

Author: Dorota Miler

Title: Obejście prawa w polskim prawie prywatnym / Circumvention of Law in Polish Private Law

Source: Kwartalnik Prawa Prywatnego („Quarterly of Private Law”)

Year: 2025, vol.: XXXIV, number 1 pages: 93-195

Keywords: circumvention of law, Polish private law, German private law, law evasion

Discipline: Law (Civil Law)

Language: Polish

Document type: Article

Publication order reference: University of Gdańsk [dorota.miler@ug.edu.pl]; University of Augsburg [dorota.miler@jura.uni-augsburg.de]

Abstract:

The phenomenon of circumvention of law is inherent to all legal systems. Namely, in every legal system, it is possible – by undertaking certain legal or factual transactions – to exclude the application of statutory provisions that prevent the accomplishment of certain legal or economic results and instead take advantage of statutory provisions that allow the achievement of these results. What differs among various legal systems is the significance that each legal system attaches to the concept of circumvention of law. A discrepancy that can be noticed at first glance is the one found at the legislative level, namely whether and, if so, how circumvention of the law and its legal consequences have been regulated in each jurisdiction. Further distinctions result from the analysis and systematization of circumvention of the law by academics and attempts to answer the following questions: Is it necessary and useful to distinguish the concept of circumvention of the law? How can the very concept be defined? What are its prerequisites? What legal consequences should it have? Ultimately, the utility of statutory provisions and the validity of scholarly proposals are verified in court practice, in which abstract questions are replaced with a case-by-case examination of transactions potentially circumventing the law under the given factual circumstances.

A comparison of Polish and German law, jurisprudence, and legal literature reveals a striking contradiction in the understanding of the circumvention of the law and its interpretation in jurisprudence and legal literature. This contradiction raises the question of who is correct: the representatives of the doctrine or the courts. In other words, is there a theoretical and practical justification for distinguishing legal circumvention from other causes of defects in legal transactions and its explicit legal regulation?

The paper discusses the following issues: the definition of circumvention of the law, the theoretical distinction between circumvention of the law and other related legal concepts, selected legal judgments in which the Polish Supreme Court considered finding circumvention of the law, prerequisites for finding circumvention of the law under Polish private law, the legal consequences of circumvention of the law, and the function performed by its regulation under Polish private law. These issues are examined in the context of German law and legal literature published in German (authored by German, Austrian, and Swiss scholars).

The author concludes that circumvention of the law is an independent legal institution in Polish private law, and its legal consequences should be explicitly regulated within this legal framework.