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DEVELOPMENT TRENDS OF PUBLIC POLICY EXCEPTION IN ARMENIA: AN OVERVIEW IN THE CONTEXT OF POST-SOVIET COUNTRIES

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Abstract. The public policy exception is one of the most important mechanisms of Private International Law that limits the application of the rules of foreign law which are chosen on the basis of conflict of laws principles, if such application may be contrary to the fundamentals of the legal order (public policy) of the Republic of Armenia. It is preferable to study the development tendencies of this mechanism, especially in the context of the Post-Soviet Countries, since its development in Armenia as a general legal concept began in the 1960s, when the reforms of the civil legislation of the USSR and Soviet States had launched.

Hence, within the framework of this work, a legal comparative analysis of the legislation of Armenia and most of the Post-Soviet Countries is conducted, judicial practice is discussed and on the basis of mentioned directions for the development of the public policy clause in Armenia are determined.

Key words - public policy; public policy exception; Private International Law; Post-Soviet Countries; legislation; judicial practice; a rule of foreign law.

1. INTRODUCTION

Currently, Private International Law has acquired considerable importance as a tool for regulating private legal relationships burdened with a foreign element, and especially the choice of law applicable to these relations.

Meanwhile, there are several states with their own characteristics: for example, their different legal systems, economic orders, religious and moral beliefs, etc., which determine the formation and predominance of different views on issues of legal importance in society. Consequently, to "preserve those characteristics" states provide legal mechanisms such as the public policy exception in Private International Law. Accordingly, public policy includes the basic legal principles, fundamental perceptions of justice and morality, and basic legal norms, which, due to their exceptional importance for society and the state, are universal[1]. In turn, the public policy exception means that a foreign law chosen based on Conflict of Laws rules does not apply, and subjective rights based on this foreign law are not protected if such application or protection contradicts the public policy of the own state[2].

[1] **Лебедев Сергей Николаевич, Кабатова Еелена Витальевна** - Международное частное право: Учебник. В 2 т. Т. 1: Общая часть / Отв. ред. С.Н. Лебедев, Е.В. Кабатова. – М.: Статут, 2011. – 400 с. **Lebedev Sergey Nikolaevich, Kabatova Elena Vitalievna** - Private International Law: Textbook. In 2 volumes. Volume 1: General Part / Responsible. editors S.N. Lebedev, E.V. Kabatova. - M .: Statut, 2011. - 400 p., p. 314.

[2] **Дмитриева Галина Кирилловна -** Международное частное право: учебник / отв. ред. Г.К. Дмтриева. - 4-е изд., перераб. и доп. - Москва: Проспект, 2016. - 680 с. **Dmitrieva Galina Kirillovna** - Private International Law: Textbook / ed. G.K. Dmtrieva. - 4th ed., Revised and Enlarged. - Moscow: Prospect, 2016. - 680 p., p. 162.

1. A BRIEF HISTORICAL OVERVIEW

The public policy exception as a legal mechanism that restricts the application of a rule of foreign law is a relatively new phenomenon in the domestic (Armenian) legal system. However, it is noteworthy that the ideology underlying it - to block the application of foreign law if it contradicts the basics of the legal system of the applying country - found expression in the domestic legal culture even much earlier than the French Civil Code (the Napoleonic Code) had been developed and the term "*ordre public*" was fixed in it. Particularly, in the Armenian Lawcode of Astrakhan of 1765 there were provisions regulating specific cases when a particular legal relationship was burdened with a foreign element, and the application of a foreign law was simply prohibited. For example, in paragraph 5 of Chapter 7, it was established that if a deed of obligation is written in a foreign country and in which the specified interest is more than half of one hundred percent per month, then that deed has no power (legal force) in the part exceeding half of one hundred percent[1]. Similarly, in paragraph 9 of Chapter 15, it was established that if a bill issued in a foreign country provides an interest exceeding half of one hundred percent per month, then this bill also has no power (legal force) in the part exceeding half of one hundred percent per month[2]. As we can see, such a high rate of interest was considered unacceptable in the local Armenian community, in fact, contrary to its mores, as a result of which the application of such interest established by documents drawn up based on a foreign law was blocked by the Lawcode.

