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Content of a public policy clause

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Consideration of the operation of conflict of laws rules of private international law would not be complete if it did not investigate such an important issue as limiting its action in those cases when they refer a disputed issue to a different legal system than to the law of the country of the forum or the place of enforcement.

In other words, in all cases, one should obey the instructions of the conflict of laws rule on the application of foreign law. In practice, a conflict of laws rule refers to the law of a foreign state or to an international agreement that can create a situation where the enforcement of an award becomes impossible for the state court while applying the clause on "public policy" (public order) of its country.

The origin of this public order clause is to be found in Roman law. It was there that the principle "*ius cogens privator umpactis mutari non porest*" was formed and consolidated in writing. Its meaning was that it is impossible to violate the peremptory norms of Roman law by private agreements, since such agreements are incompatible with it (Roman law) and are null and void.

If you take a retrospective look at the evolution of private international law, it is not difficult to see that the category of "good manners" began to be applied immediately after the emergence of private international law. In the basic features that it has at present, emerged from the end of the 13th, the beginning of the 14th century and up to before the adoption of the French Civil Code in 1804. In Article 6 of the Code along with "good morals", the term "public order" (ordre public) was used and put in the first place, which soon migrated into the legislation of many countries of the world.[2]

The understanding of the legal content of "public order", *i.e.* in fact, in the entirety of norms that characterize it, in contrast to the philosophical or sociological understanding of this term, it is rather difficult. It can even be said that no one has succeeded in this until now, since the very idea of society about what is permissible and what is unacceptable and violates the formed concept of "good manners" has historically changed and is now different from one country to another.

One clear example is the cohabitation of same-sex people, and even more marriage between them, until quite recently was considered absolutely unacceptable, whereas today in more than a dozen countries of the world it is allowed and is no longer immoral.

In the Anglo-American legal literature, the section on public policy is often written as the tasks of the court in protecting or preserving public interests. Professors Clarkson and Hill point out it directly as "the purpose of some legal norms is to protect or promote public interests. Each country has interests assessed either directly on its own behalf, such as protecting its own security, or on behalf of those members of society who need it, for example, consumers or hired workers".[3]

The drafting history and language of the New York Convention explicitly define that "public policy" refers to the public policy of the state where enforcement of an award is seeking.[4] Recently, there has been a tendency in the doctrine to distinguish between 4 types of public policy:

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[2] KABATOVA, S. LEBEDEV E. Private International Law: Textbook[M]. 《Статут》 Moscow, 2011: 317.

[3] S.M.V. CLARKSON & JO HILL. Conflict of Laws[EB/OL](2016)[2020–11–04]. https://global.oup.com/academic/product/clarkson-and-hills-conflict-of-laws-9780198732297?cc=sa&lang=en. ISBN: 9780198732297.

[4] MOSES M. Chapter 11: Public Policy under the New York Convention: National, International, and Transnational[J]. 60 Years of the New York Convention: Key Issues and Future Challenges, 2019(6): 169–184.

- domestic public policy;[5]
- international public policy, which may not coincide in content with the domestic public order (for example, the one referred to in Article 6 French Civil Code);[6]
- transnational public policy that exists outside the framework of individual countries, sometimes referred to as a "valid international order", which expresses the fundamental principles on which the cooperation of states is built, and not the legal system of one state;[7]
- pan-European public order as a set of ideas, principles and provisions operating within the European Union as a whole.[8]

In the textbooks on private international law, the section on the public policy clause is based on an analysis of predominantly domestic legislation of certain countries. There are examples of the inclusion of a public policy clause in international agreements. For example, such a clause was in the trade agreement between the USSR and Austria in 1955 and even in trade agreements between socialist countries in the sections devoted to the regulation of the enforcement of arbitral awards.[9]

There are instructions on the need to protect public order in Articles 3-5 and 57-61 of the Bustamante Code of Private International Law,[10] in Article V (2) of the 1958 New York Convention,[11] and in Article 16 of the Rome Convention on the Law Applicable to Contractual Obligations,[12] explicitly states that the application of a rule of law of any country defined by this Convention may be refused only if such application is clearly not in accordance with the public policy of the country.

According to the Article 1193 of the Civil Code of Russia "public policy clause" is defined as following: "The norm of foreign law to be applied in accordance with the rules of this section shall not be applied in exceptional cases when the consequences of its application would clearly contradict the foundations of law and order (public order) of the Russian Federation. In this case, if necessary, the corresponding rule of Russian law applies.

Refusal to apply a norm of foreign law cannot be based only on the difference between the legal, political or economic system of the corresponding foreign state from the legal, political or economic system of the Russian Federation."[13]

Moreover, the Russian legislator focuses not only on the application of a foreign legal norm, but on the consequences of its application. Only in the event that the consequences of the application of a foreign norm would clearly contradict the foundations of the Russian legal order (public order), such a norm shall not be applied on the territory of the Russian Federation.

Based on what has been discussed above, the following conclusions can be drawn:

1. The origin of the public order clause goes back to Roman law, which enshrined the principle that it was considered unacceptable by private agreements to violate peremptory norms of Roman law, since such agreements are incompatible with it and are considered null and void: "*ius cogens privator umpactis mutari non porest*".

[5] 同上.
[6] 同【1】pp.314–326.
[7] 同【3】p.p.314–326.
[8] KUZNETSOV M N. Public policy clause in private international law of Russia and the countries of the European Union[J]. 2019: 23–25. . DOI:10.24411/2312-0444-2019-10002.
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[10] Code of International Private Law (Code Bustamante) (Havana, February 20, 1928)[S].
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[12] Convention on the Law Applicable to Contractual Obligations (Rome, 19 June 1980) [S/OL]. [2020–11–06]. http://docs.cntd.ru/document/901889343.
[13] Civil Code of the Russian Federation (Part 3) [S/OL]. [2020–11–06]. https://legalns.com/download/books/codecs/GrKRFCH3.pdf.

It was established that the peremptory norms of Roman law primarily protected the "good manners", "morality" and "ethics" of their slave society. This terminology was enshrined in the law of states of all subsequent eras and was almost literally reproduced in article 6 of the French Civil Code.

In the Anglo-American legal literature, the public order clause, in contrast to Europe and Russia, is associated with the tasks of the court in protecting or preference for public interests.

2. The modern tendency is revealed to distinguish four types of public order: domestic, international, transnational and public as a set of ideas, principles and provisions operating within the European Union.

It has been established that the source of norms protecting public order and limiting the operation of their own conflict of laws rule can be not only law, but also custom (like in Switzerland, Norway) and even an international agreement (trade agreement between the USSR and Austria 1955).

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