is a component of a higher level of public order.

As usually noted, unlike law and order, civil order is formed under the influence of legal and other social norms: norms of morality, customs, corporate norms, etc. Thus, civil order is a state of settlement of social relations based on implementing all social norms and principles.

There is a close relationship between civil order and law and order, which expresses the unified social nature of these phenomena. At the same time, there are differences between law and order and civil order. They have a different socio-normative basis: for law and

order, such a basis is law and legality, for civil order – the whole set of social norms and means of social influence.

Law and order are carried out on the scale of the whole country; the unity of law and order is necessary. The existence of different laws and orders in different regions of a state is unacceptable. However, in practice, such cases may occur in certain spheres of legal regulation. They arise from contradictions in the current legislation and its various interpretations, which generate conflicts of law. Not excluded are also abuses in the sphere of legality. The term "abuse" refers to the socially harmful behavior of a subject, which is carried out within the framework of legal norms and can cause significant damage to protected interests. The state must use the means of ensuring legality, protection, and defense of law and order To eliminate such facts. Legality is one of the leading legal characteristics of law and order, makes it possible to determine the sides of its functioning.

A state also needs to protect and defend law and order, not only internal but also external. Thus, we should distinguish between the concepts of "civil order", "law and order", "world law". These concepts should not be confused with the concept of "public order", a generally accepted institution of international private law, and plays a vital role in regulating private legal relations of an international nature.

Nevertheless, the assumption of public order or public policy like a pure "national" category is not absolute. In specific contexts, the different states may apply the same public policy, which may occur in four different ways:

– public policy can be shared in a bilateral sense being applied by two states;

– public policy can be shared in a regional sense (i.e., regional norms of the European Convention on Human Rights);

– public policy can be absolute, meaning that it is (at least prescriptively) shared in a universal sense, whereas it derives from agreed international norms;

– public policy can also exceptionally possess an absolute character where it is derived not from international norms but from an essential national interest (for example, during a time of war) (Mills, 2008).

For example, Ukrainian legislation regulates the protection of public order against violations, committed with the aim that contradicts the interests of a state and society by Article 228 of the Civil Code of Ukraine. Part 1 of Article 228 of the Civil Code of Ukraine would define the conditions under which transactions are considered to violate public order, namely: if it was aimed at violating the constitutional rights and the freedoms of a person and a citizen, destruction, damage of a property of a natural or a legal person, illegal possession of property of a state, the Autonomous Republic of Crimea, the territorial community. Regarding the concept of "public order", it should be noted that the Preamble of the UNCLOS'82 contains the following concepts: "a legal order", "an international economic order". The question arises, what it is about, the regime or the order. Currently, there are many definitions in the legal literature of the concept of "legal regime". The most successful is the definition proposed by S. Alekseev: "Each legal regime is exactly "regime", and its concept bears the main shades of this word... the degree of rigidity of the legal regulation, the presence of known restrictions and privileges, the permissible level of activity of subjects, the limits of their legal independence" (Alekseev, 1995, p. 23).

The legal regime is a qualitatively holistic specific system of means, techniques, methods of legal regulation, which has an expression in the peculiarities of legal relations and individual regulations, the emergence of legal relations, legal consequences, ways of ensuring the implementation of the requirements of law. Such regulation procedure has a manifestation in the complex of legal means that create a particular direction of regulation and characterize a combination of interacting permits, prohibitions, and

positive obligations (Babaev et al., 1992, p. 29). Also, it is possible to characterize the legal regime as a tradition, the basis of which is the perception of the legal regime as "the order of regulation expressed in the complex of legal means that characterize a special combination of interacting permits, prohibitions, as well as positive obligations and create a special direction of regulation" (Alekseev, 1989, p. 185).

Peculiarities of the current Ukrainian "public order" affecting contracts on the carriage passengers by sea is determined by two major factors a) legal consequences of the illegal occupation of Crimea by Russian Federation, and b) obligations on legislation approximation derived from EU – Ukraine Association Agreement.

