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Civil-legal status of a foreign legal entity in Private International Law: a comparative legal analysis

The article regards the issues of determining the civil status of the foreign legal entities that act as the main participants in investment activity in the territory of the host state. The problem of determining the personal status of a legal entity in private international law is due to fact that economic activity of legal entities more often goes beyond the borders of one state and often covers many other states. The participation of legal entities in international civil law relations raises a number of legal issues, primarily related to the legal status of a foreign legal entity. One of the first questions arising when a foreign legal entity is admitted to the territory of the host state is whether a legal entity established under the laws of one state is considered to be a legal entity in a foreign state where it is planning to operate? Based on the analysis of the national legislation of the Republic of Kazakhstan, the Russian Federation and the bilateral treaties on the promotion and protection of investments, various approaches have been identified to determine the nationality of a legal entity. Various points of view, existing in the legal literature, regarding the legal status of foreign legal entities in private international law are considered. The comparative characteristics of the category of «personal law of a legal entity» are fixed in the civil legislation of the Republic of Kazakhstan, the Russian Federation and bilateral treaties on the promotion and protection of investments. The comprehensive analysis of the legislation allowed the authors to conclude that a unified approach is taken in the choice of the «nationality» criterion of a legal entity in Kazakhstan and Russian legislation systems, these are the criteria for the establishment or registration of a legal entity (incorporation theory).

Keywords: civil and legal status of investors, a private law of the legal entity, the nationality of the legal entity, the statute of the legal entity, bilateral treaty on promotion and protection of investments, a treaty on promotion and mutual protection of investments, a doctrine of the nationality of the legal entity.

Diplomatic relations between the Russian Federation and the Republic of Kazakhstan were established on October 22, 1992 and all this time the Russian-Kazakh relations are developing in the spirit of good-neighborliness, alliance and strategic partnership.

After the collapse of the USSR, relations between Russia and Kazakhstan turned into one of the most important components not only in the post-Soviet space, but also in the sphere of geopolitics.

Kazakhstan was the first CIS country with which Russia entered into the Treaty of Friendship, Cooperation and Mutual Assistance on May 25, 1992. According to the Treaty, the parties recognize the inviolability of the existing borders between them and agree to carry out equitable and beneficial economic and scientific-technical cooperation. The Treaty provides for the creation of a common military-strategic space, the joint use of military bases, ranges and other military facilities [1].

Mikhail Bocharnikov, Ambassador Extraordinary and Plenipotentiary of the Russian Federation to the Republic of Kazakhstan, notes in his article «Kazakhstan-Russia: a quarter of a century of partnership of sovereign states»: «25 years is a good occasion to remember the past, assess the present and look into the future. The implementation of the right to self-determination, recorded in the USSR Constitution for the Un-

ion republics, up to the separation, was embodied in 1991 in the emergence of new independent states on the site of the former Soviet Union. In these conditions, a huge positive role was played precisely by traditional economic ties and state wisdom of the Leader of Kazakhstan Nursultan Nazarbayev, who put the economy ahead of politics. Already on August 17, 1991, the presidents of Kazakhstan and Russia at a meeting in Almaty adopted a joint statement «On a common economic space», proposing to work out a concept for the economic Treaty of all former union republics. This step paved the way for the adoption in December of the same year of the Almaty Declaration by the heads of 11 states that declared the end of the existence of the USSR and the formation of a new Commonwealth of Independent States. October 22, 1992 — since the signing of the Protocol on the exchange of plenipotentiaries of the Russian Federation and the ROK — the history of relations between Russia and Kazakhstan as friendly sovereign states began. These ties have stood the test of time and at the present stage serve as a vivid example of strategic partnership. Thus, bilateral relations between Russia and Kazakhstan are very extensive and diverse. Today, friendly states face common challenges — diversifying the economy, introducing innovative technologies, attracting foreign investment, efficient use of the geographic location, and building a strong integration association» [2].

Since the proclamation of independence, the Republic of Kazakhstan and the Russian Federation have been steadily keeping pace with the development of the economy and the welfare of the people of their countries. At the same time, as one of the most important directions of state economic policy, the full support and protection of foreign investments still remains to be there.

