Conclusions on the conceptual change of the legal policy of Ukraine and its legislation concerning of evasion of law are formulated.

Key words: corporation, contract, law, multinational, civil, private.

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ДО ПРОБЛЕМИ ВИНИКНЕННЯ ЦИВІЛЬНИХ ЗОБОВ'ЯЗАНЬ

Досліджується проблема виникнення цивільних зобов'язань в аспекті дії актів цивільного законодавства у часі. Вносяться пропозиції щодо удосконалення чинного цивільного законодавства у цій сфері.

Ключові слова: *акти цивільного законодавства, зобов'язання, виникнення зобов'язань.*

Чанышева А. Р. **К проблеме возникновения гражданских обязательств**

Исследуется проблема возникновения гражданских обязательств в аспекте действия актов гражданского законодательства во времени. Вносятся предложения по усовершенствованию действующего гражданского законодательства в этой сфере.

Ключевые слова: *акты гражданского законодательства, обязательства, возникновение обязательств.*

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***Chanysheva Alina*. To the problem of emergence of civil obligations**

The issues of effect in time of acts of civil legislation and dynamics of obligations are researched in the article. Proposals are introduced on improvement of current civil legislation in the field.

Key words: *acts of civil legislation; obligations, dynamics of obligations.*

Turning to the problem of operation of acts of civil legislation in time, even with the first approximation we can see, that the legislation does not give a clear answer to the questions, that arise during application of the law. The same should be said in respect of emergence of civil obligations. At the intersection of these two difficult problems there is a number of questions, to which unambiguous answers can not be given. The science of Civil Law also have not processed recommendations concerning application of relevant legal provisions and their improvement.

At the same time in the science it is asserted, that precise determination of limits of operation of normative legal acts is an elementary, first condition of legal regulation[1]. With a glance to the above-stated the reference to the problem of emergence to obligations' relationships should be claimed topical.

The problem of emergence of obligations in the aspect of operation of acts of civil legislation in time was not specifically studied in the science of civil law, but the methodological basis for its analysis was created by authors, who studied civil obligations (M. M. Agarkov, V. A. Belov, O. S. Ioffe, N. S. Kuznetsova, N. Y. Golubeva, E. O. Kharitonov and others) and operation of acts of civil legislation in time (D. N. Bahrah, O. V. Pushnyak, A. O. Tille, V. A. Tumakov and others).

The purpose of this article is the development of theoretical positions, that can be used during interpretation and application of norms of civil law, concerning the operation of acts of civil legislation in time, in the part, in which they concern the emergence of a civil obligation, as well as while amending the Civil Code of Ukraine.

Basic provision, defining the relations, governed by the newly adopted acts of civil legislation, is formulated in the first part of article 5 of the Civil Code of Ukraine: «The acts of civil legislation are governing relations, arising from the day of entering into force by these acts of legislation».

Determining the date of entering into force by legislative acts is not a complicated task, at least compared to the task of determining the day (or the moment) of emergence of relations, regulated by these acts. So, we will attempt to perform a more detailed analysis of the problem of «emergence of relations».

First of all, it should be noted, that the term «emergence of relations» obviously means the same thing as the «emergence of legal relationships», because «relationships» is a legal shell (form) the factual relations, that are a social (public) content of legal relations. And together factual relations and legal relationships form the phenomenon, that is designated in part 1 of article 5 of the Civil Code of Ukraine by the term «relations» that are «regulated» by the acts of civil legislation.

For the purposes of law enforcement (application of the law) we should turn to more specific provisions of civil legislation, defining the moment of origination of civil relations, relationships, rights and duties. In the second part of article 331, part four of article 334, part two of article 1299 of the Civil Code of Ukraine provisions are contained, defining the moment of origination of the right of ownership. Obviously, from the same moment emerge factual and real legal relations. As for the obligations, the moment of their origination, the moment of origination of factual relations, that are mediated by obligations-legal relationships, the moment of emergence of rights and duties, that constitute the content of norms of the Civil Code of Ukraine, is not defined.

The legislator is more concerned about the determination of the moment, from which the contract is recognized concluded (article 640 of the Civil Code of Ukraine), the moment from which the contract takes effect

(part 2, article 631 of the Civil Code of Ukraine). Under such conditions the rule of operation of acts of civil legislation in time remains disagreed with the moment of emergence of relations (factual and legal, as well as rights and duties, that constitute the content of relevant legal relations).