The EU and US reaction to the illegal occupation of Crimea developed "a robust non-recognition regime" (Kontorovich, 2015), that banned almost all business ties with Crimea, including, what is specifically emphasized, a prohibition on cruise ships calls in the Crimean ports. In addition, Ukrainian legislation developed the regime of "temporarily occupied territory", which, in particular, included internal sea waters and the territorial sea of Ukraine around the Crimean Peninsula; the territory of the exclusive (marine) economic zone of Ukraine along the coast of the Crimean Peninsula; and the territory adjacent to the coast of the Crimean Peninsula of the continental shelf of Ukraine (Kormych et al., 2020). Thus, any provisions of a contract violating a non-recognition regime will become a subject of the "public order clause" in Ukraine, as well as in many jurisdictions supporting said non-recognition policy.

On the other hand, the Europeanisation processes triggered by the EU – Ukraine Association Agreement apparently penetrate almost all spheres of Ukrainian public order, resulting in the broad application of shared rules and principles. Which, in many cases, erases national differences in perception of public order at the regional level. Furthermore, it is alleged that commitments within

the EU-Ukraine Association Agreement at somewhat extend links legislation developments of associated state with the EU decision making bounding it national public order and public policy with "the EU common policies that drawing the state in question, obviously, cannot affect" (Kormych & Zavalniuk, 2020, p. 49). Thus, in many cases, Ukrainian public policy will be tied with the EU public policy principles, both existing now and those that may emerge in the future.

By applying the public order clause, states somewhat erode the perception of maritime law as an internationally harmonized body of law adopting it to their legal orders. The primary reasons behind such actions typically reflect a complex set of governments' considerations that may include:

– Considerations of national pride;
– The assertion of national jurisdiction;
– The determination of the legislature to protect the economic interests of local traders;
– A partial mistrust of overseas courts, tribunals, and arbitrators and their laws;

A reaction to the prevailing dominance of sea trade by certain foreign powers (Allison, 2014, pp. 667–668).

In any case, a public order clause and states' discretion on its application determines the distance between a specific national legal system and internationally recognized rules of maritime law. A state guarantees public order through its bodies and state institutions, establishing "super-imperative norms" in international private law. From the point of view, administrative law, comprised of imperative norms of the internal public law, aimed at protecting the rights of participants of legal relations and ensuring their implementation with the possibility of applying state coercion in the realization of the rights and the obligations by subjects of private relations (Kanashevsky, 2009, p. 153), as well as maintaining public order.

3. The International Public Order

In addition to the category "public order", it is distinguished the category "international public order". According to J. Lew, as is cited by Kanashevsky (2009), the doctrine of the international public order covers cases of slavery denial, rejection of racial, religious, and sexual discrimination, child abduction, piracy, terrorism. The latter two crimes pose a threat to the safety of sea shipping since piracy and terrorism come expensive to the sphere of international sea shipping of passengers and threaten the lives and health of individuals on a ship. This doctrine is directed against any attempt to overthrow or avoid the application of imperative norms of a sovereign state; it adheres to fundamental human rights, as declared in the UN Universal Declaration of Human Rights, and basic standards of conscientiousness; it contains certain norms and rules contained in the primary and broadly adopted identical laws and the international codes of conduct (Kanashevsky, 2009, p. 147). The international public order has a cross-border nature. Its purpose is to protect specific international values, as opposed to the public order of the country of a court, which protects the law of a court only, which is very important for the safety of the shipping industry from threats arising from piracy and terrorism, which have long been a concern in the world.

