4 INTERNATIONAL AND COMPARATIVE LAW
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THE NATURE, CONTENT AND APPLICATION OF "PUBLIC ORDER" IN PRIVATE INTERNATIONAL LAW

Abstract

In this article I would like to focus on the study of such aspects of this problem as:nature, content and application of "public policy" in private international law. Given the current situation in Kazakhstani practice, it is obvious that the questions we have raised, especially the question of contradiction to public order, are more theoretical in nature and practical in nature for international private law. However, such a basis as contradiction to public order, in the question of public order arises when applying the norms of foreign law, when executing foreign arbitration and judicial decisions, and when providing legal assistance (for example, executing an assignment, carrying out procedural actions) to a foreign state. Despite this, the combination of words "public order" has not yet found a single precise, specific, most accurate definition reflecting its meaning.

Key words: international private law, reciprocity, public policy, arbitration award, recognition, enforcement, arbitration agreement.

Introduction

The ongoing processes of establishing and strengthening international relations in various spheres determine the formation of a large number of subjects of foreign economic activity, which are building their relations with foreign partners with increasing intensity. Legal regulation of such relations inevitably leads to the interaction of different national legal systems. As a result, there is mutual penetration into the legal space of one state of foreign laws, foreign judicial and arbitration decisions of another state.

At the same time, the process of interaction of legal systems inevitably leads to the emergence of various kinds of collisions, difficulties and problems. Thus, in connection with the expansion of international cooperation, the number of disputes complicated by a foreign element, considered by state courts and arbitrations, is also increasing. And one of the main problems in this regard is the definition of the applicable law in regulating private law relations complicated by a foreign element, when the law enforcement officer faces the task of determining the law of which country should regulate specific private law relations; whether the law of the Republic of Kazakhstan or a foreign

state should be applied; if foreign law should be applied, how to determine its content and whether there are grounds for its non-application.

In the course of activities to determine the applicable law, the law enforcement officer inevitably encounters such legal concepts of international private law as primary qualification, reference of a conflict rule, establishment of the content of foreign law norms. In addition, law enforcement officers may face issues of limiting the effect of international private law norms (which include mandatory norms, the public order clause, and the norm prohibiting "circumvention of the law," reciprocity, and retortion). Some of these aspects are also important in the process of applying foreign law norms in Kazakhstan, enforcing foreign judicial and arbitration decisions, and enforcing orders from foreign government bodies.

Despite the fact that certain above-mentioned aspects of the issues of determining the applicable law from one angle or another have been studied and regulated for quite a long time, they are still assessed ambiguously, since in different legal systems there is a different approach of the legislator and law enforcement officer.

The importance of solving the above issues is due to the fact that they permeate the entire branch of international private law and they concentrate complex issues of conflict regulation, which are basic for the institutions of the general and special parts of international private law. Consequently, the place and role of international private law in the modern world is of great importance for regulating private law relations complicated by a foreign element. The study of this topic can allow the legislator, the law enforcement officer to regulate relations complicated by a foreign element objectively and without difficulty. In addition, the topic of the study has a positive impact on the formation of ideas of law enforcement officers about foreign legislation, the practice of its application, and the adoption of positive experience of foreign countries. Consequently, international private law is currently of particular interest, especially in light of the implementation of all planned state programs by the President of the Republic of Kazakhstan.

Materials and methods

The topic of the research is determined by the presence of controversial issues in the theory of international private law, the presence of gaps and contradictions in practice and legal norms, scant practice (and in some cases its closed nature), as well as the lack of comprehensive research on this issue.

The analysis of theoretical provisions concerning the research topic, their comparison with the current legislation and practice, allowed us to conclude that there are certain contradictions that create obstacles in law enforcement activities. Further improvement and development of international private law depends primarily on the development of theoretical research in this area and, as a consequence, also depends on the improvement of the legislative framework regarding conflict and material rules governing private law relations complicated by a foreign element, as well as their application.

The methodological basis of the scientific research was made up of general scientific methods of cognition, in particular, dialectical and systemic approaches to the study of socio-legal phenomena. The research methodology was made up of specific scientific methods of cognition, in particular, statistical, sociological, comparative law, logical and linguistic. In writing the article, the author relied on the generally accepted fundamental provisions of the general theory of law, works on international private law, and civil law of the Republic of Kazakhstan.