But there is one more legislative provision, where the question of operation of civil law in time is answered. It is formulated in item 4 of the Final and transitional provisions of the Civil Code of Ukraine and concerns the application of this Code. This item states, that the Civil Code of Ukraine is applied to civil relations, arising after its entry into force. If civil relations arose before, the Civil Code of Ukraine shall apply to the rights and duties, that have arisen or persist after its entry into force. Thus, the emergence of civil relations (and relationships) does not preclude the fact, that in the process of their development (dynamics), because of legal facts, stipulated by the law, new rights and duties emerge.

This understanding of correlation of civil relations (relationships) and civil rights and duties arises from item 4 of Final and transitional provisions of the Civil Code of Ukraine. It can not be ignored while interpreting the first part of article 5 of the Civil Code of Ukraine. This means, that the emergence of civil relations the legislator understands significantly differently than it was interpreted by us above. Therefore, both theoretical concepts, underlying the first part of article 5 of the Civil Code of Ukraine, and item 4 of Final and transitional provisions of the Civil Code of Ukraine, are different. According to item 4 of Final and transitional provisions of the Civil Code of Ukraine, the latter has an immediate effect (with prescribed exceptions), i.e. it defines the content and scope of rights and duties, that continue to exist after the entrance into force by the Civil Code. Part one of article 5 of the Civil Code of Ukraine provides the acts of civil legislation with prospective action, connected with ultra active operation of previously existing legislative acts – newly adopted legislative acts are applied only to those relations, that arise after its entering into force. If the relationships originated before, then to them,

to the rights and duties, to legal facts, arising after the entering into force of the newly adopted normative legal acts, are applied previously adopted acts of civil legislation up until the termination of these relations.

In this regard it should be noted, that in the theory of law the immediate effect of the law is recognized as a general rule. S. S. Alekseev wrote: «The general principle, that determines the operation of normative legal acts regarding ongoing relations, can be defined as a principle of immediate action»[2]. Earlier this view was expressed by A. O. Tille[3] and later – D. M. Bahrah[4], O. V. Pushnyak[5]. The Constitutional Court of Ukraine in one of its decisions only mentioned the possibility of immediate (direct) ultra active and retroactive operation of legal acts, and then focused on the problem of reverse (retroactive) operation of normative legal acts and evaded to answer the question, what operation of normative legal acts is a general rule[6].

And reverse action in time, linked with restrictions of action of previously existing law and prospective action of a newly adopted law, related to the ultra active action of a law, which was in force before, is an exception to the general rule. There are no arguments in favor of the idea, that concerning acts of civil legislation it is possible to deviate from the general rule, especially since it is realized in respect of the Civil Code itself in item 4 of Final and transitional provisions of this Code. That is why the first part of article 5 of the Civil Code requires appropriate amendments and implementation in it of the general rule of immediate effect of acts of civil legislation (upon the model of item 4 of Final and transitional provisions of the Civil Code of Ukraine).

Let us continue our analysis on the basis of more concrete regulatory material. If a certain action or event is recognized as a basis of emergence of obligations (p. 2, article 509, article 11 of the Civil Code of Ukraine), it would be logical to conclude, that with the occurence of this ground emerges an obligation, that is a relationship. Simultaneously, between the same parties arise factual relationships. So, at this point arise rela-

tionships as a unity of factual and legal relations. If the relationships (obligations), have arisen, it is logical to conclude as well that from that moment rights and obligations have arisen, that constitute the content of relevant legal relationships, i.e. obligations.

However, one can not ignore the fact that from the moment of arising of obligations, especially those, the basis of emergence of which is a contract, the rights and duties arise only as the common connectivity of parties, as often from this point the parties have no obligation to perform the actions, that constitute the content of respective duties and rights. At this point arise the «relationships» referred to in part one of article 5 of the Civil Code of Ukraine, which should be understood considering item 4 of the Final and transitional provisions of the Civil Code of Ukraine.

V. A. Belov writes, that with the conclusion of a contract of sale beyond any doubt arises an obligation, the content of which is a right of demand of the buyer to the seller to sell a thing…, and a monetary obligation arises later[7]. We may only note, that the right of demand of the buyer to the seller may also arise not «with conclusion of a contract», but later, within the time period, established by the contract.