An example of a violation of the public order in the sphere of sea shipping can be the case of the act of maritime terrorism against the vessel "Achille Lauro" that was seized during the Mediterranean cruise with 680 passengers on board and approximately 350 members of the crew on 7 October 1985. This incident prompted the UN General Assembly with its resolution A.40/61 recognize the urgent need for measures to prevent international terrorism. November 20, 1985 the resolution A.584 (14) "Measures to prevent unlawful acts which threaten the safety of ships and the security of their passengers and crews". The Assembly called on member states, port administrations, maritime administrations, shipowners and operators

of ships, captains and crews to take steps to improve the protection of a port and organize the protection of a ship as soon as possible. The Maritime Safety Committee (MSC) was tasked with developing detailed technical measures in this sphere.

At the 58th session of the IMO Council in 1986 was approved a plan for the conference to end the illegal acts against the safety of sea shipping. According to the results of the Roman conference in 1988 were adopted two international treaties – the Convention for the Suppression of Unlawful Acts Against the Safety of Sea Shipping and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf.

Both documents are the necessary part of the Final Act of the Conference. In addition to the texts of the convention and the protocol adopted as the basis for the work, the Conference considered the document of the IMO Legal Committee with its comments, as well as a number of documents from governments and interested organizations with comments, remarks and amendments to the projects.

The terms of entry into force of the Convention 1988 completed on 2 December 1991, the last of the 15 necessary ratifications was issued by France; in accordance with the Article 18 of the Roman Convention of 1988, this agreement came into force on March 1, 1992 and at the same time came into force the Protocol 1988.

Thus, the deliberate acts of violence against merchant ships – armed sea robbery, piracy or terrorism on the part of individuals, organizations have always violated the principles of freedom of navigation and pose a threat to the international and the national shipping (Ivanova, 2014a, p. 75).

The actions to capture a maritime ship, its robbery with the use of violence or the threat of violence and hostile actions against a crew or passengers committed in the inland waters or in the territorial sea of a state, qualify as an armed robbery at sea.

The definition of armed robbery against ships is contained in the Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against ships of the International Maritime Organization:

"any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea".

The definition of piracy is contained in the Article 101 of the UNCLOS'82:

"piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)".

The Hague Declaration on Tourism on 14.04.1989 fixed the principle (VIII), according to which terrorism constitutes a real threat for tourism and tourist movements. Terrorists must be treated like any other criminals and should be pursued and punished without statutory limitation, no country thus being a safe haven for terrorists.

Consequently, the illegal acts against the safety of sea shipping threaten the safety of people and property, seriously violate maritime communications, and undermine belief in the safety of maritime navigation (the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation).

Armed robbery at sea, piracy or terrorism are illegal acts aimed at the safety of sea shipping, violation of the fundamental human rights. Terrorism, racial discrimination, violations of the fundamental human rights are all international values to protect the international public order. On top of that current trends show possibilities of

extension of the public order clause to other spheres, for example those concerning sustainability. With regards to the cruise tourism these includes environmental issues, i.e. carbon footprint and waste management. To that end sustainability planning for cruise tourism involves four levels of interest: environment, public policies and government measures, stakeholders (firstly, the passengers and then, the crew members), companies' policies (Paiano et al., 2020, p. 77).

The sphere of human rights allows emphasizing more clearly the boundaries of the Institute "public order", which remains underestimated in the Ukrainian doctrine of the modern international private law. This has a manifestation when the consequences of applying a norm of competent foreign law or the consequence of enforcing or recognizing a foreign judicial or arbitral judgement contradict the public order of Ukraine, if only they have differences with the rights and the freedoms of a person, enshrined in Ukraine or in the international treaty of Ukraine. Therefore, the warning about public order is a manifestation of the sovereign nature of a state power within its functioning. A state indirectly implements the protection and the defense of private interests, namely the protection of the rights of a man and a citizen and is a kind of guarantor of public law and order (Tihomirov, 2005, p. 81), establishing the norms aimed at its maintenance and ensuring their implementation with the possibility of applying state coercion and protecting the national law and order of a state as a whole with the help of the imperative norms, and indicating of the presence of public interest in the privately-legal relations, that is, the administrative provision of the public law and order takes place.