In the course of the study, scientific works on the problems of international private law were of great scientific interest, and the greatest interest for the present work was caused by the studies of L.P. Anufrieva, A.P. Belov, M.M. Boguslavsky, M. Wolf, L.N. Galenskaya, G.K. Dmitrieva, N.Yu. Erpyleva, V.P. Zvekov, M. Issad, V.M. Koretsky, S.B. Krylov, L.A. Lunts, A.N. Makarov, N.I. Marysheva, A.A. Merezhko, Yu.E. Monastyrsky, I.S. Peretersky, A. Pilenko, A.A. Rubanov, L. Raape, J. Storey, M. Rosenberg, O.N. Sadikov, D.V. Saushkin, Zh. Shapira and others.

In the Republic of Kazakhstan, certain problems and aspects of private international law are studied by G.E. Abdrasulova, E.S. Abdrakhmanova, A.A. Dzhanaleeva, K.B. Ibraeva, D.A. Isaikin, G.B. Ispaeva, K.S. Maulenov, M.K. Suleimenov, K.A. Talzhanov et al.

Results and discussion

Over the years since the introduction of the clause on public order into the theory and practice of international private law, its content has been interpreted in different ways. It should be noted that of all the issues we have studied, the issue of public order is the one most frequently considered in the literature on problems of international private law. Despite this, the combination of words "public order" has still not found a single precise, specific, most accurate definition reflecting its meaning.

For international private law, the concept of "public order" is important because it is one of the main limitations of the effect of the rules of international private law. The question of public order arises when applying the rules of foreign law, when executing foreign arbitration and judicial decisions, and when providing legal assistance (for example, executing an assignment, carrying out procedural actions) to a foreign state.

J.G. Morozova connects the emergence of the public order clause with the proclamation of the principle of autonomy of will in Roman law, in connection with which it became necessary to create a rule that the norms of public law, guaranteeing the normal functioning of the most important state institutions and necessary for the very existence of the state, cannot be changed by individuals. In addition, the state had to take care of preserving the existing system of moral values in society, which expresses the unwritten principles of community life, moral and ethical ideas of citizens prevailing in society. Because each state creates norms intended to regulate internal relations. And when there is a need to use a foreign law that is not similar to domestic legal norms, then the state faces the problem of ensuring its public interests both at the international level and in the domestic sphere [1, p. 14].

According to R.Sh. Khasyanov, the term-concept "public order" began to enter into active legal circulation in Western Europe since the 18th century as one of the political and legal instruments for protecting particularly significant, general "public" interests of society and the state within the country by public authorities. In connection with the expansion of international trade and economic relations, the development of property and family ties between citizens of different countries, contradictions and conflicts of state and private interests of different states began to arise. The courts faced the problem of choosing the applicable law: to apply the law of their own state or foreign law. Legislative and judicial practice followed the path of enshrining and recognizing conflict rules that allow the courts of one state to apply the legal norms of another state. But at the same time, states began to enshrine in their legislation a special "protective" rule - the so-called "public order clause". This clause allowed the courts to limit the application of foreign law rules to which the conflict rule refers [2, p. 11].

The Anglo-American doctrine indicates that the public policy (ordre public) rule was historically established earlier in Anglo-Saxon law than in continental law. The first use of the concept of "public order" can be attributed to the 15th century, while in the continental doctrine it first appeared only in the mid-19th century. But, despite this, the scope of application of the public order clause is narrower in modern Anglo-American law. The legislative consolidation of the concept of "public order" was first noted in the Napoleonic Code. In the aspect of the positive (French-Italian) concept, public order is usually understood as "laws affecting public order and good morals." According to French law, such norms have priority over the agreement of individuals and applicable foreign law [3, p. 99]. It can be said that all attempts to define the content of public order originate from this Code. Having as its basis the public-law moment, public order is at the same time considered in relation to the actions of conflict norms and norms of foreign law, representing, on the one hand, the interweaving of private and public law, and on the other hand, a contradictory phenomenon that to this day does not have specific outlines and definitions.

The doctrine of public order is considered one of the oldest and key in the history of the science of private international law. It expresses the desire of theorists of private international law to determine the boundaries of the competence of foreign legislative jurisdiction. At the same time, it is noted that the main purpose of the doctrine of Ordre Public is to develop such a necessary amendment to the operation of the principles of determining competent laws, which protects against damage to the legal system of the court when applying foreign law [4, p. 91]. It was spoken of as: "the rights of sovereignty and political independence", as well as the highest principles of individual and social morality, respect for the natural rights of man, and the principles of economic order [5, p. 116]; the basis on which all international private law is based; "public law"; "social law", i.e. laws concerning

the rights of society (Laurent); "laws designed to preserve the state"; "a set of laws that ensure social equilibrium", which included norms of criminal and administrative law, laws on property rights, on monetary circulation and rules of morality [6, p. 54]; a set of legal norms that a given state considers to be related to its "essential interests" (interest essentials) [5, p. 125].

