Universal Decimal
Classification 342 : 346 : 347

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PROBLEMS OF DELIMITATION OF CIVIL-LAW AND PUBLIC-LAW RISKS IN JURISPRUDENCE

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As a result of the analysis of similar and fundamental differences of legal risks depending on the civil-law and administrative nature of their origin the author has conducted delimitation of civil-law and public-law risks.

Noted that public-law risks unlike civil-law ones conjugate with the prospect of a destructive development of socially significant relations in constitutional, administrative, environmental and other spheres of public life.

The author argues that public-law risks are limited by legal prohibitions and restrictions.

Keywords: legal risk, civil-law risk, public-law risk, ways of delimitation of risks types, comparative analysis of risks.

The theory of civil-law risks has been actively developing in domestic civil law since the late 60's of the 20th century up to present times. Review of major theories of risks in civil law is laid down in article of Martirosyan A. G. "Towards the Question of Risk in Civil Law of the Russian Federation" [4].

This author distinguishes three theories of civil-law risks formed in domestic civil law: subjective (V. A. Oigenzikht, S. N. Bratus', V. A. Plotnikov, etc.); objective (A. I. Omel'chenko, B. L. Khaskel'berg, O. A. Krasavchikov, A. A. Sobchak); mixed (B. N. Mezrin, V. A. Kopylov) [4].

Subjective theory of risk considers risk from psychological, subjective perspective. The subject of legal relations assumes the probability of adverse effects resulting from its activities. However, if he fails to take action (conclusion of a contract, driving a vehicle), to which the law associate the adverse effects, there is no risk [4].

Objective theory does not associate the mental attitude of individuals to committed actions, and interpret risk as the potential for occurrence cases resulting in property losses. For supporters of this point of view, risk is a constant threat of adverse consequences [4].

And, finally, the third theory combines subjective and objective foundations of civil-law risks. The authors believe that subjective risk factor is its anticipation in the future, but the very risk is "an objective reality, since the possibility of harm is directly embodied in life in the combined action of any persons and other not less real factors" [4].

According to the author, one of the causes of ambiguous interpretation of civil-law risks is the fact that the category of risk is in the "border zone" between public and private interests [4].

This author's statement is of scientific interest because it emphasizes the general legal nature of the category "legal risk", its versatility and applicability to both public-law and private-legal areas of legal relations.

All property public relations potentially include the risk of loss of property, failure to gain goals of the subjects of civil law. Itself the objective existence of such a possibility of "misfortune" (i.e. losses) – it is an integral part of social relations that form the subject matter of civil law, therefore, civil law cannot sidestep the potential possibility of property losses, because it regulates these relations.

Speaking about civil-law risks, A. G. Martirosyan emphasizes that "risk is inevitably linked to monetary relations based on equality of the parties and thus permeates all civil law, its norms reflect, regulate this risk, but in any case ... don't outline the limits of its admissibility" [4]. According to author's thoughts, there cannot be limits of risk in civil law at the level of legal regulations. Every subject of civil legal relations itself sets the limit of potential losses. The opposite is the case in public-law relations, in which risk limits are restricted by legal prohibitions and restrictions [4].

Thus, the author, in addition to the analysis of civilistic risks, concerns the problem of risks in public-law relations. According to the author's thoughts, risks in public-law relations have certain limits, i.e., they should be limited by legal prohibitions, and private-legal risks do not have limits prescribed in normative acts. This difference is rooted in the provisional nature of civil-law relations, which are based on the legal equality of parties and possibility of subjects themselves to establish the limits of possible risks.

In the article "Ways of Allocation Risk in Civil Law" A. G. Martirosyan determines the essence of civil-law risk and its interrelation with public-law relations [5].

"Civil-law risk – this is category designated by law, which explains participants possible property unfavorable consequences. The risk is of interest to the subjects of civil law because its consequences are fraught with losses. The losses affect not only the interests of the person, who is undergoing them, i.e. private interests, but also the interests of public due to the organic link of private and public foundations in civil law" [5].

Thus, the author in the given definition develops the previously sounded thesis about "border nature" of legal risks, and notes that the civil-law nature of risks does not preclude the implementation of public-law interest.

The author formulates such ways of allocation civil-law risks as:

"- establishing the legal status of participants to civil legal relations in the part of determination the property, by which they are answerable with;

- establishment of guilt as a prerequisite of civil-law responsibility;
- limiting the amount of responsibility by actual damage;
- imposition of damages to a third person, who is not a party in obligation;
- priority rating in the performance of an obligation;
- allocation of risk consequences among debtors;
- imposition of risk consequences to one party in an obligation" [5].

Touching upon the issue of analysis the methods of risks allocation, the author raises the problem of public authorities' participation in the prevention, reduction and optimization, Martirosyan distinguishes such risks allocation methods as:

First, state registration of rights (ownership rights and rights of intellectual property and means of individualization);

Second, requirement for the form of transactions, through which the transfer of rights and their state registration are exercised (written form, notarization) [5].