4. The Public Order Clause: the Gaps in Ukrainian National Legislation

The public order clause is defined in the Article 12 of the Law of Ukraine "On the Private International Law". The article regulates that the norm of law of a foreign state is not applied in cases where its application leads to consequences clearly incompatible with the

basics of the law and order, that is, the public order of Ukraine. In such cases, it is applied the law that has the closest connection with legal relations, and if such law is impossible to determine or to apply, the law of Ukraine is applied. It should be noted that the rejection to apply the law of a foreign state cannot be based only on the differences between the legal, the political or the economic system of a relevant foreign state and the legal, the political or the economic system of Ukraine, as it is evidenced in the part 2 of the Article 12 of the Law of Ukraine "On the Private International Law".

The public order clause is a universally recognized institution of the international private law. It plays an important role in the mechanism of the regulation of private legal relations of the international nature and is a manifestation of the sovereign nature of state power within its functioning. The purpose of the clause is to exclude the application of a foreign law incompatible with the public order of the country of a court. According to N. Yerpyleva, the foreign law that is subjected to apply, not known in advance and may be based on the principles and the doctrines of a foreign legal system that exists in its place of application. In this situation, the public order clause is a peculiar filter, passing through which a foreign law can be implemented in another's environment (Yerpyleva, 2015, p. 104).

The term "ordre public" (translation from French), was the first used in the Article 10 of the Declaration of the Rights of a Man and a Citizen 1789:

> *"No man must be penalized for his opinions, even his religious opinions, provided that their expression does not disturb the public order established by law".*

This famous document is still valid as it belongs to the Constitution of the French Republic of 4 October, 1958 (Romaniuk, 2015). As D. Davydenko, Director of the Institute of the International Private and Comparative Law, wrote in one of his articles, titled "The ten Interesting Points Regarding "public order" in the International Private and Civil Law": "The French, as real "fashion

lawmakers", introduced a fashion to the use of the legal category of the order public" (Davydenko, 2009).

During the development of the international private law, the attempts have been made to justify the content of the concept of "public order". However, it was impossible to determine the clear content of this category once and for all. For the modern specialists in the sphere of the international private law, it is more acceptable to talk not about public order at all, but about the public order clause that restrict the validity of foreign laws and the implementation of foreign decisions.

The Paragraph 3 of the Article 796a of the Civil Procedural Conclusion of Germany establishes that "in the appeal to the implementation of a settlement agreement shall be denied, if a settlement agreement is invalid or its recognition would violate the public order", which is an example of the use of the public order clause in the German legal system of the international private law.

The idea of the public order clause, its history are inextricably connected with the formation of two concepts of social order: positive and negative. The positive concept, which is called by its origin "the Franco-Italian", means that some set of the legal norms due to their special importance does not allow the application of foreign law regardless of its features. The negative concept, the origins of which should be sought in the German doctrine and the Introductory Law to the German Civil Law, provides that foreign law does not apply, and the obligations of the parties, arose on its basis, are not subject to the protection, if such application and such protection contradict the public order of a state. Thus, the first concept is based on the special nature of the individual norms and the principles of the internal legislation, the second – on the negative features of a foreign norm.

Some authors note the functions of the public order that determine the existence of two concepts of this legal institute (Yerpyleva, 2015, p. 110). In particular, it is noted that "the main difference between these two functions is that the negative function is necessary to reject

foreign norms and court judgements. The positive function is used to ensure the imperative application of certain norms of the country of a court without applying to a collision norm for the establishment of competent law and order". The negative concept has found its legislative expression in almost all European codifications. The positive concept makes the issue relevant of its relationship with the legal institute of imperative norms. In theoretical plan, as V. Zvekov notes, the need for clause was discussed regarding cases when a conflict norm refers to a foreign law that limits the rights and the freedoms of citizens on the grounds of social, racial, national, linguistic or religious belonging (Zvekov & Vlasova, 2011, p. 107).

