

Functions of Public Policy in Private International Law

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Abstract : In this article, we draw a distinction between two important functions of public policy in private international law. The first function is widely recognized and relates to the prevention of application of foreign laws and enforcement of foreign court judgments whenever their effects are incompatible with the domestic legal system of the forum. This effectively protects sovereign rights of the forum state as it allows to resist against the undesirable effects of foreign law-making and law-enforcement policies. The second function is less obvious, but not less important. As the internal private legal relationships, international private relationships are usually governed by rules of public policy, to which the parties can not derogate by mutual agreement. Therefore, for international private law relations public policy has a different function than previously mentioned: in this case, the public policy acts as a defense against unacceptable effects of the party autonomy. Thus, this second function of public policy consists in the limitation of the party autonomy with effects would be unacceptable for the local legal system. In the frame of this second function the author will analyse two types of public policy which can limit the party autonomy: « substantial » public policy (which regulates the substance of international legal relationship) and « conflictual » public policy (which regulates the party autonomy to choose the law applicable for the substance of relationship). The author provides an analysis of these functions of the public policy in the field of international contract law because of the important role of the principle of party autonomy for international contract relations.

Keywords : public policy, general theory of private international law, substantial public policy, conflictual public policy

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