In this regard, the issue of determining the legal status of investors — legal entities that act as the main participants of investment activity in the territory of the host state — becomes particularly urgent.

The question of determining the personal status of a legal entity in private international law is due to the fact that economic activity of legal entities more often goes beyond the borders of one state and often covers many states by its activities. The participation of legal entities in international private law relations raises a number of legal issues, primarily related to the legal status of a foreign legal entity. Can a legal entity created under the laws of one state be regarded as a legal entity in another state where it operates? According to which laws can the legal status and legal capacity of a legal entity be regarded?

As M. Suleimenov notes «The problem of legal entities in the IPL is to determine which country has the right to regulate a legal entity, which state a particular legal entity belongs to» [3; 423].

It would be reasonable to agree with L.Anufrieva, who believes that «... for international private law it is very natural to divide all entities operating in the territory into domestic (national) and foreign. The same applies to legal entities.

The civil and legal status of foreign legal entities in private international law is determined by the fact that they are affected by at least two regulatory systems — the system of national law of the state considered for this legal entity as «own» and the state in whose territory it operates or is presupposed to act (law of the host state). In some cases, the norms of the relevant multilateral or bilateral international treaties in which the states in question participate [4; 38, 39] may also have special significance.

The need to define a personal law also appears in the case of the resolution of conflicts of law, when a court is obliged to «tie» a legal entity to the legal system of a state [5].

A. Makovsky believes that the personal law of a legal entity or the «statute of a legal entity» in private international law is the law that is determined on the basis of the conflict of laws rules and is applicable to a set of relations related to the legal personality of a legal entity and complicated by a foreign element, or at least to the main part of such relations [6].

To define the legal status of foreign legal entities in private international law, the terms «personal law (statute) of a legal entity» and «nationality of a legal entity» are used. This means the law enforcement procedure of the country is applied to this legal entity.

The common opinion is shared by Russian and Kazakh scientists, «the concept of» nationality «as applied to legal entities is rather conditional, approximate ... .. Nevertheless, the application of the concept of «nationality of a legal entity» is acceptable, since it allows us to immediately delineate» our «(national) legal entities from «foreign» [3; 424; 4; 39].

The term «nationality» is steadily used in the national legislation of both states in relation to maritime, river, air and space ships. So, in the Paragraph 17 of the Merchant Shipping Code of the Russian Federation No. 81-FZ of 30.04.1999 stipulates: «A vessel enjoying the right to navigate the national flag of the Russian Federation shall have the nationality of the Russian Federation» [7]. A similar norm is also fixed in Article 16 of the Law of the Republic of Kazakhstan of 17 January 2002 No. 284-II «On Merchant Shipping» [8].

The category «statute of a legal entity» is fixed in Article 1,100 of the Civil Code of the Republic of Kazakhstan [9]. The law of a legal entity is the law of the country where this legal entity was established (art.1100 of the Civil Code of the Republic of Kazakhstan) [9]. In particular, if the statute of a legal entity recognizes the right of Kazakhstan, the legal status will be determined in accordance with articles 33-57 of the Civil Code. For example, signs of a legal entity under Article 33 of the Civil Code will be: organizational unity, property separation, speaking in civil circulation on its own behalf, independent property responsibility. The scope of legal capacity is determined by Article 35 Civil Code: Common Part refers to commercial organizations and Special Part is for non-profit organizations [9].

A similar norm is provided for in Article 1202 of the Civil Code of the Russian Federation «The personal law of a legal entity is the law of the country where a legal entity is established» [10]. However, unlike the Civil Code of the Republic of Kazakhstan, where in Article 1001 the general provision is fixed as «the civil legal capacity of a legal entity is determined by the law of a legal entity» [9] the Civil Code of the Russian Federation listed a range of issues that are determined by the statute of the legal entity. Therefore Paragraph 2 of Article 1202 of the Civil Code of the Russian Federation says:

Personal law of a legal entity determines, in particular:

1) the status of the organization as a legal entity;

2) the organizational and legal form of the legal entity;

3) requirements for the name of a legal entity;

4) issues of creation, reorganization and liquidation of a legal entity, including issues of succession;

5) the content of the legal capacity of the legal entity;

6) the procedure for the acquisition by a legal entity of civil rights and the assumption of civil obligations;

7) internal relations, including the relationship of a legal entity with its participants;

8) the ability of a legal entity to meet its obligations;

9) questions of responsibility of the founders (participants) of the legal entity on its obligations [10] null.