Foreign law is applied in a state where there is its own law and order, which inevitably affects the result. Applicable norms of foreign law should not violate the fundamental principles of local law and order, which is the principle of the international private law. So, the public order clause (French – ordre public; German: Vorbehaltsklausel) – is a special institution of the international private law that pursues the following goal: the national law allows the application of foreign law, establishes the procedure for its application and simultaneously outlines the permissible limits of its application in its territory (Ivanova, 2014b, p. 87).

The public order clause is a peculiar protective mechanism, in accordance with it is possible a refusal of application of foreign law on the grounds that the consequences of such application will contradict the foundations of the organization of society and a state.

In applying the public order clause, you should pay attention to the exclusivity of its application. It is necessary to consider the fact that frequent appeal to it by courts can lead to objection of the application of foreign law in general. The authors, such as M. Boguslavsky, V. Kanashevsky, wrote on this issue. Thus, M. Bohuslavsky states: "If the use of this clause abuses in any country, resorts unreasonably often to it, then it is possible to deprive the meaning of the international law in this country in general, as a system of norms,

designed to protect the rights of citizens and legal entities arising from the application of foreign law" (Kanashevsky, 2009, p. 147).

The appeal to the public order clause is due to the contradiction of the foreign norms of law to the basics of the domestic law and order, and the consequence of their application: a court has the right to apply the clause only when the application of foreign law can lead to a result that violates public order. This aspect is present in the laws of many states. For example, is the Austria's Federal Law on the Private International Law, which regulates that provisions of foreign law are not applicable if their application can result in outcomes incompatible with the basic values of the Austrian law and order. This norm clearly states that the public order clause is addressed not to the very norm of foreign law, but to the consequences of its application. This aspect can be seen in the norm enshrined in the Article 8 of the Venezuelan Law 1998 "On the Private International Law" provisions of foreign law, which must be applied under this Law, are excluded, only if their application would lead to consequences clearly incompatible with the essential principles of the Venezuelan public order.

The article 6 of the Law of the Republic of Poland 1965 "On the Private International Law" is devoted to the public order clause: "Foreign law is not applicable if its application would lead to results contrary to the basic principles of the law and order of the Republic of Poland".

The article 9 of the Law of the Republic of Romania 1992 № 105 on the regulation of the international private law defines a public order as follows: "The rights acquired in a foreign state, they are observed in Romania unless they contradict the public order of the Romanian international private law".

The paragraph 1 of the Article 7 of the Decree of Hungary 1979 № 13 on the private international law regulates that foreign law does not apply if it contradicts the Hungarian public order. An even more important limiter of the application of the public order clause was introduced in the paragraph 2 of the Article 7 of the Decree of

Hungary 1979 № 13 on the private international law: "The application of foreign law cannot be denied only on the grounds that the socio-economic system of a foreign state differs from the Hungarian one". The emergence of such indication was due to the widespread practice of many states in the past, aimed at non-application of the Soviet law based on another's or socio-economic system, and then the rights of other socialist states. Consolidation of such indication was aimed primarily at protecting their law. This limiter was the first introduced in the aforementioned decree (Dmitrieva, 2010, p. 161). The paragraph 1 of the Article 7 of the aforementioned Decree regulates the public order clause as follows: "Foreign law does not apply if it contradicts the Hungarian public order".

According to the current Article 6 of the Introductory Law of 1896 to the German civil code: "Any legal norm of another state does not apply if its application leads to a result that is clearly incompatible with the essential principles of German law. It is not particularly applicable if this application is incompatible with the fundamental rights".

The law-enforcement practice of different states has different approaches to establishing the scope and the elements of the content of the public order clause. By the Supreme Arbitration Court of the Russian Federation on the basis of cases considered by arbitral tribunals in the Information Letter dated 26 February 2013 № 156 "Review of the practice of arbitral tribunals on the application of the public order clause as grounds for refusal to recognize and to enforce a foreign court and arbitral judgements" formed the following definition of the concept of "public order": these are the fundamental legal bases (principles) that have higher imperativity, universality, special civil and public significance, form the basis for the construction of the economic, the political, the legal system of a state.

