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The application of "public order" in International Private Law. The Ukrainian Experience

The article is devoted to the examining one of the most complicated institutions of the international private law such as public order and its concept, reveals the problems and contradictions, relating to the application of public order of the Ukrainian Courts.

Keywords: international private law, public order, practice of courts in Ukraine.

Статья посвящена рассмотрению одного из сложных институтов международного частного права – оговорки о публичном порядке и ее понятия, раскрывает проблемы и противоречия, связанные с применением украинскими судами оговорки о публичном порядке.

Ключевые слова: международное частное право, оговорка о публичном порядке, судебная практика в Украине.

Стаття присвячена розгляду одного із складних інститутів міжнародного приватного права – застереження про публічний порядок та його поняття, розкриває проблеми і протиріччя, пов'язані із застосуванням українськими судами застереження про публічний порядок.

Ключові слова: міжнародне приватне право, застереження про публічний порядок, судова практика в Україні.

Relevance of the topic. The article focuses on public order, that imposes some legal limitations on the application of certain foreign law norms to legal situations having a foreign element. The aim of the concept of public order is to prevent the application of foreign law norms, which are not acceptable to the forum state's legal system. More than two centuries of the existing the institution of public order is till remaining uncertain. There are no doubts that there is a set of the reasons of the emergence of such limiter public order. It is important to consider this question from the point of view of international private law as in the name of this institute the essence is put disputable and not always precisely be heard.

Analysis of the latest researches. The scientifically – practical bases of this article are the works of V. I. Kisil, A. S. Dovgert, P. Mayer, U. I. Bogatina and others.

Research goals. The article's task is to analyze the public order considerations of the international private law and the Ukrainian experience in its application.

The basic material. The conflictual norms indicate the law, which is fit to govern a legal rapport with a foreign element. This appropriate law can belong to the forum, or to a law system from abroad which presents connections with that juridical rapport. In the practice of sustaining a conflict of laws it has been crystallized the idea that the enforcement of a competent foreign law according to the conflictual norm of the forum, when this interferes with the public law of the country of the forum. In this way, in the international private law, the waiver from the foreign law has an extraordinary character. Most of the modern doctrine agrees that the content of the term of public order can not be determined in the international private law, in each actual case, the court of law will establish, for each case if the foreign law normally competent contradicts or not the

public policy of international private law from the country of the forum.

It had been admitted that in the term of public order on the plan of international private law steps in "the fundamental norms for the law system of the court, which do not allow the enforcement of foreign rules, although these are competent according to the conflictual norms of the law court" [1].

One might suppose the concept of public order to be a concept embodied in every legal system. It is a notion generally well established in private law and particularly well established in private international law. But while in international public law the concept of public order might be thought to be reflected in its peremptory norms (jus cogens), there are distinctions to be drawn in its use in international private law. Public order (or ordre public in French) has the same meaning as the term "public policy," used especially in Anglo-American legal terminology. However, English and U.S. law adopted the term "public policy" to avoid conflation of the notion of "public order" with the general and traditional English concept of "law and order." Thus, the notion of public order (ordre public) is often used interchangeably with the term "public policy". And yet, despite the fact that the concept of public order in domestic law, both private and public, reflects the principle of state sovereignty, the notion of "public policy" - as one might be led to expect - has nothing to do with the notion of "politics" or "policy" in domestic or international relations. To further complicate matters, the notion of "public order" or "ordre public" is also to be distinguished from the notions of "ordre public interne" and "ordre public international" - seemingly related concepts that are used in countries which follow the French Civil Code. Furthermore, the notion of "ordre public interne" has nothing to do with conflict of laws, although the norms of "ordre public international", do form a part of the "conflict rules".

"Public order" is a term that is used to indicate those domestic obligatory (mandatory) rules that prevail over a foreign law's conflicting rules. In international private law (conflict of laws) the key role played by "public order" (public policy) is that of providing a reservation (or exemption) from application and enforcement of a foreign law which enables the forum state to refuse the foreign conflicting rules and thus protect the basic political, social, economic values of the forum state. Many of countries' new acts of private international law make mention of the need to protect their basic (constitutional) principles. The reservation's "negative role" resides in its limiting of the use of foreign law on the basis of conflicting rules of law. To avoid confusion in terminology some authors have suggested using the term "public order" (public policy) in connection with the public order exemption but not in regard to those rules which are called "directly applicable", "necessary applicable", "imperative", "cogent" or "mandatory" norms. These obligatory rules play an active role and hence, as a rule are also called "public order laws". In French these active public order laws are variously called "lois d'ordre public", "lois de police", [lois de] "disposition imperatives" or "lois d'application immediate".

Public policy of international private law differs from a state to another. The invocation of the public policy is not done in generally against the competent foreign law, but against its applicability in that particular cause, that is against the result to which they will get if the foreign law will be applied in that particular case. As a result, public policy is not absolute, but relative.

