FOREIGN PUBLIC LAW IN THE COURTS

par

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The problem with respect to foreign public law is whether its application is governed by the same rules as those that govern the application of foreign private law or by different rules [1].

The application of foreign private law is governed by the well known rules of conflicts of law. But conflicts arise not only between rules of a private law nature, such as the civil law, but also between rules of a public law nature, such as tax law or administrative law.

The event of death, as an example, can give rise on the one hand to conflicts of private law concerning the rights to the estate and the measures to take possession of the estate. But it can also give rise on the other hand to a conflict of public law concerning the State that can levy estate duties [2].

A relation of employment can give rise on the one hand to conflicts of private law concerning the rules governing termination [3] or concerning the employee's rights on inventions made in connection with his work [4]. At the same time it will give rise on the other hand to conflicts of public law concerning the duty to contribute to a pension or health insurance system or

[1] Among recent writing on the subject the following may be mentioned specially : GIHL, T., « Lois politiques et droit international privé », *R.C.*, 1953; MANN, F.A., « Öffentlich rechtliche Ansprüche im internationalen Rechtsverkehr », *Rabels Z.*, 1956; HEINZ, R., *Das fremde öffentliche Recht im internationalen Kollisionsrecht*, 1959; FREYRIA, Ch., « La notion de conflit de lois en droit public », *Travaux du comité français de droit international privé*, 1962-1964; LALIVE, P., « Droit public étranger et ordre public suisse », *Eranion Maridakis*, III, 1964; ZWEIGERT, K., « Droit international privé et droit public », *R.C.D.I.Pr.*, 1965.

[2] On this last problem *cf.* M. DONNAY, « L'impôt successoral envisagé sur le plan international », *Rec. gén. enregistr.*, 1962, n° 20782.

[3] On this problem *cf.* GAMILLSCHG, F., *Internationales Arbeitsrecht*, 1959, pp. 332-353.

[4] *Cf.* GAMILLSCHEG, p. 327; BODENHAUSEN, G.H.C., *Bijblad bij de Industriële Eigendom*, 1955, p. 130, criticizing a decision of the Dutch Octrooiraad of 7 May 1954, *ibid.*, p. 139.

concerning the duty to compensate the employee for accidents occuring in connection with his work [5].

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That phenomenon of conflicts of public law is well known. It has given rise to the accepted distinction between conflict rules for private law problems on the one hand and conflict rules for public law problems on the other hand.

The conflict rules in the field of private law are so-called bilateral rules. They are of a connecting nature because they connect the legal relationship with a system of law whose rules thereby become applicable. The legal system thus designated may be either the forum's or a foreign system.

The conflict rules in the field of public law are on the contrary so-called unilateral rules. They are limiting rules that in effect decide whether the forum's system is applicable or not. Their purpose is to limit the sphere of application of the forum's law and they can give to that question either a positive or a negative answer. But nothing is said about the possible application of foreign rules. The limiting rule states whether or not the local authorities will collect taxes, whether or not they will initiate criminal proceedings. It does not state anything about foreign taxes or foreign criminal proceedings.

Whereas the connecting rule answers the question « applying local law or applying foreign law » the limiting rule on the contrary answers a different question that may be phrased in the following way : « applying local law or aloofness of the local authority » [6].

If follows from the very nature of the limiting rule that it will never lead to applying foreign law. And indeed whereas in private law matters Courts regularly apply foreign rules, never does one see an administrative authority or a Court levying a tax in favour of a foreign State or imposing and enforcing a penalty on the basis of foreign criminal law. No country acts as the policeman or the tax collector of a foreign country [7]. The only exception is where there exists a treaty organizing international collaboration in tax matters or criminal matters [8]. But even then the collaboration aims at facilitating for every country the application of its own law and not at pledging one country to applying the law of another country. Thus on a treaty basis will tax authorities exchange informations and will criminal authorities surrender an accused person. But the rule that every authority only applies its own law seems to remain untouched.

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[5] There is a vast literature on the problems of Workmen's Compensation. See specially De Nova, R., « I conflitti di leggi e le norme con apposita delimitazione della sfera di efficacia », *Diritto Internazionale*, 1959.

[6] Neumeyer, K., *Internationales Verwaltungsrecht*, IV, 1936, pp. 115-120.

[7] *Government of India v. Taylor* [1955], *A.C.* 491.

[8] Freyria, Ch., *Travaux du comité français de droit international privé*, 1962-1964.

The basic proposition is thus that the authorities and Courts of a given country will not wield their power to enforce the application of public law rules of another country. But nevertheless it should be recognized that in numerous ways authorities and Courts are called upon to take foreign public law rules into account.

It frequently happens that the local public law can only be correctly applied by taking foreign law into account. A first example is given by the cases in which foreigners can claim the benefit of certain rules of local administrative law on condition of showing reciprocity. This is a frequent situation in social security matters [9]. Studying and taking into account foreign public law is then inevitable. Likewise, when the local tax law provides for a lower tax rate on income that has been taxed abroad, is it necessary to take into account the foreign tax law [10].