The theory cites the opinion of the first of the theorists who examined the problem of public order in detail (Savigny), who believed that the norms of public order are those norms of domestic law that, by exception, contrary to the rules of conflict of laws, do not give way to foreign norms, those norms that are applied by a judge in any case. These norms are reduced to two groups: 1) the first consists of laws of a strictly compulsory nature, which, due to their compulsory nature, are incapable of free circulation. Here he included moral principles (for example, a law prohibiting polygamy), or public good (this is a law prohibiting Jews from acquiring real estate); 2) the second group includes legal institutions of a foreign state, unknown to domestic law and, due to this, not subject to legal protection in a domestic court. As an example, he cited the institution of civil death, known to French law and unknown to German law. Savigny believed that the use of a reference to public order is an anomaly [6, p. 54].

In connection with the impossibility of defining the scope of public order, L.A. Lunts said that "the uncertainty of the category of public order is now elevated to one of the principles of international private law" [7, p. 271]. Another source notes that the term "public order" is a tribute to tradition [2, p. 10].

It is hardly possible to agree with the last statements, since, firstly, the state of uncertainty in itself cannot be a fundamental principle of law, this is the area that does not tolerate approximation. Secondly, when a judge frequently and without sufficient grounds applies a clause limiting the effect of foreign law, this leads to the fact that he always fills the resulting void in regulation with his domestic law. Consequently, the need for conflict regulation of disputes disappears altogether (since, in the end, the judge applies only his own law anyway). In addition, it is impossible to talk about "public order" as a phenomenon that has "outlived" itself, representing only a "tribute to tradition", since at any time its consolidation in legislation represents a certain kind of "protection" and "filter".

Thus, the definition of public order has occupied and occupies a significant place in theory. This is due to the fact that, by subsuming various legal, political and moral categories under "public order", a judge can expand his powers to limit the application of foreign law. Such an unjustifiably broad application of the clause to a certain extent contradicts the principle of international comity.

The doctrine, in turn, was reflected in the legislation of virtually all countries of the world, having formed in the form of two concepts of public order: negative (German) and positive (French). In the first case, the application of foreign law is limited due to the fact that, due to some of its inherent characteristics, properties, it is incompatible with the public order of the state where the foreign law norm should be applied. According to the second concept, the properties of foreign law are not considered at all, and decisive importance is given to national super- or super-mandatory norms, which, as a result of their special position, do not allow the application of foreign law.

However, these two theories do not define the content of public order, but merely represent a way of normatively, verbally fixing the reservation on public order in legislation. How is the issue of public order resolved in the legislation of states? It should be noted that, fixing the reservation on public order, almost no state specifies its content.

Thus, Article 1258 of the Civil Code of Armenia states that a norm of foreign law shall not be applied when the consequences of its application would clearly contradict the principles of legal order (public order) of the Republic of Armenia. In this case, the norm of Armenia shall be applied and guarantees of non-application of the reservation as a result of differences in political, economic and legal systems are established [8, p. 71]. The Civil Code of Belarus proceeds from the fact that foreign law shall not be applied in cases where its application would contradict the principles of legal order (public order), as well as in other cases expressly provided for by legislative acts [8, p. 81].

Article 5 of the Law on International Private Law of Georgia states that the legal norms of a foreign state shall not be applied in Georgia if they contradict the fundamental legal principles of Georgia [8, p. 91].

According to the Egyptian Civil Code, the provisions of a foreign law shall not be applied if its application is contrary to good morals or public order in general [8, p. 298].

The UAE Civil Transactions Law is based on the following: foreign law does not apply if it is contrary to Islamic Sharia, public order or morality. Public order is considered to include matters relating to personal status, such as marriage, inheritance and descent, as well as matters relating to sovereignty, freedom of trade, circulation of material assets, rules of private property and other rules and regulations on which society is based [8, p. 452].

The Tunisian Code of Private International Law includes in the public order issues in relation to which the parties do not have free discretion. The clause itself can be used by a judge only when the provisions of foreign law contradict the fundamental approaches of the legal system [8, p. 566].

