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PECULIARITIES OF DETERMINING THE PRIVATE INTERNATIONAL LEGAL STATUS OF LEGAL ENTITIES

Abstract. In conditions of developing a market economy and international economic cooperation, encouraging the attraction of foreign capital and introducing the most advanced innovations, the boundaries for business are becoming more transparent. Entrepreneurial activity of the foreign companies in the market entails the emergence of many issues concerning the determination of the status of such companies, both private legal and public-legal nature, which are resolved on the basis of finding out their nationality and personal law (statute). Topical issues of the concepts of personal law, personal statute and nationality of legal persons, theories (criteria, tests), on the basis of which the personal law of the legal entity is determined, proposed by domestic authors as well as the scholars of near and far abroad are considered the article. The authors of the article analyze the merits and lacks of the definitions of these terms expressed by researchers, suggest their own interpretations of these concepts, consider some practical aspects of determining the nationality and personal law of legal entities, as well as draw attention to some problems of their definition, and indicate the importance of determining nationality and personal law (statute) of a legal entity in the performance of activities in a foreign country.

Key words: personal law (personal statute, lex societatis) of a legal entity, nationality of a legal entity, theory (criteria, tests) of the nationality of a legal person, private international law.

Introduction. In terms of developing a market economy and international economic cooperation, encouraging the attraction of foreign capital and introducing the most advanced innovations, the boundaries for business are becoming more transparent. Business is becoming more internationalized. Large companies, well-known brands have their offices, production sites, management bodies, shareholders located in various jurisdictions regionally or even globally. Companies strive to offer a product demanded by a consumer, expand the markets for its sale, and to get the maximum profits. As for the legal entities established and operating in the same state their legal status is beyond doubt. However when foreign companies appear on the market, a lot of issues concerning the regulation of relations with such participants, both within the framework of private law and public law appear. The initial of them are about whether it is possible to recognize an organization as a legal entity or not, the law applying when relations to a foreign company, the scope of its legal capacity, etc.

The definition of legal features of the activities of foreign legal entities is of direct practical importance, since it is necessary to establish the specifics of carrying out activities on the territory of a foreign state for such legal entities as a whole and in relation to certain types of their activities, and to apply the appropriate legal regime. It should be noted that in some countries the activities of foreign legal entities are generally prohibited, as, for example, in the United Arab Emirates.[1]

It should be said that the private international legal status of entities is determined through such categories as "personal law", "personal statute" and "nationality". And namely these concepts are under the study of this paper.

Methods of research. In order to make a comprehensive analyze of the terms above the following methods were used: literature review, studying current norms of civil legislation of the Republic of

Kazakhstan, chosen approaches of foreign countries and International Court of Justice in criteria of identification of the nationality and personal law of legal entities.

Nationality of a legal entity is usually understood as the belonging of a legal entity to a certain state. This term is used to determine the legal relationship of a legal entity with the state for the purposes of paying taxes, creation of a legal base regulating the issues that constitute the content of personal status by the state. It should be noted that the term "nationality" is nominal, since it does not indicate the presence of foreign capital in the assets of legal entity or the foreigners as the founders of this organization. This term is used for convenience, brevity and is used, mainly, to delimit domestic entities from foreign ones [2]. Similar concepts of nationality have been proposed by many scholars.

So, for instance, it is possible to find such a definition of the nationality or (state belonging) of a legal entity in the specialized literature as the "attachment" of a legal entity to a specific state. [3]

Suleimenov, M.K., Academician of the National Academy of Sciences of the Republic of Kazakhstan and the Academy of European Law, determines the nationality of the legal entity as belonging and subordination of the legal entity to the legal system of a certain state (of one or another jurisdiction).[4] Thus, the scholar shows in the proposed concept that the relationship and belonging of a legal entity differ from the belonging of an individual to the state in determining its citizenship, and in relation to a legal entity it is right to say that the legal system (jurisdiction) of a particular state covers the issues of the legal entity's belonging and spreads its power on it.

The concepts of personal law or personal statute are more various from different authors.

Professor Lebedev, S.N. and Professor Kabatova, E.V. argue that the personal law or personal statute (lex societatis) of a legal entity is the law regulating the main issues of the legal status of a legal entity as a subject of law [5]. Thus, the concepts of personal law and personal statute are considered as identical, and the norms of the current law are laid in the understanding of these definitions.

