The concept of public order in Choice of Court Agreements, the Perspective of EU Law

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I. Public order and its relevance on choice-of-agreements clauses.

The globalization of the world entails the expansion of capitalism in a context of broad proportions involving nations and nationalities, political regimes, national projects, social groups and classes, economies and societies, cultures and civilizations[124]. The increase in this interconnection is intense to the point where the world is, some respects, becoming a single place[125].

Globalization is defined as the process of intensification of cross-area and cross-border social relations between actors from very distant locations, and of growing transnational interdependence of economic and social activities[126].

The expansion of globalization and capitalism is reflected in the formation of hundreds of international contracts every minute, which implies the difficult task of harmonizing the will and interests of different people in relation to domicile, nationality, culture and social and economic opportunities.

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124 GUERRA, S. 2017, p. 368.

125 MITTELMAN, J. p. 5

126 SCHERER, A. p. 3

Historically, the institutions of the European Union have adopted a series of regulations, directives and other normative acts that concern the choice of applicable law, international jurisdiction, recognition and enforcement of foreign judgments, in such a way as to seek consensus on these issues[127].

Brussels Convention of 1968 on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters, the Rome Convention of 1980 on the Law Applicable to Contractual Obligations and the 2005 Hague Convention on Choice of Jurisdiction are clear examples of this tendency to standardize understandings.

The commonality of understanding is also revealed through the declaration of intent between the parties that, in international contracts, can choose the country whose jurisdiction shall be competent for the resolution of conflicts that may arise from the contract.

This possibility of choice in international contracts is called "*choice-of-court agreement*", whose main objective is to give legal security to businesses and, consequently, to attract investments.

When the parties insert the clause of election of forum, they end up preventing the filing of litigation in a country other than that chosen in the clause of the contract.

Normally, countries sign multilateral Treaties where, legally, the contracting parties are bound by a uniform set of rules on civil and commercial matters, including a commitment to respect the jurisdiction of other countries when there is a choice clause in international contracts.

However, this type of clause is subject to rules, limits and judicial control, mainly to preserve and respect what is called "public policy", "reservation of public order" or "public interest of society", subject which concept and extension will be treated in this brief study, from the perspective of the legislation of the Union European Union.

Thus, the initial concern when developing an international contract is first determine the forum for the settlement of disputes related to the agreement and, secondly, the law governing its validity, interpretation and performance.

Private International Law determines the applicable law (*conflicts of law*), whereas the International Civil Procedure Law governs issues of jurisdiction and recognition/enforcement of foreign (court) decisions[128].

What is important is that both the *choice of law agreement* and the *choice of forum agreement* should be contextualized with the rules of public order, which can certainly alter, diminish or even render ineffective the clauses chosen in international contracts.

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127 BASSO, M.

128 SCHÄRTL, C. p. 15.

II. Concept of "public order" and the terminology used by the countries of the European Union.

There is great complexity in defining public policy because it is influenced by historical, legal, political or economic issues, representing an indeterminate legal concept[129], but widely applicable.

The Brazilian jurist CALIXTO[130], with support in the lessons of the Italian jurist BARILE, emphasizes the decision of the Court of Naples, dated September 24, 1965, which distinguished between "internal public order" and "international public order", where it was established that not all the impetuous rules constitute the international public order, only those that are the expression of the fundamental principles and the social and moral concessions on which the internal system of decision is based, in relation to a certain historical period and the legal conscience of a date of the society in this period.

Looking at the subject from the perspective of the European Union, the term 'public order' contains variations in terminology. In German law, public order functions as *'Vorbehaltslausel'* or reservation clause. The Spaniards call it '*ordem publico*', and the Italians define it as '*valvola di sicurezza*' or *'ordine publicco*'. The French define it as '*odre public*'.

Anyway, the premise that public order must be preserved is universal, but the legal system of each nation has its own perspective of the definition and scope of the concept of public policy, which is bounded by each nation based on their peculiarities.

Public policy is closely connected to the legal certainty and fair expectation that each individual has in relation to respect for fundamental rights and civil liberties.

As well as public order is connected to security, although each nation to define the patterns of action and behavior to preserve public order, the commitment to public order is universal and has a minimum content common as to be provided in the preamble of Universal Declaration of Human Rights of 1948, by providing that "the Member States committed themselves to developing, in cooperation with the United Nations, universal respect for human rights and fundamental freedoms and the observance of those rights and freedoms".

