

Karolina Sondel-Maciejewska
al. Focha 26, 30-119 Kraków

Summary of the doctoral thesis “*Public policy clause in private international law of the European Union*” written under the direction of Prof. dr hab Andrzej Mączyński

A public policy clause is an institution of private international law whose function is to exclude the application of foreign law if the effects of such application would be contrary to the fundamental principles of the legal order of the State concerned. An essential feature of this institution is that it can only be heard in exceptional situations where the most fundamental values of that country are at stake. In view of this exceptional nature, its application must always precede a thorough examination of the matter. This entails the obligation of the court (or other authority) applying the clause to identify a specific substantive rule and explain why it considers it a fundamental principle of legal order in its legal order. This becomes possible only when a specific foreign provision indicated by the authoritative conflict-of-law rules is revealed. It is this provision, and not the entire legal system from which it originates, that is valid for the assessment of whether the interference of the clause should occur or not, and ultimately the consequences of the application of the provision are decisive, and not its mere contradiction with the content of the provisions in force in the state of the court. The term ‘public order’, to which the concept of a clause refers, already belongs to the Canon of private international law. Any attempt to define it is impossible, since it is blank, flexible and filled in with content in certain circumstances when a court (or another authority applying the law) of a given country refuses to apply a foreign provision on the basis of the basic principles of its legal order. It can therefore only be pointed out in a very general way that public order is the core of its own substantive rules, in particular, determined by constitutional rules, which cannot be violated by the application of foreign law.

The public policy clause has traditionally been included in national codifications and in the Convention regulations of private international law. In connection with the unification of private international law, which has taken place on a large scale in the European Union legislation in recent years, it has also been included in all EU regulations governing this area

of law in the Member States: Article 26 of Regulation (EC) No 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations ('Rome II'), Article 21 of Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations ('Rome I'), Article 12 of Council Regulation (EU) No 1259/2010 of 20 December 2010 introducing enhanced cooperation in the field of the law applicable to divorce and legal separation, Article 35 of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of judgments, reception and enforcement of authentic instruments in respect of succession and on the establishment of a European Certificate of Succession, Article 31 of Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the field of jurisdiction, applicable law and the recognition and enforcement of judgments in matters relating to matrimonial property regimes, Article 31 of Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the field of jurisdiction, Applicable law and the recognition and enforcement of judgments in matters relating to the property consequences of registered partnerships, as well as in Article 13 of the Hague Protocol, to which Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. Those provisions are in principle identical or very similar in substance, according to which the application of a provision of the law designated by each of the Regulations may be refused only if such application is manifestly incompatible with public policy (*ordre public*) of the Member State of the court.

For the application of the clause, it does not matter to which legal system belongs the provision of law, which is excluded due to its interference. It can also be the law of any other country, including a member state of the European Union. The mere cultural proximity of states does not determine the absence of differences as to what values the legislator considers fundamental and requiring protection of each of them. At the same time, EU Member States share a common range of these values. In connection with the membership of a given country in the group of Member States of the European Union, we are also talking about the EU public order of a given country. It is an expression of the principles arising in EU primary and secondary law applicable to EU Member States both at the level of the Treaties and regulations and directives created by EU bodies, in particular in relation to their interpretation by the EU judiciary in accordance with the letter and spirit of the Treaties. They form an integral part of the national public policy of each Member State, which is controlled by the

body of the EU judicial authority, the Court of Justice of the European Union. The courts of the Member States no longer have full discretion in the content of the blank notion of public policy, but they must take into account the fundamental principles of EU law. It is now up to the national court to ensure the same effectiveness in protecting the rights guaranteed in the national legal order and the rights guaranteed in the legal order of the Union, although the CJEU case law has so far defined only the basic framework of public policy understood in this way.

15. novembra 2023r., Kendine Sadel-
-Merijavke