The standards contained in Paragraph 2 of Article 1101 of the Civil Code of the Republic of Kazakhstan and Paragraph 3 of Article 1202 of the Civil Code have a similar) concept [9; 10].

The norm, contained in Paragraph 4 of Article 1202 of the Civil Code of the Russian Federation «If a legal entity established abroad carries out its entrepreneurial activities primarily in the territory of the Russian Federation, the claims of liability for the obligations of a legal entity of its founders (participants), other persons who have the right to give instructions binding on it or otherwise have the opportunity determine its actions, apply to the Russian law, or at the choice of the creditor, the personal law of such a legal entity» [10] is missed in the Kazakhstan Civil Code.

The same principle (the personal law of a legal entity) for determining the «nationality» of a foreign legal entity has the norms contained in Paragraph 1101 of the Civil Code of the Republic of Kazakhstan [9] and Article 1203 of the Civil Code of the Russian Federation [10] because the right of some foreign states allows the existence and activity of organizations as participants in the civil turnover, which at the same time are not recognized as legal entities. Although these organizations do not have a full legal personality, they act in circulation under their own name and carry out transactions on their own behalf with third parties. This situation has, for example, a place in relation to some types of trade partnerships envisaged by the law of foreign countries. In particular, it concerns such organizational and legal forms of entrepreneurial activity as a full or limited partnership created under the law of the Federal Republic of Germany, general or limited partnership in the countries of the Anglo-American legal system [6].

Thus, there is a uniform approach in the choice of the criterion of «nationality» in Kazakh and Russian legislation. They are the criteria for the establishment or registration of a legal entity (incorporation theory).

In practice, there are cases when courts use the personal law of a legal entity when establishing the legal status, standing and legal capacity of the foreign person participating in the case. For example, a foreign company applied to an arbitration court in the Russian Federation with a statement of claim against a Russian limited liability company (Russian community) in connection with the improper fulfillment of obligations by the latter from the contract of international sale of goods.

The arbitration court left the claim without consideration on the basis of Clause 7 of Part 1 of Article 148 of the APC of the RF [11], guided by the following.

By virtue of Part 2 of Article 254 of the APC of the Russian Federation, foreign individuals have the right to apply to arbitration courts in the Russian Federation according to the rules of jurisdiction and estab-

lished by this Code to protect their violated or disputed rights and legitimate interests in the field of entrepreneurial and other economic activities [11].

According to Part 3 of the same article, foreign individuals participating in the case must submit to the arbitration court evidence proving their legal status and the right to carry out entrepreneurial and other economic activities [11].

In this case, by virtue of Article 1202 of the Civil Code of the Russian Federation, the personal law of a legal entity is the law of the country where a legal entity is established, hence the legal status of the foreign company should be determined by the law of the state of the place of its establishment [10].

The Russian community (the respondent) presented to the court duly certified official documents indicating that at the time of filing a claim by a foreign company, it was excluded from the register of foreign companies due to non-payment of annual fees.

As it follows from the norms of the applicable foreign law of the place of incorporation of the company, legal entities may be excluded from the corresponding register of foreign companies due to non-payment of annual fees, after which they may not continue to conduct business and otherwise perform transactions with assets, file claims and initiate on their own behalf and in their capacity. At the same time, companies excluded in this order from the register do not lose the opportunity to be subsequently restored in the register after paying off their arrears on payment of annual registration fees.

Thus, according to the personal law of the foreign company, the latter was deprived of an active procedural legal personality. Due to these circumstances, the arbitral tribunal concluded that the foreign company before the restoration of it in the register of companies of a foreign state did not have the right to participate in the consideration of cases in arbitration courts in the Russian Federation as a plaintiff [12].

As for Kazakhstan's judicial practice, as the Managing Partner of the International Law Firm «Integrites» Kurmangazy Talzhanov notes: «During the period of our independence in Kazakhstan, about 80 normative resolutions of the Armed Forces of the Republic of Kazakhstan were adopted. However, none is specifically dedicated to the practice of procedural examination of cases involving foreign persons, which would generalize the judicial practice on the application of the legislation of the Republic of Kazakhstan with the participation of foreign persons (both material and procedural law) [13].

