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LEGAL PROBLEMS OF RISKS MINIMIZING IN INTERNATIONAL SETTLEMENTS

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Abstract: The paper deals with the problems of delimiting international payments from domestic ones. In jurisprudence, the criteria for distinguishing these types of calculations are debatable, therefore, the most frequently substantiated are the following: multinationality (belonging to different states), residency, cross-borderness and currency control. According to the authors, the settlement transaction is international if the banks performing the basic settlement operations (issuing bank and performing bank) are located on the territory of different states. Attention is paid to the fact that minimization of negative consequences of risks is possible both by private law and public legal means. It is established that the settlement legal relations arise with the help of the main ones, therefore it is necessary to delimit the settlement risks (risks in the sphere of settlement relations) from the banking risks and risks of the basic transactions as a whole (purchase and sale, transportation, etc.).

Keywords: International Settlements; risk; private law and public law ways of risks minimizing.

INTRODUCTION

The modern world economy is characterized by the process of globalization, which, according to the IMF, is understood as the growing economic interdependence of countries around the world as a result of the increase in the volume and diversity of cross-border flows of goods, services, and capital (Kovshova & Kozlova, 2012). An obvious consequence of this circumstance is an increased interest in ensuring the security of receiving payments for goods delivered, services refused and works performed. Therefore, the aims of this paper are to analyze the general features of "risk" as an economic and legal category and the features of its manifestation in the sphere of settlement relations. To achieve this goal, it is necessary, first, to understand the content of the concept of "international settlements" because of the controversy of many judgments made about the criteria of this concept.

RESEARCH TOOLKIT

While working on the paper, we used formal dogmatic, systemic, logical and other methods of investigation. This paper is the first work in the Russian Federation devoted to the legal aspects of minimizing risks in international settlements.

THE MAIN PART

The problems of international and domestic settlements delimitations have been poorly studied. Describing the legal framework of international financial relations,

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some authors either do not pay attention to it (Altshuler, 1984) or do the analysis of the criteria of the currency transaction instead (Lunts, 2002). In a number of cases, the opinions of the authors are not sufficiently specific. Thus, according to one of the authors, payment is considered international if it has contact with more than one state (Luca, 2000).

Sometimes the distinction criterion is indicated through a binding to the main transaction. Thus, according to V. Tikhini, "international settlements are understood as settlements between legal entities, as well as settlements with individuals, performed via bank, on foreign trade and other foreign economic transactions" (Tikhinya, 2001). A similar position is held by I.V. Getman-Pavlova: "International Settlements are the regulation of payments on monetary claims and obligations arising in the sphere of international civil relations; These are payments for foreign economic transactions" (Getman-Pavlova, 2013). Thus, according to this author, international settlements can be both a legal process (regulation) and an actual action (payment). Such a position does not allow us to sufficiently define the concept of international settlements.

According to A.V. Shipova, a foreign trade transaction is understood as "a civil legal transaction aimed at the proper performance of a monetary obligation in accordance with the terms of a contract entered into by economic agents in the field of foreign trade carried out by participants in the international system of cashless settlements located on the territory of different countries, and being subject to currency control of relevant government executive bodies of The Russian Federation; the transaction is aimed at interstate non-cash assets movement" (Shipova, 2007). Thus, this definition contains the following criteria: (1) multinationality (belonging to different states); (2) cross-borderness, since the entities are located on the territory of different countries and the transfer of non-cash assets is "interstate"; (3) presence of currency control.

Turning to the analysis of regulatory acts, it should be noted that, as a rule, they do not contain criteria for distinguishing between domestic and foreign economic transactions, but an indication of the relations to which the document applies. This circumstance is not always taken into account. For example, Ya.V. Wolvach argues that "The most commonly used criterion for assigning a transaction to a foreign economic transaction is the location of commercial enterprises of the parties to the transaction in different states. It is this criterion that serves as a condition for the regulation of certain types of foreign economic transactions by the relevant international conventions - on contracts for the international sale of goods (1980), on international financial leasing (1988) and on international factoring (1988)" (Wolvach, 2005). This opinion does not correspond to the content of normative acts. So, in Art. 1 of the Convention on Contracts for the International Sale of Goods of 1980, the circle of relations to which it applies is defined, and not the criterion for classifying the transaction as a foreign economic one. In addition, it is necessary

to take into account the availability of other regulations governing the contract for the international sale of goods.