Voznesenskaya, N.N. adheres to a similar position regarding the determination of the legal status of a legal entity. In her opinion, the legal status of a legal entity is always determined by a single law - a personal law (statute) of a legal entity. Personal law establishes the basic legal parameters of a legal entity, it answers the question whether a particular entity is a legal entity, what is its legal capacity, what are the powers of the bodies that represent it, what is the responsibility of this legal entity, etc. The author also draws attention to the fact that in this case the fundamental principle of private international law - the principle of autonomy of will - is inapplicable. [6]

Academician Suleimenov, M.K. states that the personal law of the legal entity determines its state belonging, "nationality" and resolves the issues of its statute on this basis: is the organization a legal entity, when does its legal capacity arise and cease, what is its scope, how is the legal entity established, reorganized and liquidated, what is the fate of the property of a legal entity, its branches and representative offices. [7] In our opinion, the stated position is vulnerable, since nationality is a primary concept, and the concept of personal law is secondary to nationality. We believe that the content of personal law follows precisely from nationality as belonging a legal entity to a state, because the state in the person of its state authorities having normative powers stipulates the personal law of such a legal entity, and also can modify and supplement it. In addition, it should be noted that the issues of the functions of the state following from its basic essence are considered in details in the theory of state and law, and in this sense the state has three main functions and branches of power: legislative, executive and judicial [8], and, therefore, the implementation of normative activities is one of the manifestations of state functions. Meanwhile, the researcher probably proceeds from the concept of a personal law established by the Civil Code of the Republic of Kazakhstan (Special Part), according to Article 1100 of which the law of a legal entity is the law of the country where this legal entity is established. The concept of the statute is also disclosed through the issues that are fixed in the personal law accordingly the above-mentioned concept proposed by the academician. They are the following: "is the organization a legal entity when its legal capacity arises and ceases, what is its scope, how is the legal entity established, reorganized and liquidated, what is the fate of the property of the legal entity, its branches and representative offices ". To our mind, these issues are determined by the legal status of a legal entity, otherwise this concept is illogical, since the personal law is defined through the personal statute. Unfortunately, the author does not specify whether he matches the concept of personal law and the personal statute or not, so we believe that the regulation of the issues above is covered by the concept of the legal status of a legal entity, which is the status of a legal entity

regulated by the norms of law, the totality of its rights and obligations, including the legal personality, the rights and obligations established by law, the guarantees of the provided rights and the liability of a legal entity as a subject of law for non-performance of duties. [9]

Shlyantsev, D.A. considers the concept of a "personal statute" as the scope of legal capacity of a legal entity in a state. The content of this concept includes relations regarding the establishment, activity, termination of the activities of a legal entity, the relationship between the founders (participants), the procedure for obtaining and distributing profits, settlements with the budget, and others. The personal statute has its content in each legal system, and it is often different from each other. [10]

Moreover, referring to the legal literature, the concept of a personal statute is mainly viewed as an analog of a personal law, and the concepts of the personal law (statute) given above are illustrative examples of this position. Also the very concept of the statute (from English "statuo", from late-Latin "statutum", from Latin "statuo" - I decree, I decide) is usually associated either with the name of some legislative acts of the countries of the Anglo-Saxon system, or with the regulation of the activity of an international body in the form international agreement. [11] In this regard, the identification of a personal statute, based on its understanding as a relevant act or document containing certain legal norms, with the concept of personal law is fully justified.

It is also possible to meet the concept of a personal law of a legal entity, which means certain rules governing the procedure for the establishment, operation and liquidation of such a legal entity. [12] This concept seems incomplete, because it does not take into account, e.g. the issues of liability of a legal entity, which are also stipulated in the law. At the same time, the issues of legal entities' liability in the legislation of different countries are regulated in different ways. In some countries, a legal entity is recognized even as a subject of criminal law, that is not inherent, for example, to the Republic of Kazakhstan.

In our opinion, personal law or personal statute can be defined as a set of legal norms of a state, which determine the legal status of a legal entity as a subject of law - a participant in property relations, as well as personal non-property relations related to property ones.

Thus, the importance of defining a personal law is to determine whether it is possible to consider an organization as a legal entity in general and apply the relevant legal norms regulating its legal status to it. So, if the personal law of the partnership is English law, then such partnership will not be recognized as a legal entity, and if to apply the law of France to such an organization, then such entity will be treated as a legal entity. [13]

If to refer to the Civil Code of the Republic of Kazakhstan, Article 34 provides for organizational and legal forms of legal entities depending on the main purpose of the activity (i.e. commercial and non-commercial legal entities).
This article of the Code states that a legal entity being a commercial organization can be established only in the form of a state enterprise, an business partnership, a joint-stock company, a production cooperative. A legal entity being a non-profit organization can be established in the form of an institution, a public association, a joint-stock company, a consumer cooperative, a foundation, a religious association and in another form provided for by legislative acts. A legal entity that is a non-profit organization and which is held only at the expense of the state budget can be established solely in the form of a state institution. Legal entities may establish associations that are recognized as non-commercial legal entities.