The wording of the Civil Code of Uruguay is interesting, Article 2404 of which states the following: foreign laws that clearly contradict the essential principles of international public order on which the Republic of Uruguay bases its legal personality shall not be applied [8, p. 590].

In the Bustamante Code, a number of issues are attributed to international public order, such as constitutional provisions; rules on the protection of the individual and the community established by state or administrative law; rules on the form of a will; cases of incapacity to inherit; prohibitions on renouncing the community of acquisitions during marriage; rules rejecting the inalienability of a dowry; rules prohibiting employment for life or for more than a certain period, etc. [8, p. 749].

Thus, the public order clause is contained in the laws of almost all countries, the only difference is how states define this public order. In addition, this is due to differences in culture, legal system, and different political approaches. Judging by the examples given, the legislative approach does not differ, as well as the doctrinal one, in any special specification in establishing the scope of public order. Here, again, there is a mixture of it with legal, moral concepts and imperative norms of states.

The existing uncertainty in the content of public policy can, of course, affect the law enforcement activities of judges. Firstly, it can lead to an unlawful, extended application of the clause and, as a consequence, by abusing their powers, judges can forget that the decision of a specific case in the sphere of international private law affects, first of all, the rights and obligations of the parties to the dispute – individuals and legal entities.

Public policy may also be a basis for refusing to enforce arbitration awards of one state in another. Thus, in the UK, an arbitration award will not be enforced if the underlying obligation is contrary to public policy in the country of enforcement, whether it is the UK or any other country. An example is the 1988 case of Lemenda trading Co. ltd. v. African Middle east petroleum ltd., in which the underlying obligation was that the intermediary was obliged to use his personal influence to conclude a contract in Qatar (however, the ways of using such influence, be it a bribe, payoff, threats or other means of exerting influence, were not specified). The arbitration award, made outside the UK, was presented for enforcement in the UK, where the defendant had assets. The judge refused to enforce the award on the basis of fundamental principles of morality, and also because the contract violated identical public policy in the country of enforcement [9]. In general, in this matter, judges rely on subparagraph b) of paragraph 2 of Article 5 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards1958. [10], which states that recognition and enforcement of an arbitral award may be refused if the competent authority of the country in which recognition and enforcement is sought finds that recognition and enforcement of the award are contrary to public policy of the country. However, the Convention does not specify the content of public policy either.

Results and discussion

As for the Republic of Kazakhstan, as M.K. Suleimenov notes, the public order clause in the judicial practice of Kazakhstan took place for the first time. This was a case related to the execution of arbitration court decisions. The London Court of International Arbitration issued an arbitration award on November 22 2005. in the case of Belocorp Scientific and Sapkodyu S.K.L. v. Kulan Group LLC, Giprosvyaz LLC and Web.kz LLC, according to which Belocorp Scientific is granted the right to collect a certain amount from the defendants jointly and severally. Belocorp Scientific filed an application for a writ of execution for the compulsory execution of this arbitration award with the specialized inter-district court of Astana, which, in turn, issued a ruling that the recognition and enforcement of the arbitration award are contrary to the public policy of the state, since the award was made in relation to three defendants, without specifying the share of each of them. On this basis, the court

refused to satisfy the application of Belocorp Scientific for the issuance of a writ of execution for the compulsory execution of the arbitration award. As M.K. rightly notes. Suleimenov, "it is very difficult to assume that the failure to define the type of liability in an arbitration award relates to exceptional and extraordinary cases that infringe on the foundations of the state and social structure or the foundations of the rule of law" [11]. This is despite the fact that, according to paragraph 2 of Article 1090 of the Civil Code, the refusal to apply foreign law cannot be based solely on the difference between the political or economic system of the relevant foreign state and the political or economic system of the Republic of Kazakhstan. The basis for applying the clause is not simply "dissimilarity" or differences in law, but the negative consequences that the norm may entail as a result of its application.

Another case from the practice of the Republic of Kazakhstan. In the summer of 2016, the attention of the legal community was attracted by a number of publications by M.K. Suleimenov [12], which described the situation that arose from the cancellation of the decision of the Kazakhstan International Arbitration (KIA) dated April 6, 2016 by the determination of the Specialized Interdistrict Economic Court (SIEC) of Almaty dated June 27, 2016. The SIEC judge recognized the contradiction of the KIA decision to public order as the basis for the cancellation of the arbitration decision. Briefly about the situation itself: the dispute considered by the KIA concerned the conclusion of a preliminary agreement, its non-fulfillment and the return of the deposit in accordance with the terms of the Civil Code of the Republic of Kazakhstan. At the same time, it should be immediately stipulated: to resolve the dispute, the KIA applied the law of the Republic of Kazakhstan. The KIA decision was canceled by the determination of the SIEC of Almaty. The reference to public order in the determination was more than inappropriate.