Such foundations include a ban on actions directly prohibited by the imperative norms of the legislation of the Russian Federation, if these actions harm the sovereignty or the security of the state, infringe

on the interests of large social groups, violate the constitutional rights and the freedoms of individuals.

The Plenum of the Supreme Court of Ukraine in the Resolution of 24.12.1999 "On the practice of consideration by the courts of petitions on recognition and execution of judgements of foreign courts and arbitrations and on the cancellation of decisions, delivered in the order of international commercial arbitration on the territory of Ukraine" in the order of international commercial arbitration on the territory of Ukraine tried to decipher the concept of "public order": "Under the public order in this and other cases, when the failure to harm it, determines the possibility of recognition and execution of a judgement, it is necessary to understand the law and order of a state, the defining principles and the bases that form the fundamentals of the existing system in it (concerning its independence, integrity, self-dependency and inviolability, basic constitutional rights, freedoms, guarantees, etc.)".

Thus, based on such definition, it is still possible to establish the certain cases when the execution of a foreign arbitral judgement will be incompatible with the public order of Ukraine:

the execution of judgements, violating the basic constitutional rights and freedoms of a man and a citizen;

the execution of judgements, giving in violation of a respondent's procedural rights;

the execution of foreign arbitral judgements in cases when such execution will affect the imperative norms of the national public law.

In practice, the appeal to the public order occurs in exceptional cases, especially in contractual relations. Abroad, the public order is applied in cases when it comes to: confiscation without proper compensation, smuggling contracts, bribery of officials, evasion of the imperative norms of a foreign law, for example, the rules of the customs legislation, as well as the issues on the family law and the inheritance law, recognition of polygamous marriages. In particular, the English courts refused to recognize contracts restricting trade

or concluded under the influence or the coercion, trade contracts with the enemy or violating the laws of the friendly country; the English courts also do not recognize discriminatory consequences arising from foreign law, such as the status of slavery or civil death (Levontin, 1976, p. 13). Thus, the experience of different states, including Ukraine, shows that the legislator, giving due importance to the public order clause, is restricted to the most general definition of the public order.

Conclusions

The category of public order reflects the administrative regulation of sea shipping of passengers in promoting the implementation of the state maritime policy and ensuring safety, protection of the state sovereignty in the inland sea waters, the territorial sea, the airspace over them, on the sea-bottom and in the bosom within them; protection of the sovereign rights and the jurisdiction of Ukraine in its exclusive (maritime) economic zone, as well as in strategically important areas of the sea for a state; protection of the national interests in the World Ocean and protection of human life at sea and rescue of people, property and ships. The state indirectly exercises protection and defense of private interests, namely the protection of the rights of a man and a citizen, establishing the norms aimed at maintaining the public order, and ensuring their implementation with the possibility of applying state coercion.

The imperative nature of the public order has a manifestation at two levels: 1) the state level, when it allows state intervention in privately-legal relations in order to achieve socially important goals (the national and the public security, fulfillment of international obligations, protection of the rights and the freedoms of citizens, implementation of the state policy tasks in the maritime sphere, etc.); 2) the international level, when the international public order aims to protect the specific international values from the threats, arising from piracy and terrorism. The signs of the international public order are

a cross-border character; it is a kind of the imperative limitation; the application to international sea shipping; a purpose, which consists of the protection the specific international values; the importance for the safety of the shipping industry from the threats, arising from piracy and terrorism.

The characteristic feature of the public order is to restrict the application of foreign law. The analysis of the legal regulation of the public order clause in different countries showed a broad discretion in the field. That discretion bases not only on a contradiction between foreign law and domestic law and order but also on a court's perception of the consequences of their application. A court has the right to apply the clause only when the application of foreign law can lead to a result that violates the public order, which is a common aspect in the laws of many states.