Thus, the author notes public-law foundation in determining the ways to allocate private-legal risks, to which he refers participation of public authorities in

the process of registration of transactions, rights of intellectual property, real estate, transfer of rights, state registration".

It seems interesting to analyze the concept of legal risk in the banking sector, proposed by T. E. Rozhdestvenskaya [6]. Conclusions of the scientist go beyond the designated subject matter and deal with the methodological aspects of the concept of "legal risk". In her article the author analyzes the monograph that was created by the European Commission and the Central Bank of the Russian Federation "Banking Supervision. European Experience and Russian Practice". It proposes four member classification of banking risks: 1) credit risk; 2) market risk; 3) liquidity risk; 4) operational risk [6].

In turn, as the scientist notes, in the study "Banking Supervision. European Experience and Russian Practice" legal risk is regarded as an integral part of operational risk: "This definition [of operational risk] includes legal risk, which is understood as the risk of losses due to non-compliance with legislative acts, as well as a reasonable moral norms and treaty obligations, and the risk of initiation of judicial proceedings. However, strategic risk and reputational risk are not included in the definition" [6].

In this definition Rozhdestvenskaya notes an important methodological aspect of the definition of legal risk, which is an integral part of operational risk. Therefore, according to the scientist, in the considered legal act, legal risk in banking activity is a secondary category [6].

Furthermore, on the basis of the analyzed definition, T. E. Rozhdestvenskaya highlights such qualitative characteristics of banking risk as potential financial losses and interrelation banking risks in violation of legislation and contractual obligations [6]. The scientist stresses such peculiar and rarely noted sign of banking risks as "causal link between non-compliance with such standards of legal behavior, which are not formalized by law (business custom), and emergence of legal risk" [6].

The author notes that the concept of "legal risk" in relation to the banking environment is contained in international legal act "Recommendations for Securities Settlement Systems". "Legal risk – as noted in the document – is a risk of situation where a party will incur losses because laws or legal norms do not support the rules of securities settlement system, the operation of the respective settlement schemes or property rights and other participation interests stored in a settlement system. Legal risk also arises because of the ambiguity in application of laws and legal norms. Legal risk is a risk that threats to counterparty in the event of unexpected application of law, by virtue of which contracts become illegal or unsecured

by legal sanctions. It includes a risk arising from the delay in seizure of funds or securities or blocking of positions. ...Counterparties may incur losses as a result of the application by court in a particular jurisdiction of a law, which is different from the one on which they relied or one indicated in the contract. So, legal risk aggravates other risks, such as market, credit and liquidity risk related to the good conscience of transactions" [6].

Based on the definitions set out in international-legal instruments regulating banking settlements, the author makes the following conclusions about the essence and signs of legal risks outlined in regulatory interpretation:

first, legal risk is considered either as a part of operational risk, or as a factor affecting banking risk;

second, legal risk is associated with infliction of losses to a bank;

third, legal risk arises as a result of the breach of legal regulations in normative acts or in treaties;

fourth, legal risk arises as a result of the violation of business customs;

fifth, as sources of legal risks the mentioned acts note parties of legal relations that do not provide high quality of legal work; subjective mistakes of law enforcement agencies that exercise the law; insufficient quality of regulatory environment [6].

T. E. Rozhdestvenskaya criticizes provisions about the fact that legal risk is a kind of operational risk. One must agree with the view of T. E. Rozhdestvenskaya, that it is more correct to consider category "legal risk" as a separate legal category.

"In this case, – she writes, – it must be said that different approaches to the determination of the place of legal risk in the system of banking risks have only theoretical significance, since the practical organization of legal work of a bank (any corporation) always comes from the fact that the actions of any employee of the bank, which have legal consequences, may carry legal risk. However, this methodological principle will be relevant in building the classification of legal risks" [6].

Thus, the analysis of the normative regulations governing legal risks shows a fundamental methodological nuance of the current problem. In some cases (for example, in the study "Banking Supervision. European Experience and Russian Practice" [6]) "legal risk" is treated as a secondary category with respect to operational risk, therefore, "legal risk" is a secondary category in banking legal relations. In others (for example, in international-legal act "Recommendations for Securities Settlement Systems" [6]) the category of "legal risk" is treated as a separate category, arising from the imperfection of legal structures of legal norms, law-enforcement and interpretation of legal prescriptions.

Consideration of the legal risks through the prism of the activities of authorized persons, such as employees of organizations, can be traced in the study of Yu. V. Truntsevskii "On the Organization of Legal Risks Management of an Economic Entity". The scientist examines legal risks as a result of the violation of established rules by the economic entity's management. "In activity of an economic entity, – he writes, – violations of or discrepancies with internal and external legal norms, such as laws, bylaws of regulators, rules, regulations, prescriptions, constituent documents appear in the form of legal risks for effective control (management) of organization" [7].

These risks are manifested:

first, in violation by an organization of the requirements of normative acts and contractual obligations.

second, in legal mistakes in the implementation of its activity (incorrect legal advice, incorrect drawing up documents, including in court instances);

third, in violation of normative legal acts, as well as the terms of concluded contracts [7].

