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# PUBLIC POLICY CLAUSE IN PRIVATE INTERNATIONAL LAW

The article gives an overview of one of the mechanisms for the protection of ordre public which to prevent the devastating effects of foreign law on national public policy — a public policy clause. The analysis of nature and character of the wording of national norms of different countries shows that provisions aimed at protecting national public policy may be constructed differently. The world practice knows two concepts of clause of ordre public: positive and negative, and the negative concept of public policy clause is dominant in contemporary private international law.

**Key words:** ordre public, public policy, ordre public clause, public policy clause.

**Problem statement.** Public policy (*ordre public* — fr.) clause is a recognized institute of private international law and plays an important role in the mechanism of regulation of private relations of an international character. Under the conflict rules it's possible potentially to choose the law of any state of the world, and to provide all the consequences of this choice is not possible. It is possible to eliminate the negative effects of foreign law and aimed reservation of public policy. Institute of reservation of public policy outlines the permissible scope of application of foreign law on its territory, and is one of the mechanisms for the protection of national ordre public.

**Analysis of recent researches and publications.** Protecting the state public policy through the use of the ordre public clause has been known for a long time in private international law. However, the category of ordre public and public policy clause not thoroughly investigated. We find a mention of public policy in works of F. Savigny, Ch. Broche, A. Makarov, A. Pilenko, L. Luntz, G. Dmytrieva, V. Kysil. Among the special works we can call the works of M. Brun «Order Public in Private International Law» (1916) and Y. Bogatina «The Public Policy Clause in Private International Law: Theoretical Problems and Modern Practice» (2010).

**Paper purpose.** The purpose of this article is to explore the content of the concept of ordre public in private international law, as well as study the nature and character of public policy clause formulations in various national legal systems.

**Paper main body.** At the modern stage, to resolve issues arising from the activities of foreign citizens and legal entities, the state traditionally, along with the effect of domestic law allows the application of foreign law, therefore

 

agreeing to provide foreign standards with the same legal value as they have in the state. The consequence of interaction of national legal systems in regulating international civil relations is penetration into a national legal space of foreign state acts — laws, judicial and arbitral decisions, requests for legal assistance.

But, any state has its own factors that contribute to the formation of law: the differences in the historical development and national identity, traditions and religious beliefs, moral and cultural values of a society, and different levels of integration into the international community. Each national legal system is based on its own general principles; each national legal system is the product of society, reflecting its features. And, as pointed out by Montesquieu, it is rare when the laws of one nation may occur suitable for the other. Therefore, by a reasonable remark of L. Raape, appeal to foreign law is always a «leap into the unknown» [1, p. 96]. A foreign rule present within the legal framework of the state can be seen as a foreign formation that does not fit in the legal system of the state, built on the social, ideological, economic and moral platforms. The use of such a rule could lead to the destabilisation of cultural and spiritual foundations of society, break it ordre public. Therefore, the modern private international law has a task to ensure a balance of private and public interests. One of the mechanisms to achieve this balance is the public ordre clause.

In deciding a conflict of laws question, a judge will sometimes say, «The foreign law ordinarily applicable will not be applied in this case because to do so would violate our public policy». The concept of public policy is one of the most ancient, esoteric and pervasive creations in the history of private international law. Its origins have been traced by one author to the fifteenth century, although it is probable that the doctrine is as old as the concept of the law itself. In the nineteenth century, the courts sought to confine the reach of the doctrine to the limited number of categories. The general judicial attitude of the period is summarized by the famous statement of Burrough J. in *Richardson v. Mellish*, that public policy «is a very unruly horse, and when once you get astride it you never know where it will carry you» [2].

Reference to the impossibility of applying of foreign law because of its contradictory to moral and good manners has already occurred during post-glossators (XIV century) [3, p. 269]. In the XVII century, the Dutch specialist in conflict of laws U. Huber noted that the recognition of foreign law (based on comitas gentium) is allowed in cases where such recognition does not diminish the sovereignty of the Dutch provinces and the rights of their citizens [4, p. 9]. One of the founders of the Soviet science of private international law A. Makarov, on the question whether a judge may apply any foreign law in accordance with the conflict of laws rule or not, answered that not: «foreign law that conflicts with domestic ordre public may not be applied, though its application would come out of the stated conflict rule» [5, p. 52]. Modern researchers, in particular, G. Dmytrieva [6, p. 182], V. Kysil [7, p. 94] also emphasize the impossibility of applying foreign law because of its contradictory to national ordre public.