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Аракелян М., Іванова Д., Туляков В. Категорія "публічний порядок" та обмеження автономії волі сторін у договорах морського перевезення пасажирів. – Стаття.

У цій статті здійснена спроба дослідження мети, значення та суті категорії "публічний порядок" у правовому регулюванні та практиці правозастосування у сфері морських перевезень пасажирів. У першій частині статті автори розглядають роль публічного (імперативного) елемента у правовому регулюванні морських пасажирських перевезень. Звертається увага на вагомий сегмент державного та наддержавного адміністративного регулювання у сучасному правовому базисі таких перевезень. Воно отримує прояв у закріпленні можливостей імперативного впливу на систему приватноправових відносин, у т.ч. відносин ускладнених іноземним елементом, зокрема на сферу морських пасажирських перевезень. У другій частині статті автори звернулися до визначення кореляційних зв'язків категорії "публічний порядок" із суміжними правовими категоріями "правопорядок", "громадський порядок", "світовий правопорядок", здійснили розмежування категорій "порядок" та "режим". Акцентували увагу на тому, що правовий режим є процесом, спрямованим на встановлення публічного порядку. Третю частину статті присвячено короткому дослідженню міжнародного публічного порядку у проекції на проблематику морських пасажирських перевезень. Наголошується на спробі світового співтовариства сформувати правову основу для протидії незаконним діям у морських просторах, які порушують встановлений міжнародний публічний порядок, якого спрямовано на збереження та охорону здоров'я та життя людей. Зазначається, що сфера прав людини дозволяє чіткіше підкреслити межі інституту "публічний порядок", що залишається недооціненим в українській доктрині міжнародного приватного права. Нарешті, автори розглядають застереження про публічний порядок як один з провідних інститутів міжнародного приватного права та відповідного законодавства більшості сучасних держав. Підкреслюється відсутність визначення категорії "публічний порядок" за умов належної регламентації у законодавствах відповідного застереження.

Ключові слова: морські перевезення, пасажири, публічний порядок, застереження, імперативні норми, надімперативні норми.

Аракелян М., Иванова Д., Туляков В. Категория "публичный порядок" и ограничение автономии воли сторон в договорах морской перевозки пассажиров. – Статья.

В этой статье предпринята попытка исследования цели, значения и сущности категории "публичный порядок" в правовом регулировании и практике правоприменения в сфере морских перевозок пассажиров. В первой части

статьи авторы рассматривают роль публичного (императивного) элемента в правовом регулировании морских пассажирских перевозок. Обращается внимание на значительный сегмент государственного и надгосударственного административного регулирования в современном правовом базисе таких перевозок. Он получает проявление в закреплении возможностей императивного воздействия на систему частноправовых отношений, в т.ч. отношений, осложненных иностранным элементом, в частности на сферу морских пассажирских перевозок. Во второй части статьи авторы обратились к определению корреляционных связей категории "публичный порядок" со смежными правовыми категориями "правопорядок", "общественный порядок", "мировой правопорядок", разграничили категории "порядок" и "режим". Акцентировали внимание на том, что правовой режим является процессом, направленным на установление публичного порядка. Третья часть статьи посвящена краткому исследованию международного публичного порядка в проекции на проблематику морских пассажирских перевозок. Отмечается попытка мирового сообщества сформировать правовую основу для противодействия незаконным действиям в морских пространствах, нарушающим установленный международный публичный порядок, который направлен на сохранение и охрану здоровья и жизни людей. Отмечается, что сфера прав человека позволяет четче определить пределы института "публичный порядок", остающегося недооцененным в украинской доктрине международного частного права. Наконец, авторы рассматривают оговорку о публичном порядке как один из ведущих институтов международного частного права и соответствующего законодательства большинства современных государств. Подчеркивается отсутствие определения категории "публичный порядок" в условиях надлежащей регламентации в законодательствах соответствующей оговорки.

Ключевые слова: морские перевозки, пассажиры, публичный порядок, оговорка, императивные нормы, надимперативные нормы.