On the question of what is a personal law of a legal entity, there is no single answer, and therefore one has to make choices from existing doctrines, criteria or theories on this question.

It is well known that different criteria are used to determine the nationality of a legal entity in different countries, including criteria: institution, or registration (the doctrine of incorporation), the seat of the administrative center (the doctrine of exploitation centre), the center of the main activity (the doctrine of the operation center) and the control criteria (the doctrine of control).

Consider issues of determining the personal statute of a legal entity on the example of bilateral treaties on the promotion and protection of investments (hereinafter BIT).

1. Criterion of «place of establishment of a legal entity» in determining the nationality of a legal entity. Doctrine of incorporation.

According to this doctrine, the personal law of a legal entity is the law of the state where it is established (registered). The application of the doctrine of incorporation is characteristic of the countries of the Anglo-Saxon legal system. At the same time, a number of countries of the continental legal system, including the Republic of Kazakhstan, the Russian Federation, the Republic of Belarus and the Republic of Uzbekistan, apply this doctrine [14–17].

For example, in the BIT between the Government of the Republic of Kazakhstan and the Government of the Republic of Korea "The term «investor» related to any of the Contracting Parties refers to any corporations, companies, firms, enterprises, organizations and associations that have the rights of a legal entity or are established under the law in force on the territory of this Contracting Party» [14].

A similar definition refers to the BIT between the Government of the Russian Federation and the Government of the Kingdom of Bahrain «any legal entity, including corporations, firms or business associations established or established in accordance with the legislation of that Contracting Party» [15].

The criterion of the place of establishment of a legal entity is also applied as the only one in the Treaty between the Government of the Russian Federation and the Government of the Republic of Zimbabwe [18], the Treaty between the Government of the Russian Federation and the Government of the Republic of Singapore [19], the Treaty between the Government of the Russian Federation and the Government of the Argentine Republic [20], the Treaty between the Government of the Union of Soviet Socialist Republics and the Government of the United Kingdom of Great Britain and Northern Ireland [21], between the Government

of the Union of Soviet Socialist Republics and the Government of the Republic of Korea [22], the Treaty between the Government of the Republic of Kazakhstan and the Government of the Republic of Hungary [23]; Treaty between the Government of the Republic of Kazakhstan and the Government of the Republic of India [24]; Treaty between the Government of the Republic of Kazakhstan and the Government of Malaysia [25] and the Treaty between the Republic of Kazakhstan and the State of Kuwait [26].

2. The theory of «settlement – location» of a legal entity in determining the personal statute of a legal entity.

According to this doctrine, the personal law of a legal entity recognizes the law of the location of its administrative center.

As a rule, the charter of a legal entity contains an indication of the place of its stay. This doctrine has spread in France, Germany, Italy, Austria, Switzerland and a number of other countries of continental law. The definition of a personal law on the basis of this doctrine is quite convenient: the location of the corporation is easy to verify, and consequently, there are no difficulties with obtaining information about its legal capacity.

However, countries that use the doctrine of incorporation often use the Doctrine of Settlement to determine the location of a legal entity. In particular, in Article 39 of the Civil Code of the Republic of Kazakhstan it is fixed that «the location of the legal entity is the location of its permanent body» [9]. An example of the use of two criteria in BIT are: Treaty between the Government of the Republic of Kazakhstan and the Government of Romania: «legal entities, including companies, corporations, business associations and other organizations that are established or otherwise organized in accordance with the national legislation of the state of that Contracting Party and have their location, together with actual economic activities in the territory of the State of that Contracting Party» [27], the Treaty between the Government of the Republic of Kazakhstan and the Government of the Islamic Republic of Pakistan: «a legal entity established in accordance with the national legislation of the State of one Contracting Party, having its seat on its territory and investing in the territory of the other Contracting Party» [28], the Treaty between the Government of the Russian Federation and the Government of the Italian Republic states «legal entity» is understood as a company and/or its subsidiary branch, company, society or any other organization, which has located on the territory of the Contracting Parties and recognized in accordance with its law legal entity, regardless of whether the liability of the company is limited or not» [29].