The need for such organizational and legal clarity in the civil legislation of the Republic of Kazakhstan is caused by the frequent desire of entrepreneurs to establish various non-standard and combined economic entities (e.g., a firm, corporation, trust, trust company, holding, etc.) without an exact name of their organizational and legal form after gaining independence by the state and proclaiming freedom of private entrepreneurial activity. Since the rights, duties, internal structure, authorities of bodies and responsibility for obligations largely depend on the organizational and legal form, the peculiarities of which, as a rule, are determined by a specially adopted law, the establishment of "formless" legal entities made it difficult to determine their true legal status. Therefore, the Decree of the Supreme Council of the Republic of Kazakhstan dated December 27, 1994 "On the Implementation of the Civil Code of the Republic of Kazakhstan (General Part)" stipulated the provision according to which the legal entities established before the official publication of the Civil Code (General Part) dated 27.12.1994. in organizational and legal forms not provided for by the Civil Code (General Part), had to be transformed

into organizational and legal forms provided for by the Civil Code (General Part) before January 1, 1998. [14]

Further, the researchers identify the criteria that form the basis for determining nationality (e.g. Shlyantsev, D.A. [15], Gasanov, K.K., Shmakov, V.N., Sterlingov, A.V., Ivashin, D.I. [16], Makarov, A.N. [17]) or the personal law of the legal entity (e.g. Ruzakova, O.A. [18], Lebedev, S.N., Kabatova, E.V.[19]).

We share the position that a state adheres to a certain criterion for determining the nationality of legal entities, which finds its legal fixation in a personal law, i.e. in the law of the country, which regulates the legal status of organizations. From this point of view, as it was already mentioned above, the personal law is dependent on the definition of the nationality of the legal entity.

When choosing the criteria that determine the nationality of a legal entity, the legislation of different countries and scientific doctrines expressed by the scholars are based on two basic concepts. According to one of the concepts, the basis for determining the nationality of a legal entity is a formal legal criterion that is not related to the conditions of economic activity of the legal entity (i.e. the criterion of incorporation). The second concept is based on the discovery of the "economic" criterion of nationality depending on the aspects of the production and commercial activities of the legal entity (the criterion for the location of the governing bodies and the criterion for settling or carrying out productive activities). [20]

In the literature, there are references to the use of the criterion determining the nationality of a legal entity in conditions of normal civil turnover or the legal domicile of its government. Another position is in determining the nationality of a legal entity according to the state where such an entity has been originated. Some other criteria are also proposed. Among them are: the center of economic operations of a legal entity, the citizenship of the majority of individuals who are members of a legal entity (e.g. shareholders in joint-stock companies). [21]

Such theories as the theory of incorporation, the theory of settled life, the theory of the center of exploitation (siège social or real seat), and the theory of control were formulated on the basis of the criteria above and widely spread in the theory of international law.

The theory of incorporation is typical for countries of common law - the United States, Great Britain, India, Australia, Canada, Singapore, as well as for such countries as the Russian Federation, China, Kazakhstan, the Netherlands, etc. The essence of the theory of incorporation is that a legal entity belongs to the law and order of the country where a legal entity is registered (entered in the register).

The theory of settled life is stipulated by the legislation of France, Germany, Belgium, Spain, Ukraine and other countries. According to this theory, the personal law of a legal entity is the law of the location of the control center (supervisory board, directorial board, other bodies of the legal entity).

According to the siège social or real seat theory (the theory of the center of exploitation) the personal law of a legal entity is the legislation of the country where the legal entity carries out its activities. Elements of such theory are fixed in the legislation of Portugal, Germany, India.

The control theory determines the citizenship, nationality of the founders of the legal entity and its participants as the main criterion.

Among the issues, which are determined on the basis of a personal law of a legal entity, are:

- the status of the organization as a legal entity;
- the organizational and legal form of the legal entity;
- requirements for the name of a legal entity;
- issues of creation, reorganization and liquidation of a legal entity, including issues of succession;
- the content of the legal capacity of the legal entity;
- the procedure for the acquisition of civil rights by a legal entity and the assumption of civil obligations;
- internal relations, including the relationship of a legal entity with its participants;
- the ability of a legal entity to meet its obligations.