Regarding the public policy exception as a separate and general legal mechanism, it can be noted that its development began during the time of the Armenian SSR, although there were certain rules during the time of the Russian Empire as well. Therefore, to study the development trends of this mechanism in the legal system of Armenia, it is necessary to simultaneously refer to the developments of other post-Soviet countries, taking into account also that the trade and economic relations with these countries are more extensive based on membership in various organizations, and being informed about their public policy exception mechanisms is, therefore, a necessity. It is noteworthy, that according to the survey conducted by the Ministry of Justice in 2022, 66.60% of the foreign counterparties of the persons who participated in the survey are from Russia, 9.25% from Georgia, the same amount from Ukraine, 5.55% from Kazakhstan, etc.[3]

In this context, the Russian experience is of particular interest, since private international relations among these countries have become more widespread in Russia conditioned by its geographical, demographic, political, and other specifics. Meanwhile, when studying the public policy exception, the experience of its practical application is of paramount importance, because in the case of the impossibility of a legislatively detailed definition of the concept of public policy, the center of gravity falls

[1] Available at https://digilib.aua.am/book/3300/3850/24612/%D4%B4%D5%A1%D5%BF%D5%A1%D5%BD%D5%BF%–D5%A1%D5%B6%D5%A1%D5%A3%D5%AB%D6%80%D6%84%20%D4%B1%D5%BD%D5%BF%D6%80%D5%A1%D5%AD%D5%A1%D5%B6%D5%AB%20%D5%80%D5%A1%D5%B5%D5%B8%D6%81 by 17.09.2024.

[2] Ibid.

[3] The Report "On the assessment of the needs and prospects of the establishment of a new arbitration center in Armenia" was provided in response to our request to the Ministry of Justice of Armenia.

on judicial practice[1] and there is quite an amount of judicial decisions regarding public policy exception by the Russian courts.

Now, turning to the current situation in Armenia, first, we note that Part 1 of Article 1258 of the Civil Code of the Republic of Armenia (hereinafter referred to as the Civil Code[2]) establishes that the rule of foreign law to be applied in accordance with paragraph 1 of Article 1253 does not apply if the consequences of application clearly contradict the foundations of the legal order (public policy) of the Republic of Armenia. In this case, as necessary, the relevant rule of law of the Republic of Armenia is applied. According to part 2 of the same Article, the refusal to apply a rule of foreign law cannot be based solely on the fact that the legal, political, or economic system of the relevant foreign state differs from the legal, political, or economic system of the Republic of Armenia.

It can be noted that this Article is aimed at limiting the application of the rule chosen by the Conflict of Laws principles. It is noteworthy that this regulation restricts the application of a foreign legal rule, and does not ban the foreign law itself, because it points to the possibility of the consequences of applying a foreign legal norm, not of the contradiction of foreign law. Otherwise, the denial of foreign law would also mean the denial of legal relationships formed within its framework[3], which would directly contradict the principles and ideas underlying Private International Law[4]. Part 2 of this Article is also of great importance, as it directly excludes the application of the public policy exception based on differences in the legal, political, or economic systems, thus decreasing the possibility of unnecessary application of the public policy exception.

The same Article also mentions that in case of restriction of the application of a foreign legal norm with the application of a public policy exception, the relevant rule of law of Armenia should be applied as necessary. In other words, instead of the direct application of the Armenian rule of law in these cases, the necessity of such application needs to be considered, which means that in each specific case, when applying the public policy exception, the applicability of another rule, including a foreign one, should be decided. Thus, it seems that the legislator provides the right for the one deciding on the application of the foreign rule of law to be guided by the Conflict of Laws principles and choose the most applicable legal norm[5]. Nevertheless, as we will see below such an interpretation usually is not followed by the Armenian courts.

To understand the developments of public policy exception's legal mechanisms in Armenia, it is preferable to refer to the legislation of the USSR, since, having had no completely independent statehood for many years, Armenia did not have independent legislation as well. Particularly, Articles 128 of the Fundamentals of Civil Legislation of

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[1] Ibid., **Dmitrieva Galina Kirillovna**, p. 164.

[2] See at Civil Code of the Republic of Armenia of May 5, 1998.

[3] **Արմեն Հայկյանց** - Միջազգային մասնավոր իրավունք: Դասագիրք: 2-րդ հրատարակություն (լրացումներով և փոփոխություններով) / Ա. Հայկյանց.-Եր.: Երևանի պետ. համալս. - Եր.: ԵՊՀ հրատ., 2013: 552 էջ. **Armen Haykyants** - Private International law. Textbook. 2nd edition (with additions and changes) / A. Haykyants.-Yerevan. Yerevan State University - Yerevan. YSU ed., 2013. 552 pages, pp. 148-9.

[4] **Г. В. Костикова** - Некоторые вопросы применения оговорки о публичном порядке в российском праве, вестник воронежского института ФСИН России, 2013, № 1. **G. V. Kostikova** - Some issues of application of the public policy exception in russian law, Bulletin of The Voronezh Institute of The Federal Penitentiary Service of Russia, 2013, No. 1, p. 105.