The criterion for the location of a legal entity takes place in the legislative and judicial practice of the Russian Federation. Thus, in accordance with the Resolution of the plenum of the Supreme Court of the Russian Federation and the plenum of the Supreme Arbitration Court of the Russian Federation of July 1, 1996, No. 6/8 «when state registration of legal entities is based on the fact that the location of the legal entity is the location of its bodies». The material norms of the Russian Federation, relating, for example, to limited liability companies, operate with a combination of several signs in this regard: «The location of the company is determined by the place of its state registration. The constituent documents of the company can establish that the location of the company is usually the permanent location of its management bodies or the main place of doing business» (Clause 2 of Article 4 of the Law on Limited Liability Companies of February 8, 1998) [30].

3. Doctrine of the operation center.

According to this doctrine, the personal law of the corporation is the law of the place where its main activity is carried out. Supporters of the application of this doctrine are few. Indeed, if the center of exploitation is taken as the main criterion for determining the personal law, the fact that the commercial activity of an enterprise (buying and selling goods, concluding contracts with banks and insurance companies, etc.), which generates legal obligations, will not be taken into account at all, is committed in the control center. Moreover, often a company can have several operating centers with an equal volume of transactions.

4. Use of the «control criterion» in determining the concept of a legal entity.

According to the control doctrine, a legal entity has a nationality not of the state to which the legal entity belongs formally, but of the state where the persons exercising control over the legal person (founders of the legal entity) live or are located [3; 425].

The control criterion, as M. Boguslavsky points out, is used to establish the actual ownership of the legal entity and the person actually controlling it [31; 125]. However, in practice, it is sometimes difficult to determine this. According to N. Doronina, the category of nationality applied to legal entities is more often used to distinguish between its own (national) and foreign (foreign) legal entities and in order to determine the legal regime of the latter's activities within the national legal system, while to foreign ones («foreign» in this legal system) may include and often include local (own or national) legal entities controlled by compa-

nies of another state [32; 142]. This is fully applicable to Kazakhstan, since in accordance with Kazakhstan legislation a legal entity established under the laws of the Republic of Kazakhstan is a legal entity of the Republic of Kazakhstan (i.e., a national legal entity), whether it is controlled by a foreign enterprise (i.e. a legal entity established under the laws of a foreign state) or not.

In certain bilateral treaties of the Republic of Kazakhstan, the criterion of «control» applies only to legal entities not established in accordance with the legislation of one of the contracting parties, but directly or indirectly controlled by individuals or legal entities of the same contracting party. There are five treaties — the Treaty between the Government of the Republic of Kazakhstan and the Government of the Republic of Poland on the promotion and mutual protection of investments [33], the Treaty between the Government of the Republic of Kazakhstan and the Government of Mongolia on the promotion and mutual protection of investments [34], the Treaty between the Government of the Republic of Kazakhstan and the Government Republic of Tajikistan on the promotion and mutual protection of investments [35], the Treaty on the Promotion and Mutual Protection of Investments between the Republic of Kazakhstan and the Kingdom of the Netherlands [36], the Treaty between the Government of the Republic of Kazakhstan and the Government of the Kingdom of Sweden on the promotion and mutual protection of investments [37].

5. Dissemination of the provisions of Bilateral Investment Treaties to entities that are not recognized by legal entities under the laws of the Republic of Kazakhstan.

In some bilateral investment treaties, for example, in a treaty between the Republic of Kazakhstan and the Federal Republic of Germany, the term «company» means: «a) in respect of the Republic of Kazakhstan: any legal entity, company, firm, enterprise and other organizations with a location in the territory of the Republic of Kazakhstan; b) with respect to the Federal Republic of Germany: any legal entity or trading company, other companies or associations with or without the right of a legal entity, with a place of residence in the territory of the Federal Republic of Germany, regardless of whether their activities are directed towards making a profit or not» [38]. The treaty between the Government of the Republic of Kazakhstan and the Government of the Republic of Bulgaria also allows to be an investor «any company, organization or association, with the right of a legal entity or without it, established in accordance with the legislation of the states of each of the Contracting Parties and located on its territory» [39].