For the purposes of this study, it is important to keep in mind that public order is viewed from the perspective of the opposite limit to the exercise of freedoms. In all democratic environment, the maintenance of public order is a prerequisite for preserving the social order, covering the normal functioning of the basic institutions of society, social peace, public coexistence and fundamental rights under the Constitution of each country.

Following this idea, public order consists of the values extracted from a social and legal consensus given system, flexible to any historical changes and related to feelings of legality, justice and morality, especially motivated by the fundamental rights and guarantees.

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129 BARTOLOMÉ CENZANO, J. p. 27.

130 CALIXTO, N. p. 45-49.

The disregards for the fundamental guarantees are able to make illegitimate the legal or judicial act, enabling control of their effectiveness and validity to avoid shaking the public order.[131]

In simple words, public order arises as a limitation of forum clauses election, and discuss the limitations of public order these private agreements, focusing on restrictions imposed by European legislation.

III. General Notions on the Hague Convention regarding choice of court agreement clauses.

a. Scope of application.

The Private International Law Hague Conference adopted the Convention on Choice of Court Agreements on June 30, 2005, but entered into force on 1 October 2015, ten years after its conclusion. It currently has 33 Contracting Parties, mostly EU member states (excluding Denmark). Ukraine, the U.S. and China have not yet ratified the Convention under domestic law[132]

As the Arbitration Convention in New York[133], the Hague Convention establishes rules to strengthen the choice of private forums agreements and rules to recognize and strengthen the decisions issued by the chosen forum, highlighting the ease of compliance with the decisions.

There are geographical and material limitations on scope of Hague Convention. According to Article 1 of the Convention, it applies to both civil and commercial court-elect agreements. The Convention applies only to international agreements, excluding its reach agreements to which the parties are resident in the same country (applies only in international cases)[134]

In this article, the view is taken that the geographical limitation of the Hague Convention should be revised in view of the current context of the European Union, as it is notable that the growing immigration process makes it possible for people (or business partners) residing in the same country to sign contracts between themselves. On the other hand, it is possible for these people to feel more legally protected by electing outside jurisdiction (more "neutral") to prosecute disputes arising out of the contract.

The need for a neutral jurisdiction is caused by the discrimination faced by people who, although resident in the same country, are distanced by different ethnic and cultural ties, which is often the case in the multicultural society, as KOECK[135] explains:

The multicultural society is characterized by the fact that different cultures, national, ethnic, religious groups – while all living within the same territory – do not necessarily come into contact with each other or even consider such contact desirable. Between the different groups there may

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131 CABRAL, T. p. 64.

132 https://www.hcch.net/pt/instruments/conventions/status-table/?cid=98.

133 http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html

134 Paragraphs (2) and (3) of Article 1 define what is an international case for purposes of the Convention.

135 KOECK, H. p. 22.

exist passive tolerance, but not mutual acceptance or esteem. Difference is often viewed negatively and forms major justification for discrimination. In consequence, even where there are laws designed to stop discrimination, the law may not be enforced uniformly and its enforcement might even be not welcome.

Regarding material scope of application, there are matters that are excluded from the possibility of a forum selection clause, a clear example of preservation of public order. The excluded matters are provided for in Article 2 of Hague Convention, which excludes contracts concluded by consumers, employment relationships, and contracts derived from family law, because they are matters requiring greater State protection.

The Convention has established some crucial rules: [i] article 5 provides that clauses of election of forum are exclusive, also called *´ECCA´*; [ii] Article 6 provides that if there is a exclusive choice clause in a jurisdiction, the court not chosen by the parties has a duty to refuse to hear the case; [iii] an exception to the ECCA (the "null and void" exception), where the decision on jurisdiction in an agreement is subject to the law of the chosen court instead of the court seised; [iv] an ECCA judgment of a court in a Contracting State shall be recognized and enforced in other Contracting States, except where there are grounds for refusal, which makes it very easy to comply with judicial decisions (article 8).

Under Article 3 it is possible to find the formal requirements for the validity of the forum choice clause:

> *a)* "exclusive choice of court agreement" means an agreement concluded by two or more parties that meets the requirements of paragraph *c)* and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts;
> *b)* a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise;
> *c)* an exclusive choice of court agreement must be concluded or documented *i)* in writing; or *ii)* by any other means of communication which renders information accessible so as to be usable for subsequent reference;
> *d)* an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.