[5] Ibid., **Armen Haykyants**, p. 149.

the USSR and Union Republics of 1961[1] and Article 572 of the Civil Code of the Armenian SSR of 1964[2] provided that foreign law (as a legal act) is not applied if its application would contradict the principles of the Soviet order. Further, Article 158 of the Fundamentals of Civil Legislation of the USSR and the Union Republics of 1991[3] stipulated that foreign law does not apply if its application would conflict with the foundations of the Soviet legal order (public policy), and that in such cases Soviet law applies. However, due to the collapse of the Soviet Union during the same year, the last settlement was no longer directly expressed in the context of Armenian legislation, until the adoption of the current Civil Code.

Comparing the already mentioned regulations of the current Civil Code and the regulations of the USSR period, we can notice several differences. More specifically, in 1960-64 the regulation was about foreign law (as a legal act), in 1991 - about foreign law, and from 1998 until now - about the rule of foreign law: this is not only a difference in terms, but also the reflection of the approach to other states and Private International Law. For example, in the first case, with the exception of foreign law (as a legal act), the applicability of the public policy exception was limited only by legal act, though the sources of law vary from state to state. Besides, such regulation was dangerous in terms of the consequences of restricting overall the foreign legal act (as a whole). In the second case, the regulation was also about the contradiction of the whole law and not its particular rule. The regulation about a particular rule was provided only by the current Civil Code.

In turn, in 1961-64 regulation did not specify which law of the applying country should be applied in case of referring to public policy exception, the 1991 regulation referred to the direct application of the law of the Soviet Union, but, the current Civil Code refers to the application of the law of Armenia as necessary, which, indeed, is a more flexible regulation.

Finally, unlike the 1961-64 regulation, in the 1991 and the current regulations, it is simply stated that the application of the public policy exception cannot be based only on the difference in the legal, political, or economic systems of a foreign state, which, as we mentioned, is a fair limitation in terms of not unnecessarily restricting the application of the foreign law.

Consequently, we can observe clear trends in the positive development of Armenian legislation, which seeks not only to clarify the limits of the application of the public policy exception but also takes measures to exclude cases of its unjustified application.

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[1] See Закон СССР об утверждении Основ гражданского законодательства Союза ССР и союзных республик. 08.12.1961 г. Law of the USSR on the approval of the Fundamentals of Civil Legislation of the USSR and the Union Republics. 08.12.1961, available at http://museumreforms.ru/node/13894 by 29.11.2022.

[2] See Հայկական Սովետական Սոցիալիստական Ռեսպուբլիկայի Քաղաքացիական օրենսգիրք, Ընդունված Հայկական ՍՍՌ վեցերորդ գումարման Գերագույն սովետի երրորդ սեսիայի կողմից 1964 թվականի հունիսի 4-ին, «ՀԱՅԱՍՏԱՆ» հրատարակչություն, Երևան, 1964թ.. Civil Code of the Armenian Soviet Socialist Republic, Adopted by the Third Session of the Supreme Soviet of the Sixth Convocation of the Armenian SSR on June 4, 1964, Armenia Publishing House, Yerevan, 1964.

[3] See Основы гражданского законодательства Союза ССР и республик, 31 мая 1991 года N 2211-1. Fundamentals of Civil Legislation of The Ussr And Republics, May 31, 1991 N 2211-1, available at https://normativ.kontur.ru/ document?moduleId=1&documentId=32705 by 29.11.2022.

2. COMPARATIVE OVERVIEW

Turning to foreign practice, we note that Article 1993 of the Russian Civil Code[1] provides for almost the same regulation as Article 1258 of the Civil Code, with the only difference that it first emphasizes that a foreign rule will not be applied in "exceptional" cases (...), and then that the consequences of its application must contradict the public policy of Russia, given the nature of relationships that are burdened with a foreign element. In fact, this regulation is aimed at eliminating the unnecessary application of the public policy exception, in one case simply emphasizing the exclusivity of its application, and then drawing attention to the specifics of the legal relationships in question. However, we believe that these features are due to the peculiarities of Russian judicial practice.

Thus, there are many conflicting opinions about Russian judicial practice, especially about their tendency to limit the application of foreign law by unnecessarily applying the public policy exception[2]. But, along with this opinion, in fact, there is a judicial practice with a large number of cases in which, even if the specifics of the public policy exception or its definition are not fully disclosed, but still some characteristics are still discussed that make the application of this exception more predictable and contribute to the establishment of uniform and developing judicial practice. At the same time, it is important that this mechanism is discussed by the higher judicial instances, a phenomenon that is absent in Armenia, but would contribute to developing the application practice of this mechanism.