Particular attention in connection with interpretation and application of part 1 of article 5 of the Civil Code of Ukraine attract civil relationships concerning securing performance of obligations and civil relationships, in the framework of which civil liability is realized. Their peculiarity lies in the fact, that their origin is put under the condition of emergence of circumstances, concering which at the moment of conclusion of a contract it is not known, whether they will arise or not. The foregoing statement is by its legal content identical to the provision of item one of article 212 of the Civil Code of Ukraine, that characterizes the transactions, made under the condition of occurance of suspensive circumstances. Suspensive condition of a transaction (agreement), according to the letter of the law (part one of article 212 of the Civil Code of Ukraine) should concern transactions. But at the same time nothing is

stipulated comcerning establishment of a suspensive condition in respect of a part of a transaction. Given the fact that the legislator, establishing rules on invalidity of transactions, formulates a separate provision on the invalidity of a part of a transaction, it could be stated, that the absence of a legislative provision on the possibility of putting a part of the transaction under a suspensive condition, means that it is impossible. On the other hand, it is difficult to find arguments in favor of the ban of putting a part of a transaction under the occurrence of a suspensive condition. This makes no sense, especially considering the fact, that there are no obstacles to marking out a part of a transaction and execute it as a separate transaction (agreement). That is why in the first part of article 547 of the Civil Code of Ukraine it is said about the «transaction, ensuring the fulfillment of obligations».

The transaction, securing the performance of the principal obligation with a penalty is usually only a part of a contract, that is a ground of arising of this obligation. However, given the above, it can be regarded as a separate transaction, that is subject to the wording of part one of article 212 of the Civil of Ukraine, i.e. as a transaction, made under a suspensive condition. If this is right, the relationships in an obligation to pay a penalty do not arise from the moment of conclusion of a contract. They arise from the moment of a breach of the principal obligation by the debtor. And this violation is a ground of an obligation to pay a penalty. Thus, in accordance with the first part of article 5 of the Civil Code of Ukraine, the relations, governing the payment of a penalty, are regulated by the acts of civil legislation, that were in force (took effect) on the day, when the debtor violated the obligation, secured by the penalty. This statement should be considered correct also for the cases, where the penalty is established by the law, as stipulated in part one of article 548 of the Civil Code of Ukraine or by legislation, or according to provisions of paragraphs first and third of part two of article 551 of the Civil Code of Ukraine.

The transaction that secures the performance of an obligation by a deposit may be made both separately or as part (condition, several conditions) of the contract, that is the ground of arising of the obligation, secured by the deposit. This transaction should be considered as made under a suspensive condition as well, i.e. part one of article 212 of the Civil Code of Ukraine is applied to it, and the relations (obligations), concerning the deposit, arise from the day of violation of the obligation (by the debtor or the creditor). Therefore, these relations under part one of article 5 of the Civil Code of Ukraine are regulated by the acts of civil legislation, that were in force on the day of violation of the obligation, secured by the deposit.

It is not contrary to the law to include the conditions, concerning surety, into the contract, which is the ground of arising of an obligation, that is secured by the surety, and signing of such an agreement by the parties to the contract and the surety (guarantor). But part one of article 553 of the Civil Code of Ukraine provides for the conclusion of a contract of surety as an individual contract. If in respect of the contract of sale V.A. Belov writes, that the obligation to pay for the goods arises not from the moment of conclusion of the contract, but later, he had to admit, that after signing the contract of surety different rights and duties of the parties arise as well. But he writes, that on the basis of a contract of surety arise guarantee relationships (and not the obligations). To their content, according to him, are included, in particular, regulatory duties of the guarantor to do everything possible to guarantee the proper implementation of the secured obligation – from verbal and economic influence on the debtor, to the independent performance of the appropriate obligation[8]. But to this duty of the guarantor corresponds not the right of demand of the creditor, but his right of expectation[9].

Returning to the problem of the origin of surety as a respective civil obligation, it should be recognized, that from the moment of conclusion of the contract of surety, no factual or legal relationships arise between

its parties, because this agreement is a transaction under a suspensive condition. Relations concerning surety, surety obligations, duties and corresponding rights of the creditor arise in case and from the moment of breach of an obligation, secured by the surety. Thus, to these relations under p.1 article 5 of the Civil Code of Ukraine are applied the acts of civil legislation, which took effect by the specified moment.

It should be, however, recognized, that the foregoing does not fully comply with current legislation. According to provisions, developed in the science of civil law, surety is an obligation[9], in any case – a legal relationship[10]. So when in article 559 of the Civil Code of Ukraine termination of surety is mentioned, it means termination of an obligation (legal relationships). But article 559 of the Civil Code of Ukraine is applied, in particular, to cases, where the ground of liability of the surety did not arise. To eliminate the legal uncertainty the words «surety is terminated» in article 559 of the Civil Code of Ukraine should be replaced with the words «contract of surety expires.» This would mean that before the infringement of the obligation, secured by the surety, no legal relationships (no obligations) emerge and the concluded contract of surety as a transaction under the condition, that will govern the relations of the parties in case of occurrence of this condition, is effective from moment of its conclusion until the moment of its expiration.