Exclusive choice of court agreement is defined by article 3(b) of the Convention:

> "a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise;"

Therefore, the Hague Convention highlights that the court of the Contracting State designated by the forum for election agreement will have exclusive jurisdiction to settle any dispute that fits the Convention material scope, unless it is considered null under the law and the rules of public order of the State in which the nullity is claimed.

After these general notions about the Hague Convention, this article will list the cases considered as "public order" reasons that make unenforceable the choice of forum clauses, focusing on European legislation.

b. Hypotheses that make unenforceable the choice of forum clauses (the public order cases).

Article 6 of Hague Conventions lays down five exceptions to the rule that proceedings must be suspended or dismissed. Where on of the exceptions applies, the prohibition against hearing the case is lifted. The Convention does not then prevent the court form exercing such jurisdiction as it may have under its own law.

Therefore, the court not elected by the parties has the duty to declare itself incompetent in the case, except in the case of the following exceptions of article 6: (a) the agreement is null and void under the law of the State of the chosen court. The "null and void" exception applies when there is material flaw, such as: substantial error, fraud, coercion, or lack of agent capability. It does not cover formal failures (the written ones); (b) lays de nullity when party lacked the capacity to conclude the agreement under the law of the State of the court seised; (c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised; (d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; (e) the chosen court has decided not to hear the case.

The public policy is even a cause for not enforcing a forum selection clause. Article 9 lists seven grounds for refusal.

The pertinent point for this article is Article 9(e), which states that:

> "recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State".

Under Article 9(e) of the Convention, recognition or enforcement may be refused if the foreign judgment would be "manifestly incompatible" with the public policy of the enforcement state. When such a serious breach of public policy exists, a court may then exercise its discretion and deny recognition.

IV. The principle of party autonomy and its contrast with public order doctrine.

a. Principle of party autonomy (freedom of choice) in Europe.

Traditionally, private autonomy has prevailed in Europe, based on the classical choice-of-law theory favoring predictability and legal certainty[136].

European jurisprudence tended to favor parties autonomy, as seen on those cases for example: (1) England: In re Missouri Steamship Company (1889) 42 Ch.D. 321, 326; Spurrier v. La Cloche [1902] A.C. 446, 447; Montgomery v. Zarifi [1918] 2 S.L.T. 110, 113; Indian and General Investment Trust, Ltd. v. Borax Consolidated, Ltd. [1920] 1 K.B. 539, 545; (2) Germany: Reichsgericht [RG] [Imperial Court of Justice], Oct. 3, 1923, Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 108, 241, 243; RG, Jan 27, 1928, RGZ 120, 70, 72; (3) France: Cour de Cassation [Supreme Court], Dec. 5, 1910, 39 Clunet 1156- 1158 (1912).

136 RÜHL, G., p. 1.

Finally, the Rome Convention came to reinforce the trend of prevailing party autonomy. The reign of party autonomy is determined by Article 3 (1) of Rome Convention[137] regarding the *freedom of choice*:

> Article 3 - Freedom of choice
> 1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.

On the other hand, article 3 (3) of Rome Convention itself precludes the parties' autonomy in choosing legislation in purely domestic cases (geographical scope of application).

Freedom of contract is also provided for in article 1.102 of the Principle of European Contract Law.

However, autonomy is not confused with judicial control immunity, as well explains an interesting article that focuses on party Autonomy and Private-Law Making in Private International Law[138]:

> "the parties freedom to determine the contents of their contract is always subject to a domestic legal system. The very *raison d'être* of a contract is its acknowledgement through a domestic legal system. It is therefore not possible for parties to an international contract to create a kind of legal '*perpetuum mobile*', i.e., a contract which carries this rule of acknowledgement in itself. The parties' freedom of contract is not a sovereign right. Rather, it is always regarded as a '*right sub lege*')"

b. Public order in European legislation.

The well-crafted article written by KESSEDJIAN[139] points out that the first time the European Court of Justice (ECJ) had to decide a case dealing with the exception of public order, it rendered a decision that confirmed that the member states had a unique responsibility in defining their public policy[140].

The court followed a traditional viewpoint by stating that public policy was a territorial concept (i.e. a specific public order for each member state) that may evolve over time. The ECJ thus recognised that member states could change the content of their public policy as may be necessary with the evolution of the members of their societies and their activities.