The first species of public policy has been identified with equity, the natural law, the law of reason, and ultimately the divine law. It is referred to by early legal commentators with wonder, as an animistic spirit dwelling deep within our jurisprudence that is «written in the heart of every man and tells him what to do and what to avoid» [2]. Ultimately, it was in the gradual rationalization of this supra-human tendency against which « [n]either statute nor custom can prevail that the modern idea of public policy was first developed and readied for conscious application.

The doctrine of public policy today plays an extremely important, although often subtle, role in private international law. Explaining why the problem of public policy is so difficult end elusive for legal doctrine, legislation, and court practice, the Ukrainian professor V. Kysil has stated that the problem is related to the very essence of public policy, which is determined by the historic, social-economic, political, ethno-cultural and other factors of the given legal system's development [8, p. 198].

According to O. Merezhko, public policy (with regard to Ukraine) encompasses the following elements: 1) the fundamental, most important, principles of Ukrainian law, and first of all its constitutional, private law, and civil-procedural principles, 2) the generally accepted principles of morality, upon which the Ukrainian legal order is based, 3) the legitimate interests of Ukrainian citizens, legal persons, and the state, the protection of which is a major task for Ukraine's legal system, and 4) the generally recognized principles and norms of international law, including the international legal human rights standards [9].

It has been argued that besides the Constitution of Ukraine the major principles upon which Ukraine's public policy is based can be found in Art. 3 of the Civil Code, Art. 5 of the Commercial Code of Ukraine, and Art. 7 of the Family Code of Ukraine. The Supreme Court of Ukraine has defined the concept of public policy with respect to the recognition and execution of foreign courts decisions. According to Supreme Court, «public policy ... should mean the state's legal order that defines principles that form the basis of the existing system there (relating to independence, integrity, fundamental constitutional rights, freedoms, guarantees, etc.)».

The analysis of nature and character of the wording of national rules of various states, which deny the application of foreign law, has showed that the provisions aimed at protecting a national ordre public may be constructed differently. The world practice knows two concepts of public policy clause: positive and negative. The content of these concepts was first formulated by L. Raape, which indicated that the order public clause may take the form of «offensive» or «defensive». The clause based on own law may be called positive, as it ensures the application of its own law in the borderline cases — this is the «offensive» clause. Opposite to it is a negative clause, which rejects the foreign legal rule. This clause is not «offensive», but only «defensive». It prevents the application of foreign law through controversy of the latter with good manners... the foreign legal rule is only rejected without the use of Germanic legal rule» [1, p. 98].

Based on the analysis of French, Italian, German doctrines and practices of public ordre clause, L. Luntz concludes that the legal and technical side of Germanic concept differs significantly from the Franco-Italian. If the Franco-Italian concept of ordre public is presented as a set of French (Italian) substantive rules that reject the effect of foreign law because of their qualities (the so-called positive concept of public ordre), the Germanic doctrine… covers the properties of foreign law that prevent its use, despite the reference to it of domestic conflict rules (the so-called negative concept of ordre public) [3, p. 274]. It should be noted that L. Luntz, who made significant contribution to the disclosure of the content of public policy, and has left us a legacy of the concept of positive and negative clauses of public policy and ordre public itself as perception of unacceptability of concrete results of social relations legal regulation as a result of the application of foreign law by the state, society and individuals, and the public policy clause as a mechanism to protect it, does not distinguish nor emphasize the latter.

At the present stage of development of private international law in the national legal systems the concept of a positive clause of public order is also based on certain principles and rules of national law with special positive value for the state; the negative clause comes from the content of foreign law.

The negative concept of public policy clause dominates in the modern private international law; it is enshrined in the laws of many states. Specifically, Article 6 of the Polish Act on Private International Law of 1965 states that «foreign law may not be applied if its application would have consequences that are incompatible with the fundamental principles of law of the People's Republic of Poland» [10, p. 470], Article 17 of the Swiss Federal Act on Private International Law of 1987 stipulates that «foreign law does not apply if the consequences of its use are incompatible with the Swiss ordre public» [10, p. 632]. Standards with contents may be found in Turkish, Chinese, German, Vietnamese, Portuguese legislations and so on.