The guarantee is fully consistent with the definition of a transaction (p. 1, article 202 of the Civil Code of Ukraine) and a unilateral transaction (p. 3, article 202 of the Civil Code of Ukraine). Therefore, it is appropriate to say in respect of a gurantee that it is performed. Until the moment of a breach of an obligation there are no legal relationships (obligations) between the creditor (beneficiary) and the guarantor. Therefore, to the guarantee obligation under the first part of article 5 of the Civil Code of Ukraine are applied the acts of civil legislation in force on the day of violation by the debtor (principal) of the obligation, secured by the surety.

The foregoing leads to the conclusion, that the problem of emergence of civil obligations requires further thorough research concerning all types of such obligations, particularly those defined in the science as additional (accessory). Along with improvement of the Civil Code, concerning the action of acts of civil legislation in time, this will give an opportunity to bring greater certainty into civil legal relations.

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Чанишева А. Р. **До проблеми виникнення цивільних зобов'язань**

У статті досліджується проблема виникнення цивільних зобов'язань в аспекті дії актів цивільного законодавства у часі. Дослідження зазначеної проблеми грунтується на базовому положенні, що визначає відносини, які регулюються новоприйнятими актами

цивільного законодавства, сформульованому у частині першій ст. 5 ЦК України: «Акти цивільного законодавства регулюють відносини, які виникли з дня набрання ними чинності».

Для цілей правозастосування у статі проаналізовано більш конкретні положення цивільного законодавства, що визначають момент виникнення цивільних відносин, правовідносин, прав і обов'язків. Так, у частині другій ст. 331, частині четвертій ст. 334, частині другій ст. 1299 ЦК України містяться положення, що визначають момент виникнення права власності. Стосовно ж зобов'язань момент їх виникнення, момент виникнення фактичних відносин, що опосередковуються зобов'язальними правовідносинами, момент виникнення прав та обов'язків, що складають зміст зобов'язань, нормами ЦК України не визначаються.

Зроблено висновок про те, що теоретичні концепції, покладені в основу частини першої ст. 5 ЦК України, і п. 4 Прикінцевих та перехідних положень ЦК України, є різними. Відповідно до п. 4 Прикінцевих та перехідних положень ЦК України останній має негайну дію (з установленими винятками), тобто він визначає зміст і обсяг прав та обов'язків, що продовжують існувати після набрання чинності ЦК України. Частина перша ст. 5 ЦК України надає актам цивільного законодавства перспективної дії, пов'язаної з ультраактивною дією раніше чинних актів законодавства: новоприйняті акти законодавства застосовуються тільки до тих відносин, що будуть виникати після набрання ними чинності. Якщо ж відносини виникли раніше, то до них, до прав і обов'язків, до юридичних фактів, що виникають після набрання чинності новоприйнятими нормативно-правовими актами, застосовуються раніше прийняті акти цивільного законодавства аж до моменту припинення зазначених правовідносин.

Зроблено висновок про те, що з моменту виникнення зобов'язань, особливо тих, підставою виникнення яких є договори, права і обов'язки виникають тільки як загальноправова пов'язаність сторін,

оскільки часто з цього моменту сторони ще не зобов'язані здійснювати дії, що утворюють зміст відповідних обов'язків і прав. Тобто з цього моменту виникають «відносини», про які йдеться у частині першій ст. 5 ЦК України, які слід розуміти з урахуванням п. 4 Прикінцевих та перехідних положень ЦК України.

Особливу увагу у зв'язку з тлумаченням і застосуванням частини першої ст. 5 ЦК України у статті звернуто на цивільні правовідносини щодо забезпечення виконання зобов'язань, а також цивільні правовідносини, в рамках яких реалізується цивільно-правова відповідальність. Їх особливість полягає в тому, що їх виникнення ставиться під умову виникнення обставин, стосовно яких на момент укладення договору взагалі невідомо, настануть вони чи ні. Відносини щодо поруки, зобов'язання поруки, обов'язки поручителя і кореспондуючі їм права кредитора виникають у разі і з моменту порушення боржником зобов'язання, забезпеченого порукою. Отже, до цих відносин відповідно до частини першої ст. 5 ЦК України застосовуються акти цивільного законодавства, які набули на зазначений момент (день) чинності. До гарантійного зобов'язання відповідно до частини першої ст. 5 ЦК України застосовуються акти цивільного законодавства, що були чинними на день порушення боржником (принципалом) зобов'язання, забезпеченого порукою. До зобов'язальних правовідносин щодо застави застосовуються акти законодавства, що набули чинності на день укладення договору застави і виникнення відповідних відносних відносин. Відносини щодо відповідальності регулюються актами законодавства, що набрали чинності на день вчинення порушення. Це не виключає необхідності у спеціальному вирішенні цього питання у ЦК України.