In general, unfortunately, it is already possible to draw a conclusion about the unfavorable trend of misunderstanding and application of the public order clause in the law enforcement practice of the Republic of Kazakhstan.

It should be noted that the division of the public order clause according to the negative and positive concepts is also reflected in the legislation of the Republic of Kazakhstan. Thus, if Article 1090 of the Civil Code of the Republic of Kazakhstan, which establishes the public order clause, is based on the negative concept, then Article 1091, which determines the application of mandatory norms (the so-called super-mandatory norms), establishes the positive concept of public order. In the first case, the application of foreign law that contradicts the foundations of the legal order of the Republic of Kazakhstan is excluded; in the second case, there is a certain set of such mandatory norms of the state that exclude the application of foreign law. If the situation with the positive clause in the Civil Code (mandatory norms) is more or less clear, i.e. such super-mandatory norms are found in many laws, such as, for example, paragraph 3 of Article 153 of the Civil Code (failure to comply with the simple written form of a foreign economic transaction entails the invalidity of the transaction); paragraph 2 of Article 177 of the Civil Code (the limitation periods are provided for by law and cannot be changed by agreement of the parties); Art. 380 of the Civil Code (ensuring freedom of contract), etc., then determining the content and scope of the clause on public order in the sense of the negative concept, again, does not seem possible. At the same time, public order should be understood as the basic principles and principles of the legal institutions of the state.

Also, as in other countries, in the Republic of Kazakhstan there is no precise definition of the concept of "public order". Although it is reflected, in addition to the mentioned article in the Civil Code, in paragraph 1) of Article 2 of the Law of the Republic of Kazakhstan "On Arbitration" [13], which provides a definition of public order of the Republic of Kazakhstan. Thus, the article states that public order of the Republic of Kazakhstan is the foundations of legal order, enshrined in the legislative acts of the Republic of Kazakhstan.

Let us dwell in more detail on Article 1090 of the Civil Code of the Republic of Kazakhstan. The first paragraph of the article reads as follows: foreign law shall not be applied in cases where its application would contradict the foundations of the legal order of the Republic of Kazakhstan (public order of the Republic of Kazakhstan). In these cases, the law of the Republic of Kazakhstan shall be applied.

Firstly, public order is equal to the rule of law. According to V.L. Tolstykh, the rule of law is understood as the state of regulation of social relations by law, in which rights are used and obligations are fulfilled. At the same time, for the purposes of private international law, in his opinion, the rule of

law should be understood as a complex category that includes three elements: the basic principles of domestic legal consciousness, the basic provisions of domestic law and the interests of legal entities protected by domestic law [14, p. 100]. Sh.M. Mengliev also considers it appropriate to proceed from the identity of "public order" and "law and order". He notes that the rule of law is the main thing that forms the essence, the basis of regulation, the level of orderliness, the state of organization corresponding to the degree of development of the state. The rule of law is the result of the functioning of law, its individual norms. Thus, he writes, the rule of law (public order) should be understood as the main principle enshrined in the Constitution and other laws. Public order is a generally recognized, universally observed basis that determines the rules of conduct of legal entities. The content of public order is so broad that it does not lend itself to a simple listing of specific actions of entities that violate it [15, p. 224]. Consequently, public order can be called legal order, i.e. such a level of regulation of social relations by legal norms, at which the behavior of participants in the relations is characterized by legality.

Secondly, it should be noted that the public order clause itself is not directed against foreign law and the system as a whole. It excludes in the territory of the country of the court the effect of only that norm which is defined as applicable, but as a result of implementation (application) may lead to negative consequences for this state (country of the court). Thus, the public order clause should be directed only at a specific norm of foreign law, whereas the article speaks about foreign law as a whole. This inconsistency with the theory should be taken into account by the legislator and excluded.

Thirdly, it must be pointed out that it is not the norm of foreign law itself or the decision of a foreign court or arbitration, but rather the consequences of its application or execution that can cause certain harm to society, for the determination of which it is necessary to establish the materiality of the contradictions to the legal order.