As for the Treaty between the Republic of Kazakhstan and the State of Kuwait, it specifically stipulates that the term «company» means any legal entity created in accordance with the laws of the contracting state, whether it is created for financial gain and whether the company private or public, or owned or controlled by investors of a contracting state, and includes a corporation, a trust, partnership, sole proprietorship, a branch, association, or other similar organization [26].

6. Options for using different criteria for determining the nationality of a legal entity.

Thus, in the Treaty between the Government of the Republic of Kazakhstan and the Government of the Kyrgyz Republic: «a legal entity, other associations with the right of a legal entity or without it, a) established in accordance with the legislation of any of the Contracting Parties, b) having its seat in its territory and investing in the territory other Contracting Party [40], in the Treaty between the Government of the Russian Federation and the Government of the Argentine Republic: «Any legal entity, (a) created or established in accordance with the legislation in force in the territory of that Contracting Party and (b) the place of residence therein, provided that it is entitled, in accordance with the legislation of that Contracting Party, to invest in the territory of the other Contracting Party» [41], in the Treaty between the Government of the Russian Federation and The Great Socialist People's Libyan Arab Jamahiriya — «(a) Any legal entity established or established in accordance with the legislation of the State of the Contracting Party and b) investing in the territory of the State of the other Contracting Party in accordance with the laws of the State of the latter Contracting Party [42], the Treaty between the Government of the Russian Federation and the Government of the People's Republic of China: «(a) any legal entity, including companies, partnerships and other organizations established or established in accordance with laws and other regulatory legal acts of any Contracting Party and b) is located in the territory of the Contracting State [43], in the Treaty between the Government of the Russian Federation and the Government of the Slovak Republic: «(a) Any legal entity established and acting in accordance with the legislation of one of the Contracting Parties, and (b) having its seat in the territory of that Contracting Party; Parties, with the condition that the individual and the legal entity are entitled, in accordance with the legislation of its Contracting Party, to invest in the territory of another Contracting Party» [44].

In some BITs three criteria are used in different variations.

In the Treaty between the Government of the Republic of Kazakhstan and the Government of the Islamic Republic of Iran, when determining the status of an «investor», the following criteria are applied:

1) legal entities established in accordance with the legislation of any of the contracting parties; 2) having a seat on its territory; 3) making investments in the territory of another contracting party [45].

In the Treaty between the Republic of Kazakhstan and the Czech Republic on the promotion and mutual protection of investments, the criteria for determining the concept of «investor» are: 1) any legal entity registered or established in accordance with applicable law; 2) recognized as a legal entity; 3) which has a permanent residence in the territory of one of the contracting parties [46].

In the Treaty between the Government of the Republic of Kazakhstan and the Government of the French Republic on mutual encouragement and protection of investments, the following are recognized as criteria: 1) a legal entity established in the territory of one of the contracting parties in accordance with the legislation of this party; 2) having its seat in the territory of this contracting party; 3) controlled directly or indirectly by citizens of one of the contracting parties or legal entities having their location in the territory of one of the contracting parties and established in accordance with the legislation of this contracting party [47].

In accordance with the Treaty between the Government of the Republic of Kazakhstan and the Government of the Republic of Lithuania on the promotion and mutual protection of investments, the term «investor» means: 1) any economic entity established in the territory of one of the contracting parties in accordance with its legislation and procedure; 2) any economic entity or organization established under the legislation of any third state; 3) directly or indirectly controlled by citizens or economic entities of the contracting party, whose location is in the territory of this contracting party, bearing in mind that a majority of the property is required for control [48].

The practice of international legal regulation of foreign investments of the Republic of Kazakhstan at the bilateral level also includes cases of application of four criteria when determining the status of an «investor» — a legal entity. In particular, the Treaty between the Government of the Republic of Kazakhstan and the Government of the Republic of Finland stipulates that the term «investor» means: 1) a legal entity created in accordance with the legislation in force in Kazakhstan or in Finland; 2) which is competent under the laws of its country to invest in the territory of another contracting party; 3) a legal entity that has its seat on the territory of one of the contracting parties or of a third state, with the investor of one of the contracting parties having the predominant participation in it; 4) a legal entity whose definition does not cover Paragraphs 1 to 3, provided that the contracting parties jointly approve each individual investment planned by that person [49].