In particular, the Supreme Court of the Russian Federation considered the foundations of Russian social (society's) order within the framework of the public policy exception and noted that the exception can be applied only in cases where the application of a foreign legal rule may lead to consequences unacceptable to the Russian legal perceptions[3]. Later, the same Court indicated that within public policy should be considered those basic legal principles that are enshrined in the Constitution and laws of the Russian Federation[4]. In another case the Court indicated that public policy refers to the fundamental rules on the economic and social structure of society established by the state, the foundations of legal order, enshrined in the Constitution of the Russian Federation, and federal legislation[5]. The Supreme Court of the Russian Federation also stated that the essence of the concept of public policy cannot be identified with the content of the rules of national legislation, since the legislation of the Russian Federation allows the application of a foreign law, and such

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[1] See Гражданский кодекс Российской Федерации часть 3, 26 ноября 2001 года N 146-ФЗ. Civil Code of the Russian Federation, Part 3, 26 November, 2001 N 146-FZ

[2] **Михайлов Станислав Владимирович, Фатхи Валентина Игоревна -** К вопросу о применении оговорки о публичном порядке в судебной практике, Гражданско правовая аналитика, 2021. **Mikhailov Stanislav Vladimirovich, Fathi Valentina Igorevna** - On the issue of applying the public policy exception in judicial practice, Civil Law Analytics, 2021, p. 19; **A. B. АСОСКОВ** - Практика Президиума ВАС РФ: пример обоснованного применения оговорки о публичном порядке, Международный коммерческий арбитраж No. 1/2006 (январь-март). **A. V. ASOSKOV** - Practice of the Presidium of the Supreme Arbitration Court of the Russian Federation: an example of the justified application of the public order clause, International Commercial Arbitration No. 1/2006 (January-March), p. 24.

[3] Ibid., **G. V. Kostikova**, p. 104.

[4] See Постановление Президиума Верховного Суда РФ от 2 июня 1999 г. Resolution of the Presidium of the Supreme Court of the Russian Federation of June 2, 1999, available at http://www.sudbiblioteka.ru/vs/text_big1/verhsud_big_3709.htm. by 29.11.2022.

[5] See Определение Судебной коллегии по гражданским делам Верховного Суда РФ от 19 августа 2008 г. N 91-Г08-6. Definition of the Judicial Collegium for Civil Cases of the Supreme Court of the Russian Federation dated August 19, 2008 No. 91-G08-6.

difference only cannot be a basis for the application of public policy exception, which will lead to the rejection of the foreign law in general[1]. In the same context, it was also noted that the absence of relevant rules and regulations in Russian legislation does not in itself constitute a basis for the application of public policy exception[2].

The information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation is also noteworthy. According to it public policy must be understood as fundamental legal principles that have the highest imperative, universality, special social, and public significance and form the basis for building the economic, political, and legal systems of the state[3]. These can be considered principles of fundamental importance for the existence of society, distinguished by their "force" and application, as well as principles with functional significance for the state and society[4], which, according to some theorists, leads to constitutional principles[5].

Turning to other post-Soviet countries, we note that the legislations of Ukraine[6], Estonia[7], and Lithuania[8] also determine the application of the public policy exception by the consequences of applying a foreign rule. In turn, in Belarus[9], Kazakhstan[10], Moldova[11], Tajikistan[12], Uzbekistan[13], and Kyrgyzstan[14], it is explicitly established that

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[1] See Определение Верховного Суда РФ от 13.04.2001. Definition of the Supreme Court of the Russian Federation dated 13.04.2001, available at https://lawrussia.ru/texts/legal_305/doc305a500x270.htm by 29.11.2022.

[2] See Постановлении Пленума Верховного Суда РФ от 09.07.2019 № 24. Resolution of the Plenum of the Supreme Court of the Russian Federation dated 09.07.2019 No. 24, point 12.

[3] See Информационное письмо Президиума ВАС РФ от 26.02.2013 N 156. Information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation dated 26.02.2013 N 156.

[4] **Хахаев Дмитрий Дмитриевиич** - Конституционное ограничение применения российскими судами норм зарубежного права путем применения оговорки о публичном порядке, "Молодой учёный" No. 18 (152), Май 2017г. **Khakhaev Dmitry Dmitrievich** - Constitutional limitation of the application of foreign law norms by Russian courts through the application of the public policy exception, "Young Scientist" No. 18 (152), May 2017, p. 251.

[5] **Демирчян Виктория Вагановна** - Некоторые особенности применения оговорки о публичном порядке российскими судами. **Demirchyan Victoria Vaganovna** - Some Features of the Application of the Public Policy Exception by Russian Courts, p. 5.