Fourthly, the article is formulated too softly to express the category of public order.

Fifthly, in case of non-application of foreign law, the law of the Republic of Kazakhstan shall be applied. It should be said that the reservation has no character of either an explicit or hidden conflict of laws rule. After foreign law, the law of the Republic of Kazakhstan will be the next most closely related to this relationship, because the dispute will be considered by the court of the Republic of Kazakhstan, or there will be some Kazakhstani element in the relationship, therefore the void that may be formed as a result of the application of the reservation is filled by the law of the Republic of Kazakhstan.

Conclusion

Taking into account the above, paragraph 1 of Article 1090 of the Civil Code of the Republic of Kazakhstan should be amended and stated as follows: "The norm and foreign law shall not be applied if the consequences of its application contradict the foundations of the legal order of the Republic of Kazakhstan (public order of the Republic of Kazakhstan). In such exceptional cases, the law of the Republic of Kazakhstan shall apply".

According to paragraph 2 of Article 1090 of the Civil Code, the refusal to apply foreign law cannot be based solely on the difference between the political or economic system of the relevant foreign state and the political or economic system of the Republic of Kazakhstan. In this paragraph, the legislator has secured a guarantee of non-admission of the application of a reservation for political reasons of the judge (which was often practiced in relation to the Soviet system). Thus, the basis for applying a reservation is not simply "dissimilarity" or differences in law, but the negative consequences that the norm may entail as a result of its application.

Thus, to some extent, the principle of impartiality of judicial consideration of disputes is consolidated. It is possible that the courts can often resort to the public order clause only in order to prevent the application of foreign law. This can be explained either by the judge's attitude to the law of a given state, or by the general attitude to foreign law in general. If the first moment is due to political motives, then the second is due to the unwillingness to face the problems of applying a foreign norm. As a result, the court can unlawfully refer to contradictions with the existing legal order. A unique paradoxical situation arises when conventions, legislators and courts on publicly important issues and disputes refer to a legal norm - public order, without defining its concept, composition, features and

other necessary characteristics, leaving all this to the subjective perception and discretion of judges or other authorized law enforcement officials. A way out of this could be legislative consolidation or judicial interpretation of the content of this legal category [2, p. 10]. On the other hand, referring the clause on public order to the categories of public law and types of imperative norms, it is also not entirely correct to talk about providing the courts with the opportunity to evaluate and interpret the category of "public order". Since such categories, for the purpose of unambiguous regulation of public relations, must be predictable.

Most likely, it would be correct to determine which foreign norms may contradict public order, for example, norms that contradict public order include norms that violate the fundamental rights and freedoms of man and citizen, contradicting the basic principles of the activities of the Republic of Kazakhstan. Speaking about public order, for example, most likely, one should be guided by Sections 1 and 2 of the Constitution of the Republic of Kazakhstan. And the same norms of foreign law that contradict the imperative norms contained in the sectoral legislation of the Republic of Kazakhstan will not be applied on the basis of Article 1091 of the Civil Code of the Republic of Kazakhstan, i.e. in cases of application of the imperative norm of the Republic of Kazakhstan.

Agreeing with the opinion that uniformity in the understanding of various definitions and legal terms used in the process of applying civil law norms by the court is of considerable importance for judicial practice, and it is the highest judicial authority that has the role of establishing the limits of understanding the text of a normative legal act when developing such definitions [16, p. 21], we believe that the Supreme Court of the Republic of Kazakhstan should provide a normative explanation (as is usually done on certain controversial issues of theory and practice with the aim of a uniform procedure for the application of certain legal norms by courts) on the uniform application of Article 1090 of the Civil Code of the Republic of Kazakhstan (on the clause on public order), which could bring clarity to the general law enforcement practice precisely when resolving disputes complicated by a foreign element.

Thus, ensuring the unity of practice of courts of general jurisdiction in civil cases, expressed in the correct and uniform application by all courts of the norms of the Constitution and legislation, is achieved in the following ways:

a) the adoption by the Supreme Court of the Republic of Kazakhstan of regulatory resolutions containing clarifications on issues of judicial practice in civil cases;

b) studying the practice of consideration and resolution of civil cases by lower courts, followed by the publication of reviews of judicial practice;

c) using the results of the consideration by the Supreme Court of the Republic of Kazakhstan of specific civil cases at first instance and in the supervisory procedure.