Finally, another example of a multifaceted approach to the determination of the investor's status is the Treaty between the Government of the Republic of Kazakhstan and the Swiss Federal Council on the Promotion and Mutual Protection of Investments, which provides that the term «investor» with respect to each of the Contracting Parties means: 1) a legal person, including companies, corporations, business associations and other organizational structures established or organized in accordance with the current legislation of the contract party; 2) having their place of permanent residence and actual business activity on the territory of the same contracting party; 3) a legal entity established in accordance with the laws of any country; 4) is directly or indirectly controlled by nationals of one of the contracting parties, or legal persons who have their permanent place of residence and the real business activities on the territory of that Contracting Party [50]. Thus, in the bilateral treaties concluded by the RK, it can be traced as the experience of other states, and first of all developed countries, as initiators of such Treatys, and specific features of the approach of other countries to international cooperation.

In conclusion, it should be noted that of all the criteria used to determine the nationality of a legal entity, the criterion of incorporation or the place of establishment of a legal entity is becoming increasingly widespread. This is caused by the need to monitor the investment processes, including with the participation of foreign investors. In modern conditions, a foreign investor operates through a national legal entity in the territory of the receiving state, either by his own free will (for example, in connection with a more favorable fiscal regime) or because he is forced to invest through a national legal entity, since the national legal order The host state allows investments only through a national legal entity. This requirement is typical for those countries that adhere to the Calvo doctrine (for a number of Latin American countries — Brazil, Honduras, Mexico, as well as for some others, for example, Indonesia, Laos, Syria, Pakistan, Sudan, etc.) [51]. However, according to the legislation of the Republic of Kazakhstan, the activity of foreign investors through a national legal entity does not deprive a legal entity of a foreign state of the right to apply for the protection of

the violated right in international commercial arbitration or the right to include in conditions of the applied law.

Consequently, giving national (intrastate) status to a legal entity with the participation of a foreign investor is more nominal or formal and does not entail serious legal consequences in the context of private international law. Therefore, the criterion of control is of great practical importance, since it allows us to determine the actual, and not legal, nationality of a legal entity.

The solution of the problem from the point of view of N. Voznesenskaya is to recognize «two enterprises that formally belong to one state and, according to capital, to persons of another state, two legal statuses: the first is generally accepted, determined by personal law (in Russia, by the law of the place of establishment); and the second — the investment status, which is determined by the capital and real control. Such a status should be established in the investment law, and act only in relation to investment relations» [52].

Under the legislation of the Republic of Kazakhstan and the Russian Federation, the civil legal capacity of a legal entity is determined by the law of the legal entity (Clause 1, Article 1101 of the Civil Code of the Republic of Kazakhstan, Article 1202 [9, 10]), which considered the law of the country where this legal entity is established (Article 1100 of the Civil Code of the Republic of Kazakhstan; Item 1202 of the Russian Federation). This means that in the civil legislation of the Republic of Kazakhstan and the Russian Federation the criterion of «the place of establishment of a legal entity» is fixed. However, as shown by the above analysis, this criterion is not the only one when it comes to bilateral and other international treaties signed and ratified by the Republic of Kazakhstan. Therefore, the proposal of N.Voznessenskaya on the existence of two statuses of a legal entity as a participant in investment relations is fully justified and acceptable. Indeed, having a civil status, a legal entity with foreign participation may have a special investment status that is granted to it in connection with an international Treaty or treaty both in the Republic of Kazakhstan and in the Russian Federation.