As concerns the content of the term of public policy in the international pri-

vate law, this is settled by two ways:

- usually, it is determined by the court of law, which will assess when a norm from the law system of the forum dedicates a fundamental judicial principle, so that its transgression by the foreign law assigned as competent, can justify its removal from its implementation;

- in certain cases the law forum settles clearly some juridical norms of whose transgression establishes a ground for appealing to the public policy of international private law and of removal from applying the opposed foreign law [2].

It is often arises a question about the distinctions in the term of public policy of internal law and the term of public policy in the international private law.

Public policy in the international private law is different from the public policy of internal law.

In the internal law, public policy indicates the imperative character of some juridical norms from which the parties can not derogate through their juridical documents [3], unlike the permissive and optional norms.

In the international private law, public policy holds back the enforcement of a foreign law, which is usually proficient according to the conflictual norms of the forum [4].

Thus, the term of public policy does not have the same meaning in the internal law and in the international private law, those being distinctive.

Between the two notions there are the following differences:

- they have different functions, although they express and defend the interests of that particular state. Public policy of internal law, which is given by the assembly of the imperative norms of that particular law system, has as a purpose the delaying of producing the effects of the writ that are contrary to these norms, expressing the limits of the autonomy of volition of the parties, in the internal juridical rapports. Public policy of the international private law has the role to stop the implementation, on the territory of the forum state, of the effects of a foreign law, although usually able to apply the respective juridical rapport, it expresses the limits of applying the foreign law in the country of the forum;

- they have different areas of implementation, in the sense that public policy of internal law is larger than the one of the international private law; not everything which is of public policy in the internal law is of public policy in the international private law, too. As a consequence, only a part of the norms of public policy from the internal law are of public policy in the international private law, an example in this matter being the subject which interests the state and the ability of the people.

Public policy in the international private law has the following essential characters [5]:

- from spatial point of view, public policy of the international private law has a national character in its content, in the sense that it is performed through the internal law of the state of the forum;

- from the content point of view, public policy differs from a country to another, thus, for example, in some countries it is allowed in certain conditions the determination of the paternity outside the marriage, while in other countries, this is not allowed or it is permitted only restrictively where such an action will be rejected as being contrary to the local public order. As well as in some countries the divorce is not allowed or is admitted in restrictive conditions, where a divorce of foreigners

will be rejected as being opposite to the public policy of the forum [6];

- from temporal point of view, public policy is actual, in the sense that from the moment of the birth of the juridical rapport to the moment of solving the litigation concerning this juridical rapport has changed the content of public order, it is not taken into consideration its content from the moment of birth of the juridical rapport, but that from the moment of solving the litigation. Thus, the act signed abroad can not still be considered against public policy if meanwhile the law of the forum has changed, becoming similar to the foreign one, for example in that what concerns its living conditions or only some of these. On the contrary, if meanwhile the conflictual norm has been changed, in default of legal contrary disposition, it is taken into consideration the conflictual norm which is in force at the time of closing that juridical paper;

- from material point of view, public policy has a character of exception from the rule that the foreign law usually competent, must apply to the juridical rapport with a foreign element, the consequences of this character are, in essence the following, public policy is of strict interpretation, in the sense that it can not be interpreted by reducing the effects of a juridical act but restrictively, and the public policy of international private law impedes the producing of the effects of foreign law on the territory of the forum country (and as a consequences, it attracts the application instead of the law of the forum), only in rigorous measure in which these effects contravene the fundamental principles of the law of the forum.

The area of the term of public policy of international private law are as follows: juridical practice and the law (when it establishes in a clear way that the breaking of certain regulation constitutes legal basis of the exception of public policy in international private law) it proves that public policy of international private law can be invoked in any juridical rapport of material or procedure law with a foreign element. These can appear in any matter of the international private law and in a bigger extent in the following areas:

The domain of material law - the marital status, the capacity, family relationship of the people, etc.

The domain of procedural law - in case of violation the exclusive competence of the jurisdiction [7].

As concerns public policy of international private law, this can produce two effects, namely:

Negative effect [8], meaning the removal from the enforcement of the foreign law, and as a consequence the juridical rapport can not be done.

Positive effect [9], according to which when the foreign laws removed, the forum law will be enforced. The positive effect of the public policy always joins the negative one and, in spite of all this, it can manifest in two ways:

implicit (more delicate), in the sense that the law of the forum is enforced only to remove the effects of the foreign law;

explicit (more firm), in the sense the law of the forum is enforced in its substantiality, too, in the place left by the removal of the foreign law.

So, as far as the application of the public order in Ukraine is concerned, the legal provisions of the international private Ukrainian law regarding the public policy are consisted in: [10]

- the Law of Ukraine on Private International Law;
- the Civil Code of Ukraine (article 3).

A considerable portion of the rules of the Law of Ukraine on Private International Law is aimed at the complete and precise application of foreign law in Ukraine. If the parties or the court applies foreign law, taking into account the conflict law reference, this includes all the provisions, which would be applicable to the case, including public law provisions.

The Law contains modem provisions on the limits to the application of foreign law. Thus, foreign law shall not apply if the court fails to determine the contents of its provisions. In this case, Ukrainian law shall apply [11].