The definition of a personal law of a legal entity is necessary when considering disputes involving foreign legal entities. [22]

An interesting attempt as for determining the “proper” national company laws which govern the company is shared by Peter Behrens, Professor emeritus of Law of the University of Hamburg, Faculty of

Law. Under this position, the various connecting factors used in different conflict of laws systems in order to determine the “proper law” of a company (lex societatis) may be categorized in a number of ways. A first distinction can be made between “indeterminate” and “determinate” connecting factors according to their ability or inability to directly determine the “proper law” of companies. Connecting factors are “indeterminate” if they are not self-sufficient because their localizing function depends on the use of other more specific (“determinate”) connecting factors. “Determinate” factors are connecting factors that are in fact able to directly localize a company within a specific jurisdiction without requiring the use of other more specific criteria. [23]

Indeterminate connecting factors are widely used in many jurisdictions and in various contexts. These are the following: nationality, domicile, and residence. The *nationality* of companies is a concept that is mainly used in Spain, Italy and France. Article 9(11) of the Spanish Civil Code expressly provides that “the personal law for legal persons is determined by their nationality”. Domicile as indeterminate connecting factor is considered on the example of the law of England and the USA. Under this factor a corporation is domiciled in the country where it was registered. Connection factor of residence is mostly inherent to the tax purposes.

Determinate connecting factors are considered by the researcher in the context of identification of three different sub-categories of connecting factors. In order to localize a company, a first category of connecting factors relies on the creation of the company as a legal person (a); a second category relies on the internal governance structure and decision making within the company (b); a third category relies on the business activities of the company (c). [24]

As is known for the purposes to develop economic cooperation and attraction of foreign capital, the settlement of relations complicated by foreign elements is regulated not only with national law, but on the basis of interstate agreements - bilateral international treaties (hereinafter referred to as "BIT") and multilateral.

Meanwhile, the recent practice demonstrates that, although investment treaties are governed by international law, international law will refer back to municipal law for the purpose of determining nationality. States determine nationality in many different ways, sometimes by rules that can appear harsh and unusual to observers from different legal systems. [25]

The rules for determining nationality become even more complex when they are applied to corporations. Treaties apply a variety of tests to determine if a corporation qualifies as an investor of a party.

Some treaties set a low threshold for a corporation to qualify as an investor of a party. Article 1(2) of the Ukraine-Lithuania BIT, for example, defines a "Lithuanian investor" as "any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations".

Other treaties set a higher threshold. Article 1(1)(b) of the Indonesia-Chile BIT, for example, not only requires that the corporation be "constituted or otherwise duly organized under the law" of the home State, but also requires that its "effective economic activities" be in that State. [26]

Nationality of legal entities has been widely examined also by the International Court of Justice (ICJ) in the 20th century, when States aimed to protect their nationals and legal entities by measures of diplomatic protection. [27] Accordingly the ICJ Reports the nationality of a legal entity may be determined by applying several tests – test of incorporation, test of seat (siége social), and test of control. Under the incorporation test, a legal entity acquires nationality by way of incorporation. This test obviously is the most applied and the simplest of all previously mentioned. However, it is very likely that for the purposes of diplomatic protection this test would not create a genuine link with the State of incorporation, especially if the State is chosen only for its tax regime. The incorporation test is also criticized for being artificial and without practical significance; thus in reality a company is only a subject of national law. The siège social or real seat test states that a legal entity possesses the nationality of its place of principal administration. Under this theory, establishing an administrative office within a State’s territory is a condition of incorporation, which creates a more effective link with the country of incorporation. Another method to identify the nationality of a legal entity is the control test, which was developed to identify an effective link between a legal entity and a State. According to this test a legal entity has the nationality of its controlling shareholders, in other words, the control test “is an instance of ‘lifting the corporate veil’”. [28]

In recent years, it has been suggested that certain issues of private international law have been subsumed into an overarching transnational legal regime referred to as the → *lex mercatoria*. However, this is not an uncontroversial concept and the fact remains that significant differences continue to exist between national laws on key substantive and procedural issues pertaining to the international operations of corporations. [29]

Conclusions. It should be said that, since the basis of theories is based on one or another criterion, the nationality of the organization is determined in different ways, and as the states differently solve this issue in their legislation, the occurrence of the problem of the absence of nationality or the presence of dual nationality from a legal entity is quite real. In case of the lack of nationality, such situation is possible if the legal entity was established in one state while doing its main activity in another country. If the legislation of the state in which the organization was registered applies the theory of the center of exploitation, this legal entity has to subject to the law of the country where it conducts its main activity. At the same time, if the country of organization's main activities recognizes the theory of incorporation, then such a legal entity will not have a nationality at all [30]. Similarly, it is possible to simulate and consider the situations with the identification of the dual nationality of legal entities on the basis of the legislation of different states recognizing different criteria.