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Халықаралық жеке құқықтағы шетел заңды тұлғаларының азаматтық-құқықтық мәртебесі: салыстырмалы-құқықтық талдау

Мақалада қабылдаушы мемлекеттің аумағында инвестициялық қызметтің негізгі қатысушылары болып табылатын шетелдік заңды тұлғалардың азаматтық-құқықтық мәртебесін анықтаудың сұрақтары қарастырылған. Халықаралық жеке құқықтағы заңды тұлғаның жеке мәртебесін анықтау сұрағы және заңды тұлғалардың шаруашылық қызметі көбінде бір мемлекеттің аясынан шығып, көптеген мемлекетті қамтиды. Халықаралық азаматтық-құқықтық қатынастарда заңды тұлғаның қатысуы, алдымен, шетел заңды тұлғасының құқықтық мәртебесімен байланысты бірқатар құқықтық сұрақтарды туындатады. Шетел заңды тұлғасын қабылдаушы мемлекеттің аумағына жібергенде туындайтын алғашқы сұрақтардың бірі – бір мемлекеттің заңнамасымен құрылған заңды тұлға өзінің қызметін басқа мемлекетте жүзеге асыруды жоспарлаған жағдайда заңды тұлға болып табылады ма? Қазақстан Республикасының және Ресей Федерациясының ұлттық заңнамаларын, инвестицияларды қолдау мен қорғау туралы екіжақты келісімдерді талдаудың нәтижесінде заңды тұлғаның ұлтын анықтаудағы түрлі көзқарастар анықталған. Заң әдебиетіндегі халықаралық жеке құқықтағы шетелдік заңды тұлғалардың құқықтық мәртебесіне қатысты әртүрлі көзқарастар қаралған. Қазақстан Республикасының және Ресей Федерациясының азаматтық заңнамаларында, инвестицияларды қолдау мен қорғау туралы екіжақты келісімдерде бекітілген «заңды тұлғаның жеке заңы» санатының салыстырмалы сипаттамасы жасалған. Заңнаманы кешенді талдау авторларға төмендегі тұжырым жасауға мүмкіндік берген: Қазақстан мен Ресей заңнамаларында заңды тұлғаның «ұлты» белгісін анықтауда бірдей көзқарас байқалады, мұндай белгілер ретінде заңды тұлғаның құрылу немесе тіркелуі қолданылады (инкорпорация теориясы).

Кілт сөздер: инвесторлардың азаматтық-құқықтық мәртебесі, заңды тұлғаның жеке заңы, заңды тұлғаның ұлты, заңды тұлғаның мәртебесі, инвестицияны қолдау мен марапаттау туралы екіжақты келісім, капитал салуды өзара қорғау мен қолдау туралы екіжақты келісім, заңды тұлғаның ұлтын анықтау доктринасы.

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Гражданско-правовой статус иностранного юридического лица в международном частном праве: сравнительно-правовой анализ

В статье освещены вопросы определения гражданско-правового статуса иностранных юридических лиц, которые выступают в качестве основных участников инвестиционной деятельности на территории принимающего государства. Вопрос об определении личного статуса юридического лица в международном частном праве связан с тем, что хозяйственная деятельность юридических лиц все чаще выходит за пределы одного государства и часто охватывает своей деятельностью многие государства. Участие юридических лиц в международных гражданско-правовых отношениях порождает целый ряд правовых вопросов, прежде всего связанных с правовым статусом иностранного юридического лица. Один из первых вопросов, возникающих при допуске иностранного юридического лица на территорию принимающего государства, это — является ли юридическое лицо, созданное по законам одного государства, юридическим лицом и в другом государстве, где оно планирует осуществлять свою деятельность? На основе анализа национального законодательства Республики Казахстан, Российской Федерации и двусторонних соглашений о поощрении и защите инвестиций выявлены различные подходы определения национальности юридического лица. Рассмотрены точки зрения, существующие в юридической литературе, относительно правового статуса иностранных юридических лиц в международном частном праве. Осуществлена сравнительная характеристика категории «личный закон юридического лица», закреплённой в гражданском законодательстве Республики Казахстан, Российской Федерации и двусторонних соглашениях о поощрении и защите инвестиций. Проведенный комплексный анализ законодательства позволил авторам сделать вывод: в выборе критерия «национальности» юридического лица в казахстанском и российском законодательстве прослеживается единообразный подход — это критерии учреждения или регистрации юридического лица (теория инкорпорации).

Ключевые слова: гражданско-правовой статус инвесторов, личный закон юридического лица, национальность юридического лица, статут юридического лица, двустороннее соглашение о поощрении и защите инвестиций, соглашение о поощрении и взаимной защите капиталовложений, доктрина определения национальности юридического лица.

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