However, some documents contain exactly the criteria for distinguishing between domestic and foreign economic transactions. So, according to part 2 of Art. 274 of the Banking Code of the Republic of Belarus, a letter of credit is considered international if one of the parties participating in the calculations under the letter of credit is a legal entity of a foreign state. Thus, in this document, the criterion of nationality is used.

The drawback of Part 2 of Article 274 of the Banking Code of the Republic of Belarus is the lack of interpretation of the concept of "party". How to qualify a transaction in the event that the sum of money on a foreign trade transaction will be transferred to the account of the representative office of the beneficiary located in the same state where the payer is located? Apparently, the internal nature of payment will make it difficult to qualify a settlement transaction as an international one.

In the literature on public international law, the criterion of nationality is predominant. So, according to V.M. Shumilova, "international settlement transactions are payments on monetary claims and obligations arising from relations between states, legal entities/individuals of different states" (Shumilov, 2003).

In the economic literature, the above criterion is also generally accepted. For example, according to Yu.V. Nikitinskaya and T.V. Nechaeva, "international settlements are the regulation of payments on monetary obligations arising between legal entities (state organizations) and citizens of different countries on the basis of their economic, political and cultural relations" (Nikitinskaya & Nechaeva, 2017). M.V. Yazhlev in his dissertation comes to the conclusion that international settlements are understood as "the organization and execution of payments for monetary claims and obligations arising in connection with foreign economic and other relations of enterprises, firms, companies, organizations, individuals between themselves and banks located on the territory of different states, when conducting cashless monetary operations in the process of selling goods and services and redistributing monetary savings, by transferring the corresponding amounts bank accounts" (Yazhlev, 2000). A similar position is held by A.G. Ivanasenko (Ivanasenko, 1996), A.I. Shmyreva (Shmyreva, 1998), T.P. Lizunov (Lizunova, 1991) and a number of other economists.

The criterion of nationality is actively used in judicial practice. In particular, one of the federal arbitration courts came to the following conclusion: "Considering that a foreign legal entity - the Reserve Bank of India - participates in the transaction under a letter of credit, the relations of the parties can not be regulated by an act that operates only on the territory of the Russian Federation, namely: the Regulation on Non-Cash Calculations in the Russian Federation, put into effect by the letter of the Central Bank of the Russian Federation from 08.07.92 No. 14". However, the

reason for this decision, in fact, should not be that the executing bank is a foreign legal entity, but that it was outside the Russian Federation.

In addition to the criterion of state ownership of the parties, the residency criterion is applied. According to L.G. Efimova, international settlements are "settlements of legal entities and individuals (residents and non-residents) located in the territory of the Russian Federation with legal entities and individuals located on the territory of other states for goods (work, services) purchased or sold (Efimova, 1994).

V.A. Kanashevsky believes that "such settlements are understood as international ones, where payment must be made into the abroad" (Kanashevsky, 2016). Thus, developing the author's thought, one can come to the conclusion that the settlement transaction will be recognized international if the banks performing the basic settlement operations (for example, the issuing bank and the performing bank in the international letter of credit) are located on the territory of different States.

A wide application in normative acts has the criterion of the location of the parties to the legal relationship (residency). For example, according to Art. 2 European Union Directives No. 97/5 on "Cross-border credit transfers", the transfer is considered international if the participating banks are located on the territory of different states. Another document - the Economic Code of the Ukraine - states that "international settlement transactions are conducted for monetary claims and obligations that arise when performing foreign economic activity between states, business entities, other legal entities and citizens who are located on the territory of different countries" (para. 1 art. 344 «the International settlement operations»).

According to paragraph 1.10 of the Instruction approved by the Resolution of the Board of the National Bank of the Republic of Belarus No. 66 of 29.03.2001 (as amended April 29, 2004), an international bank transfer is a transfer of bank funds, among which there is an authorized bank and a resident bank.