Thus, the studies of T. E. Rozhdestvenskaya and Yu. V. Truntsevskii formulate the methodological problem of the legal doctrine about risks that needs further research studies. Its essence can be defined as a dilemma – whether legal risk is a potential threat contained in legal acts (laws, bylaws, decisions of court instances) or legal risks manifest themselves in the activities of specific subjects of organizations – staff, officials, etc.? These authors have set two methodologies of legal risks research – through the conduct of subjects and through the analysis of the structures and content of legal acts.

In our view, the first path of risks study is more inclusive and comprehensive. It allows us to consider risks, in addition to the legal, in sociological, political and economic perspectives, because the conduct of subjects often drops out the field of legal regulation.

Attention should also be drawn to the fact that some international-legal acts delimit risks and, along with legal risks, distinguish a number of other categories of risk. So, in the collective work of I. A. Kiselev, I. A. Lebedev, V. D. Nikitin "Legal Issues of Corporate Risks Management in Order to Combat Money Laundering and Terrorist Financing" it is noted that "the consequences of money laundering for individual financial and non-financial institutes, conscious or unwitting participation of organizations in this process is fraught with high risks for themselves. The Basel Committee on Banking Supervision has identified the following risks, which threaten to banks not implementing procedures of internal control for purposes of AML/CFT:

- risk of damage to reputation;
- financial risks;
- risk of legal consequences;
- credits concentration risk.

The above risks threaten not only to banks, but also to any other financial or non-financial institute that does not respect the requirements of the AML/CFT standards and are potentially involved in money-laundering schemes" [2].

Thus, on the one hand, there is a gradual delimitation of legal risks from reputational, operational, financial and other risks, and on the other hand – legal registration of the above risks and their statement in normative document allows us to put the question of the broad understanding of the category of "legal risk" with attributing to it all these types of risks.

The second trend has formed the concept of risk proposed by V. I. Avdiiskii "Risk Management in the Activity Economic entities" [1, 4-12]. According to the scientist, "risk is a possibility of emergence a managed event under conditions of uncertainty of environment for implementation economic activity, which can be quantitatively and qualitatively evaluated" [1, 5].

The scientific value of the author's understanding the essence of risk is that it is interbranch in nature and reflects monetary (property) component of all civil-law branches of Russian legislation. On the other hand, the methodology of the concept proposed by V. I. Avdiiskii can be applied also in determination of conceptual essence of public-law risks, since public law exercises public interest, including in economic sphere of public relations.

Our first study of public-legal risks was the article "Legal Risks in Public Administration: Invitation to Discussion" [3, 63-76]. In this paper we have analyzed scientific publications of V. V. Kireyev, A. E. Zhalinskii, A. P. Anisimov and P. E. Novikov devoted to constitutional, criminal, environmental risks. Our conclusions touched upon the methodology of determination the essence of public-law risks, and also we formulated the concepts of public-law risk and administrative-legal risk.

So, in our opinion, "public-law risk is a potential threat of adverse development of socially significant, public-law relations as a result of the adoption, implementation and interpretation of legal prescriptions.

Administrative-legal risk is a kind of public-law risk associated with the rule-making, enforcement and interpretive activity of executive authorities, which may entail adverse effects for the established management order in various areas of public administration" [3, 71].

Thus, by comparing the theoretical conclusions expressed in this and earlier conducted study, we can draw the following conclusions concerning the issue of delimitation of civil-law and public-law risks.

1. Civil-law risks are associated with potential property (financial) losses. These losses are due to the property (monetary) nature of civil-law relations. Public-law risks are associated with the prospect of destructive development of socially significant relations in constitutional, administrative, environmental and other spheres of public life. Authoritative decisions of public authorities, wrong interpretation of legal prescriptions may be the form of incarnation of the said destruction. In addition, public-law risks may lead to material losses.

2. The limits of civil-law risks are not limited to mandatory prescriptions. This circumstance is due to the dispositive nature of civil-law relations and the ability of participants to independently choose the limits of their participation in potentially risky civil-law transactions. Public-law risks are limited by legal prohibitions and restrictions. This circumstance is due to the mandatory nature of administrative legal relations that, in turn, predetermines the subordinate nature of interrelations between the subjects of public-law relations.

3. Civil-law risks may arise from business customs, because the latter are the source of civil law. In public-law relations the risks arising from violations of business customs are excluded, because the latter do not constitute the source of public law.

4. Civil-law risks are allocated among participants of legal relations (for example, parties to civil-law obligations) through civil-law methods enshrined in law. Public-law risks should be taken by a particular authority (public authority; person exercising functions of power), decisions and actions of which have contributed to a risky situation and led to financial losses.

5. It should be noted that the range of potential subjects of civil-law and public-law risks differs. In civil-law the risks, as a rule, both parties to legal relations are known in advance, for example, in contractual obligations, or one of the parties, such as a copyright holder. Therefore, the range of persons, which are potentially at risk, is determined in advance. In public-law relations the range of potential subjects of risks is not determined beforehand, especially if we are talking about an authoritative prescription addressed to beforehand undefined range of persons.

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