The Treaty instituting the European Community establishes prohibition of quantitative restrictions between member states, but article 30 provides an exception allowing prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public

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137 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:41980A0934

138 SYMEONIDES, S. note 27.

139 kESSEDJIAN, C. p. 28

140 Case 41/74, Yvonne van Duyn v. Home Office [1974] ECR, 01337 at 01351.

policy or public security. Under article 46 public policy appears as an exception on the freedom of establishment of nationals of a member state[141].

Also in the article written by KESSEDJIAN, identifies a jurisprudence of the year 1977 of the ECJ in which the court started to interfere with the very content of the member states' public policy. In the *Bouchereau* case[142], the European Court of Justice decided:

> La notion suppose, en dehors du trouble à l'ordre social que constitue toute infraction à la loi, une menace réelle et suffisamment grave affectant un intérêt fondamental de la société.

The ECJ established as *ratio decidendi* that the concept of public policy requires a genuine and sufficiently serious threat to a fundamental interest of society.

Despite the discretionary power granted to the member states to identify cases of public order according to their rules, this power has been subject to control and review by various cases judged by the ECJ.

The French jurist BUCHER[143], citing the French FRANCESKAKIS qualify for public policy as "immediately applicable law", choosing the basic laws of the market security or society: "*don't l'observation est nécessaire pour la sauvega·de de l'organisation politique, sociale ou économique du pays*".

In the context of European legislation we can detect several examples of preservation of public order:

> *Article 9 - Rome Convention on the law applicable to contractual obligation[144]*. It is possible to identify that, by using the term "mandatory rules", Article 9 of the Convention clearly imposed a public policy rule: "*nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract."*
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> *Article 1 (3) of French Civil Code[145]* stats that: *"Police and security laws oblige all who live in the territory. Buildings, even those owned by foreigners, are governed by French law. The laws concerning the state and the capacity of the people govern the French, even residing in foreign country.*
>
> *Article 6 of Germany Introductory Act to the Civil Code (EGBGB)[146] provides that "A provision of the law of another country shall not be applied where its application would lead to a result which is manifestly incompatible with the fundamental principles of German law. In particular, inapplicability ensues, if its application would be incompatible with civil rights".*

However, the concept of public order in the context of the choice of forum clauses goes through the difficult task of harmonizing the conflict between private autonomy and public interest.

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141 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12002E%2FTXT.

142 Case 30/77, Regina v. Pierre Bouchereau [1977] ECR, 1999.

143 BUCHER, A. p. 39.

144 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:41998A0126(02).

145 http://gallica.bnf.fr/ark:/12148/bpt6k1061517/f4.image

146 https://www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.html#p0022

Therefore, this article will deal briefly on the criteria necessary to reconcile the public and private interest.

c. *´Drittwirkung´* and its connection with public order. Resolution of conflicts between private autonomy and public order: *´Erforderlichkeit´* and *´Geignetheit´*.

The horizontal application of human rights, also known by the German word *'Drittwirkung'*, describes the application of human right provisions in the private sphere. Horizontal effectiveness of fundamental rights demonstrate that it is incumbent upon the State not only to respect, but also ensure compliance with regulating compliance with fundamental rights, whether they are violated by State, or by other individuals, i.e., human rights are applied horizontally between private individuals and not vertically.

Horizontal application of human rights has a clear connection with public policy, because both of which limit the freedom of contract based on the premise that human dignity and societal values have major value.

'Drittwirkung' has however taken place in European Union through the European Convention of Human Rights which has become the key text on human rights in private law.
In EU law, it is clear that individuals have directly enforceable rights and duties, even against other individuals. The reason is explained by ENGLE[147]:

> The Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community

Direct application of fundamental rights in private relationships was inspired by the case law of German courts. The case that gave rise to the theory of horizontal effectiveness was the "Lüht Case", judged by the German Constitutional Court, on January 15, 1958, where the recognition of the rights of defense of citizens in the private sphere was established.

So the question arises: how to reconcile the private autonomy (contractual freedom) with the horizontal application of fundamental rights and public order?

According to the German jurist ALEXY[148], the fundamental idea of optimization in relation to legal possibilities, that is, the examination of proportionality, can be formulated in a rule that can be called "law of weighting":

> The law of weighting shows that the balance can be divided into three steps or levels. The first level deals with the degree of compliance with or interference with a principle. The

147 ENGLE, E. note 14.

148 ALEXY, R. p. 193.

> following is next level, identifying the importance of compliance with the principle of opposite. Finally, at the third level, it is identified whether the importance of the opposite principle justifies the non-compliance of the other principle or interference with it. If it were not possible to issue ration first, the intensity of the interference, secondly, the degree of the importance of the justifying reason for the interference and, in third, the relation of one to the other, the objections raised by Habermas and Schlink would be true.