[6] See ЗАКОН УКРАЇНИ Про міжнародне приватне право (Відомості Верховної Ради України (ВВР), 2005, № 32, ст.422). Law of Ukraine on Private International Law (Information of the Verkhovna Rada of Ukraine (VVR), 2005, No. 32, Article 422), Article 12.

[7] See Private International Law Act Passed 27.03.2002 RT I 2002, 35, 217, Article 7.

[8] See Civil Code of The Republic of Lithuania, 18/07/2000, VIII-1864, Article 1.11.

[9] See Гражданский Кодекс Республики Беларусь 218-З от 7.12.1998г. Civil Code of the Republic of Belarus 218-Z of 12/7/1998, Article 1099

[10] See Гражданский кодекс Республики Казахстан (Особенная часть) от 1 июля 1999 года № 409-I (с изменениями и дополнениями по состоянию на 12.09.2022 г.). Civil Code of the Republic of Kazakhstan (Special Part) dated July 1, 1999 No. 409-I (with amendments and additions as of September 12, 2022), Article 1090.

[11] See Гражданский кодекс Республики Молдова (Книга пятая. Международное частное право) от 6 июня 2002 года № 1107-XV. Civil Code of the Republic of Moldova (Book Five. International Private Law) of June 6, 2002 No. 1107-XV, Article 2581.

[12] See закон Республики Таджикистан о принятии и введении в действие части третьей Гражданского кодекса Республики Таджикистан. LAW OF THE REPUBLIC OF TAJIKISTAN On the adoption and entry into force of Part Three of the Civil Code of the Republic of Tajikistan, Article 1197.

[13] See гражданский кодекс Республики Узбекистан часть вторая. Civil Code of The Republic of Uzbekistan Part Two, Article 1164.

[14] See гражданский кодекс Кыргызской Республики часть II от 5 января 1998 года № 1. Civil Code of The Kyrgyz Republic Part II of January 5, 1998 No. 1, Article 1173.

the application of a foreign rule should not contradict to public policy of a given country, which can also be interpreted as a contradiction of the consequences of application: since the emphasis is on application of the rule, such an interpretation will lead to a discussion of the contradiction between the consequences of application. In other words, these regulations should not be interpreted verbatim, which may lead to more negative conclusions[1]. This uniformity is also because some of these states are members of the CIS (Commonwealth of Independent States), and the Model Civil Code adopted within the CIS establishes an identical rule[2]. Finally, we can single out only Georgia[3] and Latvia[4], where it is established that a foreign rule must contradict the public policy of a given country, which, as we have already noted, can lead to the denial of foreign law, which, at least, is not solidary from the point of view of the principles underlying Private International Law. It should be borne in mind that the content of a foreign legal norm and the consequences of its application may not coincide and in this regard, when applying a public policy exception, it is more advisable to consider the inconsistency of the consequences of the application of foreign rule with the public policy of a given country in a particular case[5].

As for the choice of the legal norm applicable to legal relationships in the case of the application of the public policy exception, in Russia, a rule identical to the Civil Code is established. In Ukraine, there is a clear indication that the law most closely related to the relationship (*lex causae*) is applied, and only if it is impossible to determine it, the relevant Ukrainian rule will apply. The legislation of Georgia and Latvia does not explicitly regulate which country's law is to be applied in such cases. It is assumed, that when choosing the applicable law, one should be guided by the rules established by the legislation of these countries, however, such uncertainty can be interpreted in different ways. In turn, the legislations of Belarus, Kazakhstan, Tajikistan, Uzbekistan, Kyrgyzstan, Moldova, Estonia, and Lithuania establish that the relevant legal rule of their country should be applied, which follows from the CIS model legislation. However, this is the case when the incorporation of model rules is better to be adapted, as it was done by the legislators of Armenia, Russia, and Ukraine. Otherwise, in those legislations, sufficient flexibility is not provided, and as a result, the law most appropriate to the regulation of relationships may not be chosen. Meanwhile, based on the economic interests of the country, foreign investors and counterparties will feel more guaranteed when they realize that relations between them and a resident of a given country will be regulated by more appropriate rules applicable to

[1] **Б.Т.Адышев** - О концепции «публичного порядка» в международном частном праве, Вестник КарГУ, 2008. **B.T.Adyshev** - On the concept of "public policy" in Private International Law, Vestnik of KarSU, 2008.