Finally, it should be noted that if the court has not used the public order clause and has accordingly applied foreign law that is not applicable, this may be grounds for annulment of the court's decision. This also applies to cases where the application of foreign law is unreasonably refused with reference to the public order clause.

There is no point in dividing public order into domestic and international, especially when it comes to relations regulated by the norms of international private law. The content of public order, whatever it may be, always includes such elements as fundamental human rights and freedoms, environmental protection, etc. At the same time, it is inappropriate to somehow unify the ideas of different states on the content of public order. And the solution to the issue of the content of the concept of "public order" remains at the discretion of the legislator, or even the law enforcement officer of a particular state. In general, each state, defining "its" public order, puts into its concept the fundamental principles of interstate cooperation.

However, as noted, the relationship between public order of a domestic and international nature. They are genetically and essentially closely interconnected; both of these phenomena and institutions are the "brainchild" of the same creators - states, and pursue one common goal - the regulation of social relations and the protection of common public interests [2, p. 16]. It can be said that the international public order as a whole is a system, a complex of relations based on the most basic principles of interaction between states. Such regulation and orderliness cannot, in turn, fail to affect the content of the internal public order applied in the sphere of private law relations.

REFERENCES

1 Morozova Ju.G. Agreement on public order: reasons for its emergence // Legislation. 2000. No. 6. P. 8–16.

2 Hasjanov R.Sh. European public order, European legal transit and European convention on the protection of human rights and fundamental freedoms: their relationships and interactions. St. Petersburg, 2005. – 24 p.

3 Kazachenok S.Ju. Contradictory public order as a special category of grounds for state interference in international commercial arbitration // Vestnik of Volgograd State University. Series 5: Jurisprudence. 2014. No. 2(23). P. 98–111.

4 Monastyrskij Ju.Je. State doctrines of collective law in the USA / diss. ... cand. jurid. science. M.: Institute of state and law of the Russian Academy of Sciences, 1999. 136 p.

5 Merezhko A.A. Science of international private law: history and modernity. Kiev: Takson, 2006. – 356 p.

6 Makarov A.N. Fundamentals of international private law. M.: Jur. izdat. Narkomjusta RSFSR, 1924. 151 p.

7 Lunc L.A. Course in international private law: in 3 volumes. M.: Spark, 2002. Vol. 1. 384 p.

8 International private law: foreign legislation / Preface by A.L. Makovsky. M.: Statut, 2000. 892 p.

9 Esimhanov E. Reciprocity and public order as key aspects of recognition and enforcement in the execution of foreign arbitration decisions // Jurist. 2006. No. 4. URL: www.online.zakon.kz (accessed: 23.03.2018)

10 June-Jordan Convention of 10 June 1958 “On recognition and enforcement of foreign arbitration decisions”. URL: www.uncitral.org.ru (accessed: 23.03.2018)

11 Сулейменов М.К. Применение оговорки о публичном порядке в судебной практике. URL: www.online.zakon.kz (дата обращения: 23.03.2018)

12 Sulejmenov M.K. How the court interpreted the law according to its own amendment. URL: www.online.zakon.kz (accessed: 23.03.2018)

13 Law of the Republic of Kazakhstan of April 8, 2016 No. 488-V “On arbitration”. URL: www.online.zakon.kz (accessed: 23.03.2018)

14 Tolstyh V.L. Conflict regulation in international private law: problems of interpretation and implementation of Section VII of Part Three GK RF. – M.: Spark, 2002. – 244 p.

15 Mengliev Sh.M. International private law. Dushanbe: Typography of Tajik National University, 2013. 736 p.

REFERENCES

1 Morozova Ju.G. (2000) Agreement on public order: reasons for its emergence // Legislation. No. 6. P. 8–16. (In English).

2 Hasjanov R.Sh. (2005) European public order, European legal transit and European convention on the protection of human rights and fundamental freedoms: their relationships and interactions. St. Petersburg, 24 p. (In English).

3 Kazachenok S.Ju. (2014) Contradictory public order as a special category of grounds for state interference in international commercial arbitration // Vestnik of Volgograd State University. Series 5: Jurisprudence. No. 2(23). P. 98–111. (In English).

4 Monastyrskij Ju.Je. (1999) State doctrines of collective law in the USA / diss. ... cand. jurid. science. M.: Institute of state and law of the Russian Academy of Sciences, 136 p. (In English).

