МЕЖДУНАРОДНОЕ ПУБЛИЧНОЕ И ИНТЕГРАЦИОННОЕ ПРАВО

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CIRCUMVENTION OF THE LAW AS A CONFLICT OF PRIVATE AND PUBLIC INTEREST (ON THE EXAMPLE OF THE REPUBLIC OF BELARUS)

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If it is possible to apply the rules of foreign law in relations with a foreign element, the parties may be tempted to circumvent the legal norms of domestic legislation, which form the basis of the national legal order, containing imperative prescriptions and regulating the relevant relations regardless of the law to be applied. One of the legal mechanisms designed to prevent the emergence of such a situation is the institute of "circumvention of the law".

Article 1097 of the Civil Code of the Republic of Belarus (hereinafter – the Civil Code of Belarus) establishes that "*agreements and other actions of participants in relations regulated by civil legislation aimed at circumventing the rules of this section on the applicable law to subject the relevant relations to another law are invalid. In this case, the law of the relevant state subject to application in accordance with this Section shall apply"*.

For example, in case of cross-border transfer, personal data "leave" the scope of Belarusian legislation and fall under the jurisdiction of another state (the legislation "does not follow" the data). in the absence of rules on cross-border transfer, there would be a possibility to circumvent the requirements of paragraph 14 of Article 1 of the Law of the Republic of Belarus of May 7, 2021 No. 99-З "On personal data protection" by transferring processing to other countries with simplified requirements for data processing.

The institution of circumvention of the law traditionally comes from private law. In the doctrine prevails the point of view, according to which the *circumvention of the law is recognized as an act of a person, which does not contain elements prohibited by law*, but at the same time *serves to achieve the purpose prohibited by law*. In studying the legality of the persons' actions, the focus so far has been exclusively on the purpose (*unjust intent of the parties*) of the subject's legal action and the determination of the peremptory norm that is violated by such actions (*ius cognes).*

Nevertheless, until now, the application of the institution of circumvention of the law in the field of public economic law raises many interpretative doubts, both in doctrine and in judicial practice.

The fundamental problem concerns the consideration of *a persons' intentions*, i.e. whether they must have an *a priori intention to act to circumvent the law*, or whether *they can do so unconsciously*. The said problem is particularly significant

in public economic law, since, on the one hand, persons are *free to act* (*freedom of contract principle*, see for example, art. 2 of the Civil Code of the Republic of Belarus (thereof – the Civil Code of Belarus), and, on the other hand, *must comply with strict* rules about the regulated activity; in practice, due to the complexity of normative matter, it is difficult to indicate at what point an action is nevertheless lawful.

Thus, Mr. Alex Muranov, Russian lawyer considers the following: "Suppose Russian persons who do not want to notarize a transaction in Russia (because of the high state duty), go to another country where a simple written form is established for such transactions, and there they make such a transaction and subsequently claim that the rule of locus regit formam actum applies to it". From the point of view of the *classical theory of "circumvention of the law" there is a* circumvention of the law in this particular case.

But since we are still able to apply to Article 1097 of the Civil Code of Belarus, nothing will come of it. First, there is no "circumvention" in this case, because "the rules of this section on the applicable law" (*locus regit formam actum*) must be applied, and the parties insist on it. Second, the parties have not subjected the form of the transaction to some other law, but to *the law of the place of the transaction*.

It seems, since this institution is a form of control over the interpretation and application of legal norms by persons (including general legal principles, for example, *principle of estoppel*), it should also cover cases when persons in fault do not realize the nature of their actions.

Thus, in the case of circumvention of the law, there is *a conflict between the values of business freedom and public interest* (e.g.: concessions, licenses, special permits – rights and obligations arising from them).

In law, a *value is a socially recognized and established practice of behavior*, which is transformed into the sphere of norming laws and creating *metanorms*, which is conditioned by the *reaction of the state* (*institution of law circumvention*), aimed at consolidating the already existing consistent and hierarchically ordered system of values included in legal norms. That is, the control over the circumvention of the law is carried out as a control over compliance with systemic norms.

The control of circumvention of the law is complicated and concerns such points as: 1) *in fraudem legis* (*anything done in fraudem legis is void in law)*; 2) general control over whether their *mutual will* (*purpose of transactions*) is not directed to generate an effect prohibited by law.

By virtue of the principle of *ignorantia iuris nocet* all subjects of economic relations are obliged to comply with applicable legal norms, i.e. reference to the absence of a *deliberate purpose* (*unlawful intent to circumvent the law*) does not exempt from liability.

There are two forms of *non-compliance with the law*: 1) *contra legem (against the law),* behavior prohibited by a legal norm or non-compliance with such a norm; and 2) *praeter legem (outside the law)* actions, i.e. an intentional

act to achieve a prohibited purpose through conduct that purportedly constitutes the application of a different legal norm.

However, there is also *indirect action* which is *not stipulated*, but also *not prohibited by law*, i.e. which does not undermine the values contained in other norms, since such action is legitimate in certain situations.

Another important provision in the interpretation of the institute of circumvention of the law is Art. 9 of the Civil Code of Belarus (*abuse of right – estoppel*), which defines *expressis verbis* the limits of formation of private law actions and determines the consequences of exceeding such limits – *invalidity of actions* (absolute), or the action does not give rise to the legal consequences that the party hoped for, i.e. *illegality*.

Thus, the author comes to the following findings:

1. There is a margin for actions not provided for but not prohibited by law in any legal system (*legislative gap*).

2. Subjects of economic legal relations are obliged to comply with duly established legal norms.

3. Circumvention of the law and control of the integrity of system values shall be applied in public economic law on the basis of general principles of interpretation of public law.

4. As a rule, the actual action is within the limits of another lawful action, if the intention is lawful, and goes beyond the legally permissible, due to the collision with the prohibiting norm, if it is unlawful.

5. Circumvention of the law, on the contrary, indicates a violation of the values essential to the legal system.

Circumvention of the law in public economic law as a rule applies to actions of private law nature, but in relation to the norms of public law, in connection with which it is assessed in accordance with the provisions of the Civil Code of the Republic of Belarus, supplemented by the norms of public law – control of a complex nature.

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СОВМЕСТНЫЕ ПРОЕКТЫ РОССИЙСКОЙ ФЕДЕРАЦИИ, РЕСПУБЛИКИ БЕЛАРУСЬ И ИСЛАМСКОЙ РЕСПУБЛИКИ ИРАН В НЕФТЕГАЗОВОЙ ПРОМЫШЛЕННОСТИ. ПРОБЛЕМЫ И ПЕРСПЕКТИВЫ

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