The Brazilian jurist MENDES[149] considers that in case of conflict, the way is not to establish a hierarchy between fundamental rights. He cites the following excerpts from the judgment of the German Constitutional Court[150]:

> In view of the unity of the Constitution and the defense of the global order of values it seeks, the collision between individual rights of third parties and other legal values may legitimize, in exceptional cases, the imposition of limitations on individual rights not explicitly subject to the legal restriction expressed.

Following this reasoning, the peculiar circumstances of each case must be considered by practical agreement (*praktische Konkordanz*).

But, another question arises: how to balance the circumstances of each case? How to apply the principle of proportionality?

The use of the principle of proportionality or the prohibition of excess involves an appreciation of the necessity (*Erforderlichkeit*) and adequacy (*Geignetheit*) of the providence or interference[151].

By transferring these lessons to examining the choice of forum clause, it is concluded that interference in choice on the basis of the "public policy" argument can only be justified if the modification of the choice of parties is appropriate to the purpose, and if there is no other effective and less restrictive means to interfere with the contractual freedom of the parties.

d. Two cases that exemplify the supremacy of the *'public policy'* over private autonomy: (1) European Court of Justice: Case C-36/02, Omega [2004] ECR, I-0960[152]; (2) French Supreme Administrative Court: dwarf-throwing case[153].

In both cases cited above, the European Courts dealt with the confrontation between *private autonomy* and *public policy* (especially the principle of human dignity).

The Case C-36/02 judged by European Court of Justice (ECJ) concerns about free movement of goods *´versus´* public policy restrictions – human dignity. The Court tooked interpretation of Articles 49 to 55 EC on the freedom to provide services and Articles 28 to 30 EC on the free movement of goods.

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149 MENDES, G. p. 240.

150 *BVerfGE*, 28, 243 (261).

151 BVerfGE, 30:250.

152 *Omega Spielhallen-und Auttomatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*.

153 See Conseil d'Etat, Ass., 27 October 1995, Cne de Morsang-sur-Orge, Recueil Lebon, p. 372.

Firstly, is important to remember that the free movement of goods is provided at article 49 (and also 57) of the Treaty on European Union[154]:

The question referred to the Court of Justice by the *Bundesverwaltungsgericht* (Federal Administrative Court, Germany) was raised in an appeal on a point of law before that court by *Omega Spielhallen- und Automatenaufstellungs-GmbH* ('Omega'), in which that company challenged the compatibility with Community law of a prohibition order issued against it by the *Oberbürgermeisterin der Bundesstadt Bonn* ('the Bonn police authority') on 14 September 1994.

At this case, a company operating a so-called laserdrome had chalenged and administrative order of the local police authority prohibiting the use of sub-machine-gun-type laser targeting devices and sensory tags fixed to jackets worn by players and designed to "play at killing people".

In making this decision, the German authorities were guided by their concerned for human dignity, surpassing the provision of certain goods or services protected by the Treaty on European Union.

The decision highlighted the importance of the principle of human dignity:

> There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right.

The ECJ also decided on the possibility of control of the act of member states when they invoke "public policy" to repeal norms provided in Treaties:

> However, the possibility of a Member State relying on a derogation laid down by the Treaty does not prevent judicial review of measures applying that derogation (Case 41/74 Van Duyn [1974] ECR 1337, paragraph 7). In addition, the concept of 'public policy' in the Community context, particularly as justification for a derogation from the fundamental principle of the freedom to provide services, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the Community institutions (see, by analogy with the free movement of workers, Van Duyn, paragraph 18; Case 30/77 Boucher eau [1977] ECR 1999, paragraph 33). Thus, public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (Case C-54/99 Église de Scientologie [2000] ECR I-1335, paragraph 17).

In the same direction, in order to preserve human dignity, the French Supreme Administrative Court (at 1995) judged the famous dwarf-throwing case. The Court decided that the municipal orders prohibiting such games were valid insofar as the orders were grounded in the human dignity principle, regardless of the fact that the games only involved competent consenting adults.

It is a classic position of public order surpassing the autonomy of the person who consented to and accepted that public exposure. Individuals may not agree to forfeit their dignity and no consideration may justify such an undertaking. Dignity is thus not only a subjective (individual) right, whose content is left to vary according to individual wishes; it is also an objective notion

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154 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT

which protects a certain image of man.