The criterion of the location of the parties to the legal relationship is embodied in judicial acts of a number of foreign countries. In particular, J.Shapira notes that the position of judicial practice has passed a number of stages. Initially, courts tried to find internationality criteria in the arsenal of traditional bindings. However, this proved to be ineffective: neither the nationality of the parties, nor the place where the contract was concluded, nor the place of payment was recognized as proper criteria. 17.05.1927 The Court of Cassation, which considered the case of Pelissier du Besset, on the proposal of the Prosecutor General, refused to search for such a criterion in the field of law. "It has been proposed to consider as an international payment the transfer of funds or goods crossing the national border and going either from that country abroad or in the opposite direction" (Shapira, 1993).

Thus, taking into account such specificity of settlement transactions as the mandatory participation of banks, it can be concluded that the settlement transaction is international if the banks performing the basic settlement operations (issuing bank and executing bank) are located on territories of different States.

Turning to the analysis of risks, it should be noted that this category is economic and legal in the sense that the same term first appeared in the economic turnover and then, after a considerable period of time, was consolidated in regulatory enactments.

In the most general form, the risk (from the French: risqué) is normally understood as the possibility of the occurrence of circumstances causing material damage, the threat of loss (Zakharenko, Komarova & Nechaeva, 2008). The notion of "risk" is the subject of constant attention of lawyers, both in the Soviet and post-Soviet periods of development of civil law. As Ya.M. Magaziner pointed out back in 1925, "the law is nothing more than a risk distribution system that changes and directs their spontaneously forming distribution on the basis of the natural laws of the economy" (Magaziner, 1999). In the Soviet period, this problem was considered in the works of S.I. Komov (Komov, 1982), V.A. Rassudovskii (Rassudovsky, 1975), V.A. Augensicht (Augensicht, 1984), N.I. Tatishcheva (Tatishcheva, 1964), B.L. Haskelberg (Haskelberg, 1954), O.G. Hino (Hino, 1949) and a number of other authors.

In recent times on the subject of the study the works of V.V. Abramov (Abramov, 2011), N.G.Apresova (Apresova, 2012), A.S. Vlasova (Vlasova, 2011), D.A. Goryachkina (Goryachkina, 2011), D.R. Kanaev (Kanev, 2013), D.S.Korepanova-Kamskaya (Korepanova-Kamskaya, 2010), T.F. Magadayeva (Madagayeva, 2011), A.G. Martirosyan (Martirosyan, 2012), V.A. Petrishcheva (Petrishchev, 2010), etc. have been published. In the post-Soviet period, there were also defended theses on the theory of law (Kryuchkov, 2011; Mamchun, 1999) and civil science (Gubarev, 2002; Khmelevskoy, 2001; Kopylov, 2003; Lavrov, 2006).

The functional purpose of this category, according to the prevailing view in the jurisprudence, boils down to the following: "Using the institution of risk, the state (by issuing regulations) and entrepreneurs (by concluding agreements) establish rules that allow, on the one hand, to minimize possible harmful effects, and, on the other hand, if they do occur, distribute the losses between the participants in the economic turnover (participants in the transaction)" (Panarina, 2016). In general, while agreeing with this statement, we consider it necessary to pay attention to the fact that in many cases risks bring about not only negative but also positive consequences.

In the literature, it is customary to pay attention to the differences in risk in the economic and legal sense. So, according to D.A. Goryachkina, "The economic essence of risk consists in the occurrence of the obligation for one party to take the

losses caused by risky circumstances. The legal side of risk is not in the essence and identification of risky circumstances, but in the choice of legal means that would allow anticipating the existing probability of occurrence of negative property consequences, minimizing them and correlating with the desired property interest" (Goryachkina, 2013).

D.R. Kanev clarifies the above formulation as follows: "Civil law can not prevent negative property consequences of accidental circumstances, but it must regulate the relations of the parties in case of occurrence of such consequences" (Kanev, 2013).