[2] See Модельный гражданский кодекс для государств - участников Содружества Независимых Государств, Рекомендательный законодательный акт, Часть третья, ПРИНЯТ Постановлением Межпарламентской Ассамблеи государств - участников Содружества Независимых Государств, Санкт-Петербург 17 февраля 1996 года. Model Civil Code for the Member States of the Commonwealth of Independent States, Advisory Legislative Act, Part Three, adopted by Resolution of the Interparliamentary Assembly of Member States of the Commonwealth of Independent States, St. Petersburg, February 17, 1996, Article 1200

[3] See Law of Georgia on Private International Law, Article 5

[4] See Civillikums, 28.01.1937, Valdības Vēstnesis, 41, 20.02.1937. Civil Law, 28.01.1937, Government Gazette, 41, 20.02.1937, point 24

[5] **Дмитриева Галина Кирилловна** - Международное частное право: Учебник для бакалавров / отв. ред. Г. К. Дмитриева. — Москва : Проспект, 2015. — 392 с. **Dmitrieva Galina Kirillovna** - Private International Law: Textbook for Bachelors / ed. G. K. Dmitrieva. - Moscow: Prospect, 2015. - 392 p., p. 108.

private international relations. In addition, these legislations cannot answer the question of how to act when the relevant rule or relationship is not familiar with the legislation of the applying country: in such cases, the choice of solutions provided by the Private International Law seems more appropriate[1].

Finally, the legislations of all these countries provide for the application of a public policy exception in cases where a foreign rule contradicts the public policy of a given country. The Belarusian legislator deviates from this pattern to a certain extent, also providing the possibility of applying the public policy exception "(...) in other cases provided for by legislative acts." Naturally, such regulation is rather vague and can lead to a lot of contradictory comments, unnecessary cases of application of public policy exception, and restrictions on the application of a foreign law with any "simple" mandatory rule[2].

Considering the above, we note that the legislator of Armenia among other post-Soviet countries has adopted quite progressive approaches and is one of those states where the necessary guarantees have been established at the legislative level both for the proper application of the public policy exception and for determining cases of its abusive use. Perhaps, in terms of greater optimization of existing regulation, it seems appropriate to follow the approach of the Ukrainian legislator by establishing a clear regulation regarding the rule applicable in cases when public policy exception has been applied. However, unlike the Ukrainian approach, which mentions the law most closely related to the relationship, we propose to establish in the Civil Code that in such cases the law chosen based on the provisions of its Section 12 (Choice of Law clauses) should apply, and only if it is impossible - the relevant law of Armenia. This approach will ensure, conducting a more flexible and comprehensive analysis and choosing the most appropriate rule. It is noteworthy that the need to reform legislation on Private International Law, in general, is also enshrined in the Concept of "Reform of Private International Law", published in 2014, which notes that Conflict of Laws rules should be considered in dynamics, fixing the need for their development in parallel with changes and developments in private turnover, including following the global development of Private International Law[3].

3. JUDICIAL PRACTICE OVERVIEW

Finally, regarding the judicial practice of public policy exception, we should note that it is not yet sufficiently developed in Armenia. It is enough to state that the Court of Cassation or Constitutional Court have not yet made decisions concerning this mechanism, which is a necessity to determine the criteria for the proper application and the correct direction to lower instances. At the same time, we note, that in other countries that we have discussed, in some cases, higher instances referred to the public policy exception. For example, the plenum of the Supreme Judicial Chamber of Moldova noted that public policy is a system of legal norms of imperative nature, which are aimed at protecting the institutions and fundamental values of society,

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[1] **Казановская Ю.А.** - Проблемы совершенствования правовой регламентации оговорки о публичном порядке в международном частном праве Российской Федерации. **Kazanovskaya Yu.A.** - Problems of Improving The Legal Regulation of The Public Policy Exception In The Private International Law of The Russian Federation, p. 8.

[2] Տե՛ս **В.А. Барышев, В.А. Сидоревич** - Оговорка о публичном порядке в международном частном праве республики Беларусь. **V.A. Baryshev, V.A. Sidorevich** - Public Policy Exception In Private International Law of The Republic Of Belarus, p. 22.

[3] See at https://moj.am/legal/view/article/717 by 17.09.2024

ensuring the social protection of all people, human rights and freedoms, as well as the economic development of the state[1].

The courts of first instance in Armenia mainly turn to public policy in the context of recognition of arbitral awards or foreign judicial decisions, mostly being content with simply noting the compliance with public policy. Only in 13 court cases of the 138 studied, the court or a party attempted to conduct some kind of analysis of public policy or public policy exception[2]. The characteristic feature of the remaining 13 court cases is that the courts superficially address the features of public policy, the limits of the application of public policy exception, and then accept or reject applications (lawsuits) on other grounds.