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It also happens, and that is the problem to be further discussed, that the taking into account of foreign public law is called for by the connecting rule applicable to a private litigation in the local Courts.

The conflict rule applicable in country A prescribes the application of the law of country B. Since the subject matter of the litigation is of a private law nature, the law to be applied is the private law of country B. But one should not forget that the law of B constitutes a legal system composed of a great many different rules and in which there is no watertight separation between public law and private law. Let us take as an exemple a litigation in the Courts of country A about a contract of sale governed by the law of country B. The respondent, who is charged with bread of contract, relies on an administrative regulation in force in country B. E.g. he relies on exchange control regulations to claim that the contract is unenforceable because it has not been approved of by the monetary authorities. Or he relies on export restrictions to claim that the failure to deliver is due to a circumstance beyond the control of the parties and can not constitute a breach.

It is clear that in those two examples, if the litigation had been fought in the Courts of country B, those Courts would have drawn from the administrative regulations the consequences applying to the instant contract of sale. Must it be otherwise because the Courts of country A are handling the litigation ?

At first hand the answer must be negative. Foreign public law rules should be taken into account in so far as they exert an influence on the applicable private law [11]. That private law may either be the same country's private law

[9] FREYRIA, Ch., « Sécurité sociale et droit international privé », *R.C.D.I.Pr.*, 1965, pp. 432-434.

[10] FREYRIA, Ch., *Travaux du comité français de droit international privé*, 1962-1964, pp. 116-118.

[11] RABEL, E., *The Conflict of Laws - A Comparative Study*, II, 1947, p. 566.

or the local private law. Even the local private law can therefore be the channel whereby the private law effects of the foreign public law make their entrance.

A well-known example of such a situation is given by a decision of the German Reichsgericht. In a litigation pending before the German Courts in war-time, the German buyer was complaining of breach by the English seller. The seller relied on the war-time regulations directed against trading with the enemy. The German Courts, though refusing to consider that regulation as directly applicable, accepted on the basis of the applicable German civil law that the English respondent had been in the impossibility of performing the contract and found against the plaintiff's claim for damages[12].

Should one in this example, as in the previous examples of exchange control and export restrictions, say that the Court actually « applies » foreign public law ? It is submitted that such is not the case. The typical content of the public law rule, whereby it is distinguished from private law rules, is the use of public law methods such as penalty, tax, authorization, etc... Exchange control law is said to be public law because it proceeds by way of administrative authorization on the one hand and of fines in the case of unauthorized transfer on the other hand. But in so far as it decides that a contract entered into without authorization is invalid or makes it impossible to transfer without authorization, that invalidity and impossibility are private law consequences.

On the basis of that distinction it can be seen that even in the examples discussed the rule of non-application of foreign public law remains intact. But the notion of « application » should be clearly understood when foreign public law is the subject matter. There is application proper or rather « enforcement » of foreign public law when an authority or a Court lend its weight to the application of a typical public law method such as authorization, tax or imprisonment. There is on the contrary only « taking into account » when the Court merely takes into account the effect exerted by the foreign public law rule in the field of private relations.

Enforcing foreign public law should therefore clearly be distinguished from taking into account foreign public law. An other way of expressing the distinction is by referring to the nature of the claim at bar[13]. A Court will never entertain a claim for direct enforcement of a foreign rule of public law. It will not pass sentences of imprisonment, impose fines, levy taxes, grant or refuse an administrative authorization. But on the contrary if the claim at bar is a private law claim, such as a claim for the specific performance of

[12] R.G., 28 June 1918, *R.G.Z.*, 93, 182.

[13] As is done most convincingly by MANN, F.A., « Öffentlich rechtliche Ansprüche im internationalen Rechtsverkehr », *Rabels Z.*, 1956; See also KEGEL, G., *Internationales Privatrecht*, 2d ed., 1964, p. 388.

a contract or a claim for damages, the Court will entertain or disallow the claim by taking into account all rules of the applicable legal system, including the rules that create or recognize private law effects of public law rules.

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That distinction having been made clear, the discussion must now turn to a theory that excludes all application whatever of foreign public law even when that application merely consists of the taking into account of private law effects.

That theory of the so-called non-application of foreign public law is controversial in legal writings. It was the object in the *Institut de Droit international* of a debate that led to no conclusion and that was not exempt from confusion [14]. In the practice of the Courts that theory has mainly been relied upon to eliminate the influence on contractual matters of monetary laws such as gold clause invalidation or exchange control [15].

As an example of that dislike of « foreign public law » one may mention a decision of the Swiss Federal Tribunal of 28th February 1950 concerning the guaranty given by a Swiss firm of a contractual debt entered into in Romania in violation of that country's exchange control. The Federal Tribunal refused to adjudicate the guaranty invalid; it decided that the violation of the Romanian law did not make the contract invalid according to Swiss standards because the Romanian law merely aimed at protecting the Romanian state economic interest and did not partake of an ethical significance that would have called for recognition abroad [16].