5 Merezhko A.A. (2006) Science of international private law: history and modernity. Kiev: Takson, 356 p. (In English).

6 Makarov A.N. (1924) Fundamentals of international private law. M.: Jur. izdat. Narkomjusta RSFSR, 151 p. (In English).

7 Lunc L.A. (2002) Course in international private law: in 3 volumes. M.: Spark. Vol. 1. 384 p. (In English).

8 International private law: foreign legislation / Preface by A.L. Makovsky. M.: Statut, 2000. 892 p. (In English).

9 Esimhanov E. (2006) Reciprocity and public order as key aspects of recognition and enforcement in the execution of foreign arbitration decisions // Jurist. No. 4. URL: www.online.zakon.kz (assessed: 23.03.2018). (In English).

10 June-Jordan Convention of 10 June 1958 “On recognition and enforcement of foreign arbitration decisions”. URL: www.uncitral.org.ru (assessed: 23.03.2018). (In English).

11 Sulejmenov M.K. Primenenie ogovorki o publichnom porjadke v sudebnoj praktike. URL: www.online.zakon.kz (data obrashhenija: 23.03.2018). (In Russian).

12 Sulejmenov M.K. How the court interpreted the law according to its own amendment. URL: www.online.zakon.kz (assessed: 23.03.2018). (In English).

13 Law of the Republic of Kazakhstan of April 8, 2016 No. 488-V "On arbitration". URL: www.online.zakon.kz (assessed: 23.03.2018). (In English).

14 Tolstyh V.L. (2002) Conflict regulation in international private law: problems of interpretation and implementation of Section VII of Part Three GK RF. M.: Spark, 244 p. (In English).

15 Mengliev Sh.M. (2013) International private law. Dushanbe: Typography of Tajik National University, 736 p. (In English).

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ХАЛЫҚАРАЛЫҚ ЖЕКЕ ҚҰҚЫҚТА «ҚОҒАМДЫҚ ТӘРТІПТІҢ» МӘНІ, МАЗМҰНЫ ЖӘНЕ ҚОЛДАНУЫ

Аңдатпа

Бұл мақалада халықаралық жеке құқықтағы «мемлекеттік саясаттың» сипаты, мазмұны және қолданылуы сияқты осы мәселенің аспектілерін зерттеуге тоқталғым келеді. Бүгінгі таңда қазақстандық тәжірибеде қалыптасқан жағдайға сәйкес, біз көтерген мәселелер, атап айтқанда, мемлекеттік саясатқа қайшылық туралы мәселе халықаралық жеке құқық үшін көбірек теориялық және практикалық сипатқа ие екені анық. Алайда, мемлекеттік саясатқа қайшылық сияқты негіз, мемлекеттік саясат мәселесі шетел құқығының нормаларын қолдану кезінде, шетелдік төрелік және сот шешімдерін орындау кезінде, сондай-ақ заң көмегін көрсету кезінде туындайды (мысалы, сот актілерін орындау). тәртібі, сот ісін жүргізу) шет мемлекетке. Осыған қарамастан, «Қоғамдық тәртіп» сөздерінің тіркесімі әлі күнге дейін оның мағынасын көрсететін біртұтас нақты, нақты, ең дұрыс анықтаманы тапқан жоқ.

Тірек сөздер: халықаралық жеке құқық, өзара құқық, мемлекеттік саясат, арбитраждық шешім, тану, орындау, арбитраждық келісім.

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ПРИРОДА, СОДЕРЖАНИЕ И ПРИМЕНЕНИЕ «ПУБЛИЧНОГО ПОРЯДКА» В МЕЖДУНАРОДНОМ ЧАСТНОМ ПРАВЕ

Аннотация

В данной статье хотелось бы остановиться на изучении таких аспектов этой проблемы, как природа, содержание и применение «публичного порядка» в международном частном праве. По ситуации, которая сложилась сегодня в казахстанской практике, очевидно, что поставленные нами вопросы, в особенности вопрос о противоречии публичному порядку, имеют больше теоретический характер и практический характер для международного частного права. Однако такое основание, как противоречие публичному порядку, вопрос о публичном порядке, возникает при применении норм иностранного права, при исполнении иностранных арбитражных и судебных решений, а также при оказании правовой помощи (например, выполнение поручения, осуществление процессуальных действий) иностранному государству. Несмотря на это, сочетание слов «публичный порядок» все еще не нашло единого точного, конкретного, наиболее верного определения, отражающего его смысл.

Ключевые слова: международное частное право, взаимность, публичный порядок, арбитражное решение, признание, исполнение, арбитражное соглашение.