Proceeding from the above, it can be concluded that the determination of nationality and, accordingly, the personal law of a legal entity is a fundamental issue in identifying its status. At the same time, the identification of private international status of an organization through the criteria above is not even always possible. As for the Republic of Kazakhstan, the civil legislation of the country has adopted the theory of incorporation or domicile, according to which the personal law of a legal entity is the law of the state in which it was established.

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ОСОБЕННОСТИ ОПРЕДЕЛЕНИЯ МЕЖДУНАРОДНОГО ЧАСТНО-ПРАВОВОГО СТАТУСА ЮРИДИЧЕСКИХ ЛИЦ

Аннотация. В условиях развития рыночной экономики и международного экономического сотрудничества, поощрения привлечения иностранного капитала и внедрения самых передовых инноваций, границы для бизнеса становятся все более прозрачными. Предпринимательская деятельность иностранных компаний на рынке влечет появление множество вопросов определения статуса таких компаний, как частно-правового, так и публично-правового характера, которые определяются на основе установления их национальности и личного закона (статута). В настоящей статье рассматриваются актуальные вопросы понятий личного закона, личного статута и национальности юридических лиц, теории (критерии, тесты), на основе которых определяется личный закон юридического лица, предложенные отечественными авторами, а также учеными ближнего и дальнего зарубежья. Авторы статьи анализируют достоинства и недостатки высказанных учеными определений указанных терминов, предлагая собственные интерпретации данным терминам, рассматривают отдельные практические аспекты установления национальности и личного закона юридических лиц, а также обращают внимание на некоторые проблемы их определения, обозначают важность определения национальности и личного закона (статута) юридического лица при осуществлении им деятельности в иностранном государстве.

Ключевые слова: личный закон (личный статут, lex societatis) юридического лица, национальность юридического лица, теории (критерии, тесты) определения национальности юридического лица, международное частное право

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ЗАҢДЫ ТҰЛҒАЛАРДЫҢ ХАЛЫҚАРАЛЫҚ ЖЕКЕ-ҚҰҚЫҚТЫҚ МӘРТЕБЕСІН АЙҚЫНДАУ ЕРЕКШЕЛІКТЕРІ

Аннотация. Нарықтық экономика мен халықаралық экономикалық ынтымақтастықты дамыту жағдайында шетелдік капиталды тартуға және ең озық инновацияларды енгізуге ынталандыру жағдайында бизнестің шекаралары ашық болады. Шетелдік компаниялардың нарықтағы кәсіпкерлік қызметі олардың азаматтық және жеке заңдарын (жарғысын) белгілеу негізінде анықталатын, жекеше және заңды және қоғамдық-құқықтық сияқты компаниялардың мәртебесін айқындаудың көптеген мәселелерін тудырады. Осы мақалада отандық авторлар мен жақын және алыс шетел ғалымдары ұсынған заңды тұлғаның жеке заңы негізінде жеке заңнама, жеке заңнама және заңды тұлғалардың азаматтығы туралы тұжырымдамалардың өзекті мәселелері қарастырылады. Мақаланың авторлары ғалымдар айтқан терминдердің анықтамаларының мән-мағынасын және кемшіліктерін талдайды, осы терминдердің жеке түсіндірмелерін ұсынып, заңды тұлғалардың азаматтық және жеке заңдарын белгілеудің кейбір практикалық аспектілерін қарастырады және оларды анықтаудың кейбір мәселелеріне назар аударады, ұлты мен жеке заңын (жарғысын) шетелдегі қызметті жүзеге асыруға заңды тұлға.

Түйін сөздер: заңды тұлғаның жеке құқығы (жеке статут, lex societatis), заңды тұлғаның азаматтығы, заңды тұлға азаматтығының теориясы (өлшемдері, сынақтары), халықаралық жеке құқық

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PUBLICATION ETHICS AND PUBLICATION MALPRACTICE IN THE JOURNALS OF THE NATIONAL ACADEMY OF SCIENCES OF THE REPUBLIC OF KAZAKHSTAN

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