Reference to public order is stated in its modern interpretation: the foreign law (the Law actually states 'the legal rules') shall not apply in cases, where its application may cause a result incompatible with the fundamentals of the legal order (public order) of Ukraine. At the same time, such a refusal shall not be justified only by differences in the legal, political or economic systems. Where the refusal for application of the foreign law is made because of a possible infringement of public order, the law of the country with the closest connection shall be applied, and if it is impossible to determine or apply this law, the law of Ukraine shall be applied. There are some factors, affecting on public order in Ukraine:

- Transnational public order;
- Ukrainian public law;
- Ukrainian private law;
- Practice of international courts and arbitral tribunals (European Court of Human Rights, international commercial arbitration, international investment arbitration)
- Ukrainian Court practice.

The definition of Transnational Public order includes:

- Principles commonly recognized by legal systems around the world'
- Fundamental principles of natural law, jus cogens, general principles of morality, arbitral precedents, spirit of international treaties;
- International Law Association, Interim Report on Public Policy, 2000: "truly international public policy ... comprising fundamental rules of natural law, principles of universal justice, jus cogens in public international law, general principles of morality accepted by ... civilized nations";
- International Law Association, Final Report on Public Order, 2002 says – "public policy which is common to many States".

The practice of international courts and arbitral tribunals is also one of the important public policy considerations, which involves:

1. Decisions of the European Court of Human Rights:
- Sources of law in Ukraine (quasi-precedents);
- A positive obligation of the state to protect property rights (Article 1 of Protocol No.1 to the Convention);
- The obligation to a conduct fair trial (Article 6 of the Convention).

2. Awards in international investment arbitration:
- Determination and recognition of international standards of the protection of investor rights;

3. Awards in international and national commercial arbitrations:

- Presumed validity of an arbitral award.

The practice of Courts in Ukraine are that laws do not provide for a definition of public policy. "Public policy" was defined by the Supreme Court of Ukraine in Ruling No. 12 dated 24 December 1999 as follows:

- The law and order of the state;

- The basic principles and foundations of the existing constitutional system relative to: the independence of the state, integrity of territory, inviolability of borders, basic constitutional rights, freedoms and safeguards. (This list is not exhaustive) [12].

The general characteristics of the practice of courts in Ukraine in five years shows, that there is no official statistics in Ukraine in relation to judgments denying the recognition and enforcement of arbitral awards based on public order. The conducted research pointed out that, the refusal to recognize and enforce arbitral awards – varying from 5% to 15% depending on the region, 90% of the refusals in the recognition and enforcement – for reasons unrelated or not exclusively related to the branch of public order and 10% of refusals are related to the violation of public order [13].

To my mind, one of the contradictions in practice of courts is the lack of a uniform interpretation of the "public order" by courts. The contradictory interpretations of "public order" by courts conclude in that some judicial decisions place the burden of proof of the breach of public order on the interested party. The New York Convention says: courts have competence to determine whether an award is contrary to the public order of the state. The decision of the Kiev City Court of Appeal dated 14 March 2013 on granting permission to enforce the decision of Riga International Arbitration Court: "... in the course of the proceedings (the representatives of the party) failed to provide any proof that the enforcement of an arbitral award against an individual who undertook obligations under a surety agreement would be contrary to the public order and endanger the interests of Ukraine".

The interpretation of the public order by courts considers in two ways: strict interpretation and soft interpretation. Strict interpretation defined the public order as any departure from procedural and substantive norms of Ukrainian law by an international arbitral award. The Ruling of the Odessa Oblast Court of Appeal dated 5 June 2013 refusing to allow the enforcement of the FOSFA arbitral award: "If the case had been adjudicated by a national court, under the present circumstances the claim most probably would have been denied by the court". Soft interpretation understands public order as basic principles of the law and order and the legal system. For instance, the ruling of the Cherkassy Oblast Court of Appeal dated 22 July 2013 on the enforcement of an award made by the Swiss Chamber's Arbitration Institution (Geneva): "... the public policy is understood as the law and order the state and principles and foundations of the existing constitutional system relative to the independence of state, integrity of the territory, inviolability of borders, basic constitutional rights, freedoms and guarantees", and "The court does not examine whether an arbitral award is correct from the standpoint of the merits of the claim as it would be contrary to the sovereignty of the state whose court made a decision in question..." [14].

Conclusions. The public order is one of the most knotty institutions of private international law, which limits the application of foreign law. Providing a clear and

precise definition of public order is difficult because Ukrainian law does not define the term. This creates a problem in its application. The analysis of the practice of the Ukrainian courts which connected to the enforcement of foreign arbitral awards, with regard to the application of the ordre public exception, shows the considerable contradictions and problems such as: lack of a uniform interpretation of the public order by courts, lack of differential criteria for satisfying the requirements applicable to the recognition and enforcement of arbitral awards (resulting in difficulties with appealing against decisions made by Ukrainian national courts), domestic court judgments lack "legal certainty" and low qualification of the first instance courts, which should be solved in the future.

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