However, both decision mentioned above provides that restrict the freedom to provide services may be justified on public policy grounds only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures.

V. Conclusion.

The choice of agreement clauses are intended to minimize the risk of being subject to the effects of possible political instability, legal and economic and, especially, to give more predictability and security in international contracts.

Private autonomy has prevailed in European legislation. A tendency to increase the effectiveness of the choice of jurisdiction clauses is found in the Hague Convention, which states that the law of the court chosen, including its conflict of laws rules, will be applied to determine whether the agreement is null and void.

However, the phrase a contract is the "law between the parties" is very old and exists in some iteration in most legal systems.

In this way, the importance of public order is because the "law between the parties" can be modified even in the case of a contract that purports to be fully self-sufficient or "autonomous," namely a contract that the parties subject exclusively to minutely-detailed clauses contained in the contract and designed to address any and all eventualities.

What makes such a contract binding and these clauses enforceable is not the parties' autonomy nor their volition alone, but rather the right of each party ultimately to coerce the other party (whether through recourse to arbitration or judicial action) to abide by these clauses. In the modern legal system, this coercion remains the monopoly of the State and is reflected in its laws[155].

A judgment is contrary to the public policy of the executing State when it appears to cause prejudice to the public interest, public confidence in the administration of the law or security for the individual rights of personal liberty or private property.

However, is great complexity in defining public policy because it is influenced by historical, legal, political or economic issues of each countries, witch represents an indeterminate legal concept. There is, therefore, a discretionary power for each country to define what is "public order" to intervene in relations.

The dignity of the human person has supremacy over contractual clauses of choice of forum because clauses create obligations, but on the other hand the dignity of the human person functions as a general duty imposed on all citizens. About the status of "duty" of the principle of human

155 SYMEONIDES, Symeon. p. 6

dignity, we transcribe the lessons of the ECtHR judge PETTITI[156]:

> "The exercise of rights does not necessarily reveal dignity. Dignity has more to do with respecting duties and obligations."

The defense of the possibility of modifying the will of the parties and change the contracts of jurisdiction of choice clause normally passes the following arguments: **[i]** the parties are free to choose the contract terms, but that freedom has its limits: public policy; **[ii]** in the same perspective, *'Drittwirkung'*, describes the application of human rights provisions in the private sphere (horizontal effectiveness of fundamental rights); **[iii]** In certain cases, the Public Power may intervene in the economic order, to ensure free initiative, valorization of human labor and protection of the most fragile party; **[iv]** intervention for modification of the terms is regulated by proportionality. BEATTY[157] argues that "proportionality is a universal criterion of constitutionality" (*'ubiquitous'* in law).

However, modification of terms is balanced by the fact that freedom of contract is an important prerogative that also deserves protection.

The exceptional character of the intervention in freedom will is very well summarized in the explanation of professors ARNOLD and FELDBAUM[158]

This principle of freedom dictates that freedom of the individual is primordial, a direct expression. of its dignity, and public power intervention for a legitimate common interest must remain exceptional and needs justification.

Summarizing, according to European legislation and jurisprudence:

- public order is and undetermined concept;
- the legal system of each state define the assets and rights that are protected based on public order (we can conclude that sovereignty is highly connected with public order reach);
- the content of public order can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values;
-the European Court of Justice (ECJ) does not function as an authentic interpreter of the "public order" scale of a Member State, because it is a discretionary power. However, this power has been subject to control and review by various cases judged by the ECJ.

So there is a tendency to preserve the jurisdiction of choice clauses as provide security to the contracts.

However, *public order* acts as a constraint on this autonomy and predictability witch

156 PETTITI, L. O. p. 53, 57.

157 BEATTY, D. M. Beatty. p. 162

158 ARNOLD R., FELDBAUM E. (2016)

characterizes choice of court agreements. This counterpoint of public order is justified because contractual relations in democratic countries should pursue profit as their primary purpose, but without prejudice to the dignity of the people involved in the relationship, according to the dictates of social justice.

We conclude that the control of clauses through public policy must be guided by proportionality and "law of weighting" (ALEXY[159]). It is not appropriate to assess whether the choice of jurisdiction was good or convenient, but to examine whether the choice fills the legal formalities and does not entail a serious vulnerability to either party, which involves an appreciation of the necessity (*Erforderlichkeit*) and adequacy (*Geignetheit*) of the providence or interference guided by public order.

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159 note 25, *supra.*

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