For example, in one case, the parties challenged the issue of applicable law, and the defendant mentioned that the rules of Iranian family law could not be applied because they contradict the public policy of Armenia. Although the court, when making its decision, was not based on the circumstance of contradiction to public policy, in its reasoning it directly confirmed the statement of the defendant[3]. Consequently, not only the court, without explaining the public policy, its limits, and peculiarities of application, simply accepted the argument about its inconsistency but also stated that the application of the entire family law of Iran contradicts the public policy of Armenia. This approach not only contradicts the Civil and Family Codes of Armenia but is also contradictory from an international legal and political point of view since in such circumstances it is possible that in the future the Iranian courts will refuse the recognition of Armenian judicial decisions based on reciprocity.

The position of the court in another case is more positive when the court rightly established that both the legislation and the relevant arbitration rules rest the right to suspend proceedings with the arbitration tribunal, and therefore there can be no question of a violation of public policy[4]. In another case, the court referred to the fact that in cases of challenging an arbitral award based on contradiction to public policy, the court may make such a decision if the arbitral tribunal, by its award, obliges the parties to make a transaction concluded under a malicious agreement or on enslaving terms[5]. In another interesting case, when the party indicated as a justification for the violation of public policy that the recognition of a foreign judicial decision would violate the right of parents to choose the citizenship of their child, the court, based on the legislation of Armenia, stated that there is an agreement between the parents on the citizenship of the child, and under such conditions, a foreign judicial decision cannot contradict the public policy of Armenia[6]. In another case, the court rightly did not refer to the contradiction of public policy mentioned by the party, noting that the relationships in connection with the arbitration and related to its procedure are subject to discussion under other provisions of the Law on Commercial Arbitration and correctly assessing the situation, did not find the violation of public policy when there

[1] **Наталья Осояну** - оговорка о публичном порядке в международном частном праве Республики Молдова, Studii Juridice Universitare, 1-2 2019. **Natalia Osoianu** - Public Policy Exception In Private International Law of The Republic of Moldova, Studii Juridice Universitare, 1-2 2019, p. 104.

[2] The research was conducted in the official portal datalex.am searching with an exact text filter the words «հանրային կարգին» (to the public policy).

[3] See Court Award of 04.05.2018 in Civil case no. ԵԱՔԴ/0642/02/14.

[4] See Court Award of 07.06.2018 in Civil case no. ԵԿԴ/2004/02/2017 and the decision of the Civil Court of Appeal of 25.10.2018.

[5] See Court Award of 05.06.2020 in Civil case no. ԵԴ/10554/02/20.

[6] See Court Award of 16.04.2021 in Civil case no. ԵԴ/22943/02/20 and the decision of the Civil Court of Appeal of 20.08.2021.

was another violation clearly defined by law[1]. But, unlike the last case, the court recognized the arbitration award in another case as contradicting the public policy, arguing that the award regarded a dispute that was not provided for in the arbitration agreement, did not comply with its terms, or decided such issues that are outside the arbitration agreement[2], which is a wrong application of public policy exception, because there is another norm explicitly regulating such situations.

It should be noted that in all these cases, the courts did not consider the specifics of public policy. In the only case, we have encountered, where the court tried to reveal the specifics of public policy and the limits of its application, the court noted that the concept of public order includes the combination of political, legal, economic, and other systems, where legal systems differ from each other in the relationship and use of law sources, precedent practice, the origin and development of the legal system; the economic system includes all institutions, organizations, laws, traditions, beliefs, prohibitions, which directly or indirectly affect economic behavior; and the political system is a system of politics and management. It is also noteworthy that the court emphasized the fact that the actual violation of public policy is a complex procedure requiring proof and can be justified solely by specific evidence. As a result, the court found no inconsistency with public policy[3].

Accordingly, the judicial practice showcases that the Armenian courts are not aimed at applying the public policy exception, but they are also not aimed at identifying and interpreting the elements and features of this mechanism, especially in the absence of relevant decisions of the Court of Cassation or Constitutional Court, because of which inappropriate or incorrect application of this mechanism is not excluded.

4. CONCLUSIONS

Summing up, we must state that the public policy exception has gone through a centuries-old path of development in the domestic legal culture, starting in the form of special regulations restricting the application of foreign law in some cases, and then developing into a general legal mechanism, which within the framework of private legal relations may exclude the application of a rule of foreign law in any cases. Consequently, it is possible to notice and emphasize the tendency of the Armenian legal culture, on the one hand, to expand the possible circle of cases when a public policy exception can be applied, and on the other hand, to curb manifestations of possible unnecessary application of this exception. At the same time, in both cases, this approach is the result of consolidation in legislation following international practice, however, without the formation of proper judicial practice, even the best legal rules may be in vain.