Specifying the above provisions in relation to international settlements, it should be noted as a preliminary remark that this type of economic relations has both general and special risks. And these risks are classified into private and public. Thus, in the list of elements of the monetary system, in the economic literature it is customary to allocate the composition and structure of international currency liquidity (foreign exchange reserves), the exchange rate regime in conditions of mutual convertibility of national currencies, currency restrictions, forms of international payments, international financial organizations regulating currency relations at the supranational level, the regime of international currency markets and world gold markets. Obviously, of all the above parameters, private international agreements can only establish the forms of international settlements and the regime of exchange rates. All the rest can be regulated only by interstate agreements that have a public law nature.

With regard to private-law methods for risks minimizing, it should be taken into account that the settlement legal relationship (letter of credit, debit transfer, credit transfer, etc.) arise from the main transactions (contract of sale, transportation, etc.), therefore it is necessary to delimit settlement risks (risks in sphere of settlement relations) from bank risks and risks on the basic transactions as a whole.

In literature, there are other criteria for classifying risks as well. For example, it is asserted that "in the context of the world economy globalization, the role of international settlements in ensuring the efficiency of foreign economic operations is increasingly important. In this regard, it is necessary to minimize various risks in international financial transactions. These may include traditional external and internal risks (operational, transaction, strategic, reputational), as well as new types of risks, i.e. deliberate fraudulent actions" (Zapolskaya & Tagirova, 2014).

One of the most important risks is exchange rate instability. "Currency exchange risk is the financial risk associated with the impact of an unforeseen change in the exchange rate between two currencies. The exchange rate between currencies varies over time and can lead to unexpected gains or losses".

To minimize the negative consequences of this type of risk, it is necessary to use anti-inflationary provisions in the event of an actual decrease in foreign

exchange earnings as a result of the general depreciation of currencies relative to commodity-material values and include the settlement conditions the relevant provisions that reduce currency risks. When transactions are significant in their volume and especially when it comes to a longer period between negotiations and payment, it seems necessary to apply currency clauses (Panarina, 2016).

The stability of the international settlement system, that is, the system of relations for cross-border transfer of funds, will also increase in the case of a transition in mutual settlements to national currencies. As A.V. Vasiliev states in this connection, "the optimal use of the national currencies of countries participating in transactions is the optimal way for the correlation and interrelation of national and foreign currencies in the performance of various international operations" (Vasiliev, 2009). For example, China has signed bilateral agreements with Brazil and Malaysia on yuan, rather than dollars, pounds or euros trade.

The currently used forms of international payments differ in terms of reliability. In literature and judicial acts, it is customary to include a letter of credit as one of the most reliable forms of payment for receiving payments. For example, one of the jurisdictional bodies came to the following conclusion: "As can be seen from the case file, the Krasnodar Customs carried out an audit of the company's compliance with the currency legislation of the Russian Federation, which demonstrated the resident's failure to sufficiently fulfill duties to receive from the non-resident on his bank accounts via authorized Banks of funds for goods transferred to a non-resident, the use of such forms of settlement under an agreement (prepayment, letter of credit), which exclude the risk of non-performance of the obligations for contract, commercial risk insurance". Obviously, a prepayment, in this case, means a credit transfer.

In literature, there is the same assessment of the role of the letter of credit. In particular, it is asserted that "the use of a letter of credit remains ... very significant, especially in the countries of the Near and Middle East. During the economic crisis, its use provided partners with confidence in the implementation of trade transactions, as it provides guarantees against many trade risks" (Savinov, Masyukova & Krivonozhkin, 2014); "Non-cash settlements on a letter of credit seriously reduce risks for business entities" (Fedoranich, 2013).

CONCLUSION

(1) the settlement transaction is international if the banks that perform the basic settlement operations (issuing bank and performing bank) are located in the territory of different states; (2) the minimization of the negative consequences of risks is possible using both private legal and public legal means, (3) the settlement legal relations arise on the basis of the main ones, therefore it is necessary to delimit settlement risks (risks in the area of settlement relations) from banking risks and risks of the underlying transactions as a whole (purchase and sale, transportation, etc.).

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