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It is easy to understand the policy behind the attitude. Even in the limited measure of a mere taking into account of private law effects, Courts are reluctant to lend a hand to the realization of foreign public law. Exchange control is a case a point. It seems certain that the aim of the legislation, viz. preventing the making of contracts without administrative authorization, will have a higher degree of achievement if the parties know that foreign Courts will treat as invalid the contract entered into without authorization than if they know that foreign Courts will not entertain a defence based on invalidity. It is readily understandable that foreign Courts show a reluctance in this respect because they feel that it is not their task to further even indirectly the interest of another State [17].

[14] See *Annuaire* de l'Institut de droit international, 45 - II.

[15] *Cf.* the author's *Problèmes juridiques des emprunts internationaux*, 2d ed., 1964, pp. 207-208 and 233-236.

[16] B.G., 28 February 1950, *B.G.E.*, 76 II 33.

[17] Comp. NEUMEYER, *op. cit.*, IV, p. 254; HJERNER, L.A.E., *Främmande Valutalag och internationell Privaträtt*, 1956-1957, ch. 13.

It is thus seen that the aim pursued by the foreign State in its public law regulations is really the reason why Courts refuse to take into account the private law effects of those regulations. In the already mentioned decision of 28th February 1950 the Swiss Federal Tribunal distinguishes between regulations that pursue aims of health or morals, such as narcotics control, and regulations that further the political or economic aims of a given State, such as exchange control. The invalidity of agreements will have to be recognized only when the regulation violated is a rule rooted in natural law because it prohibits a *malum per se* whereas no invalidity will follow from the violation of a rule that prohibits merely a *malum quia prohibitum.*

A later decision of the Swiss Federal Tribunal relates to a post-war Netherlands regulation cancelling such shares of Dutch companies as had not been registered in time with a view to investigating the rightfullness of the owner's title. In that decision the Federal Tribunal recognizes the cancellation of non-registered shares because it holds that the investigation of shareholders' title was not established to further a selfish interest of the Kingdom of the Netherlands but to protect the shareholders who had been deprived of their shares by wartime events. In the view of the Federal Tribunal the aim of the regulation is the defense of private interests and that is the reason why Swiss Courts must not refuse to take that regulation's private law effects into account [18].

It is thus clearly seen that the ethical views held by the forum are called upon to distinguish between the « selfish » foreign public law, the private law effects of which will not be recognized, and the « commendable » foreign public law that will on the contrary be taken into account.

Recent doctrinal writing has therefore criticized the theory of the non-application of foreign public law by remarking that, in so far as the theory distinguishes beween « commendable » foreign public law and « selfish » public law, it is in effect not doing anything different from what Courts have always done when they have, on the basis of « ordre public », refused to apply a rule of foreign private law because the effect of that rule in the instant case was in their view repugnant or intolerable [19].

If the theory of the « non-application of foreign public law » has thus met with criticism in legal writing, it should on the other hand be noted that it has recently received recognition from the German Bundesgerichtshof that has thus followed the lead of the Swiss Federal Tribunal. In a decision of the 17th December 1959 the Bundesgerichtshof refuses to declare invalid a contract governed by East German law and violative of East Germany's exchange control rules, the *ratio* being that the East German exchange control rules do not

[18] Trib. féd., 2 February 1954, *A.T.F.*, 80 II 53.

[19] See mainly HEIZ, R., *Das Fremde öffentliche Recht im internationalen Kollisionsrecht.*

aim at protecting private interests but merely at furthering the selfish interests of the State [20].

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One may wonder whether the theory of the « non-application of foreign public law » and the notion of « ordre public » are not finally the same thing under two different names. It has already been noted that the forum's ethical and legal views will decide about the « application » or « non-application » of foreign public law in a given case. We should now address ourselves to the question what are the exact differences between the two mechanisms for the elimination of intolerable foreign law.

The theory of the non-application of foreign public law has, at first glance, the advantage of working in a fairly mechanical way in that it does not call for moral judgment on foreign law, which is always a delicate thing to indulge in. But that advantage is a merely apparent one because the truth of the matter is that in the distinction between « commendable » and « selfish » foreign public law we fall back on a moral judgment about foreign law very similar to what is practised in the name of « ordre public ».

Another advantage, and a more real one, of the theory of the non-application of foreign public law is that it permits a reaction against undesirable consequences of foreign regulations in cases where the forum has the same regulations but in its own interest. This is a situation commonly found in exchange control matters. The « ordre public » rule seems less appropriate in such cases because it is difficult to reject as morally and legally intolerable the effects of regulations that also exist in the forum's own law [21].

Another difference is that the « ordre public »-weapon is as a rule only resorted to when the case presents a sufficiently close contact with the forum (theory of the « Binnenbeziehung »), that must in all events be closer than the mere jurisdiction of the forum's Courts [22]. That restriction would on the contrary not exist in the theory of the non-application of foreign public law.

[20] B.G.H., 17 December 1959, *B.G.H.Z.*, 31, 367.

[21] This has been mainly stressed by Nussbaum, A., *Principles of Private International Law*, 1943, p. 118.

[22] Niederer, W., *Einführung in die allgemeinen Lehren des internationalen Privatrechts*, 1954, pp. 296-297.