The Ukrainian private international law also reflects the concept of negative forms of public policy clause. The Law of Ukraine «On Private International Law» states that «The rule of law of a foreign state shall not apply in cases where its application leads to consequences manifestly incompatible with the basics of law (public policy) of Ukraine. In such cases, it shall apply a law which has the closest connection with the legal relationship, and if it is impossible to define or apply such a law, it shall apply the law of Ukraine. Failure to apply the law of a foreign state may not be based only on differences in legal, political or economic systems of the foreign state from legal, political or economic systems of Ukraine» [11, p. 12]. Analysis of the given article shows that, firstly: order public clause may be only when applying the law of a foreign state leads to consequences manifestly incompatible with the basics of Ukrainian law; secondly: referrals to incompatibility with order public may be only when the negative effects of foreign law (not the foreign law itself) is contrary to the fundamentals of the rule of law in Ukraine; thirdly, it is referred to the impossibility of applying a specific rule of foreign law, not foreign law at all. As it can be seen, this approach of our legislators not only

refers to the application of lex fori, as the clause is directed only against certain provisions of foreign law, which, in itself, is decisive for a relationship.

**Conclusions.** The negative concept of public policy clause dominates in the modern private international law. The Ukrainian private international law also reflects the concept of negative forms of public ordre clause. The implementation of public ordre clause in this form allows to protect the national public policy, on the one hand, and to realize certain international private law interests by linking them to a particular legal system, which is the basis of rights and obligations, on the other.

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## ЗАСТЕРЕЖЕННЯ ПРО ПУБЛІЧНИЙ ПОРЯДОК У МІЖНАРОДНОМУ ПРИВАТНОМУ ПРАВІ

**Резюме**

Досі тривають намагання розкрити зміст поняття публічного порядку. Причина цьому — сама специфіка категорії публічного порядку. Категорія ця перш за все не правова, а соціальна, належна до категорій та понять системи внутрішньодержавних відносин. Тому, в кожному конкретному випадку вирішення питання про застосування іноземного права має проводитись з точки зору категорій саме цієї системи: як зачіпаються інтереси держави, який вплив здійснюється на ці інтереси, чи можна внаслідок такого впливу вивести систему з рівноваги та ін.

Механізм захисних застережень, як спосіб унеможливити руйнівний вплив іноземного законодавства на національний публічний порядок, сьогодні добре відомий у міжнародному приватному праві. У статті дається огляд одного з них — застереження про публічний порядок. З аналізу природи та характеру формулювань національних норм різних держав видно, що положення, спрямовані на захист національного публічного порядку, можуть конструюватися по-різному. Світовій практиці відомі дві концепції застереження ordre public: позитивна та негативна; причому негативна концепція застереження про публічний порядок є домінуючою у сучасному міжнародному приватному праві. Застереження про публічний порядок у міжнародному приватному праві України дає можливість, з одного боку, захистити національний публічний порядок, а з іншого — реалізувати певні міжнародні приватноправові інтереси через встановлення зв'язків останніх з тією правовою системою, яка і виступає підґрунтям суб'єктивних прав та обов'язків.

**Ключові слова:** ordre public, публічний порядок, застереження ordre public, застереження про публічний порядок.

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## ОГОВОРКА О ПУБЛИЧНОМ ПОРЯДКЕ В МЕЖДУНАРОДНОМ ЧАСТНОМ ПРАВЕ

**Резюме**

Попытки раскрыть содержание понятия публичного порядка не прекращаются и до сегодняшнего дня. Причина этого кроется в самой специфике категории публичного порядка. Категория эта, прежде всего, не правовая, а социальная, которая относится к категориям и понятиям системы внутригосударственных отношений. Поэтому в каждом конкретном случае решение вопроса о применении иностранного права должно осуществляться с точки зрения категорий именно этой системы: каким образом затрагиваются интересы государства, какое воздействие осуществляется на эти интересы, возможно ли вывести систему из равновесия вследствие такого воздействия и др.

Механизм защитных оговорок как способ предотвратить разрушительное воздействие иностранного законодательства на национальный публичный порядок сегодня хорошо известен в международном частном праве. В статье дается обзор одного из них — оговорки о публичном порядке. Из анализа природы и характера формулировок национальных норм различных государств видно, что положения, направленные на защиту национального публичного порядка, могут конструироваться по-разному. Мировой практике известны две концепции оговорки ordre public: позитивная и негативная; причем негативная концепция оговорки о публичном порядке является доминирующей в современном международном частном праве. Оговорка о публичном порядке в международном частном праве Украины дает возможность, с одной стороны, защитить национальный публичный порядок, а с другой — реализовать определенные международные частноправовые интересы путем установления связей последних с той правовой системой, которая и выступает основой субъективных прав и обязанностей.

**Ключевые слова:** ordre public, публичный порядок, оговорка ordre public, оговорка о публичном порядке.