At the same time, since gaining independence in 1991 having adopted mostly Russian legislative approaches, it is now necessary, along with other regulations on Private International Law, to reform the mechanism of public policy exception. Furthermore, we believe that such reforms should more clearly prompt the courts to properly apply the exception, giving them the opportunity to address it flexibly. In this context and taking into account the research conducted in this paper, we consider it appropriate to define a more advanced rule on the choice of applicable rule in cases of applying public policy exception: that is, in such cases, the law chosen in accordance

[1] See Court Award of 26.07.2022 in Civil case no. ԵԴ/13801/02/21.
[2] See Court Award of 24.06.2021 in Civil case no. ԵԴ/25771/17/21.
[3] See Court Award of 05.04.2021 in Civil case no. ԵԴ-30819/02/20.

with the provisions of Section 12 of the Civil Code (Choice of Law clauses) applies, and only if it is impossible, the relevant Armenian law applies. In other words, when applying the public policy exception, in any case, the international nature of relationships must be taken into account, and even if a rule of foreign law contradicts the public policy of Armenia, this in itself will not imply the application of the Armenian law, but the choice of law following the principles and spirit of Private International Law principles, which may differ from the rules Armenian law, but will correspond to the essence of this Private International relationship.

As a result, the public policy exception will be used as an instrument limiting the application of a rule of foreign law, rather than prejudicing the choice of a law of a specific country (the applying/recognizing country). In turn, as a derivative result of such a change, the courts, when referring to the public policy exception, will conduct a more thorough study and consideration to select the correct applicable rule, also eliminating cases of unnecessary application of the exception.

ՀԱՆՐԱՅԻՆ ԿԱՐԳԻ ՄԱՍԻՆ ՎԵՐԱՊԱՀՄԱՆ ԶԱՐԳԱՑՄԱՆ ՄԻՏՈՒՄՆԵՐԸ ՀԱՅԱՍՏԱՆՈՒՄ. ԱՆԴՐԱԴԱՐՁ ՀԵՏԽՈՐՀՐԴԱՅԻՆ ԵՐԿՐՆԵՐԻ ՀԱՄԱՏԵՔՍՏՈՒՄ

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Համատոռագիր: Հանրային կարգի մասին վերապահումը միջազգային մասնավոր իրավունքի կարևորագույն կառուցակարգերից է, որը սահմանափակում է օտարերկրյա իրավունքի նորմի կիրառումը, որն ընտրվում է կոլիզիոն նորմերի հիման վրա, եթե այդպիսի կիրառումը կարող է հակասել Հայաստանի Հանրապետության իրավակարգի հիմունքներին (հանրային կարգին): Նախընտրելի է ուսումնասիրել այս կառուցակարգի զարգացման միտումները հատկապես հետխորհրդային երկրների համատեքստում, քանի որ Հայաստանում դրա զարգացումը որպես ընդհանուր իրավական հայեցակարգ իրականում սկսվել է 1960-ական թվականներին, երբ սկսվել էին ԽՍՀՄ և խորհրդային պետությունների քաղաքացիական օրենսդրության բարեփոխումները:

Ուստի աշխատության շրջանակներում իրականացվում է Հայաստանի և հետխորհրդային երկրների մեծամասնության օրենսդրության իրավահամեմատական վերլուծություն, քննարկվում դատական պրակտիկան և դրանց հիման վրա ուրվագծվում Հայաստանում հանրային կարգի մասին վերապահման զարգացման ուղղությունները:

Բանալի բառեր - *հանրային կարգ; հանրային կարգի մասին վերապահում; միջազգային մասնավոր իրավունք; հետխորհրդային երկրներ; օրենսդրություն; դատական պրակտիկա; օտարերկրյա իրավանորմ:*

ТЕНДЕНЦИИ РАЗВИТИЯ ОГОВОРКИ О ПУБЛИЧНОМ ПОРЯДКЕ В АРМЕНИИ: ОБЗОР В КОНТЕКСТЕ ПОСТСОВЕТСКИХ СТРАН

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Абстракт. Оговорка о публичном порядке является одним из важнейших механизмов международного частного права, ограничивающим применение норм иностранного права, выбранных на основе коллизионных принципов, если такое применение может противоречить основам правопорядка (публичного порядка) Республики Армения. Предпочтительнее изучить тенденции развития этого механизма, особенно в контексте постсоветских стран, поскольку его развитие в Армении как общеправовой концепции фактически началось в 1960-х годах, когда стартовали реформы гражданского законодательства СССР и советских государств.

Поэтому в рамках этой работы проводится правовой сравнительный анализ законодательств Армении и большинства постсоветских стран, обсуждается судебная практика и на их основе определяются направления развития оговорки о публичном порядке в Армении.

Ключевие слова - *публичный порядок; оговорка о публичном порядке; международное частное право; постсоветские страны; законодательство; судебная практика; норма иностранного права.*