



YURISPRUDENSIYA

HUQUQIY ILMIY-AMALIY JURNALI

2026-yil 4-son

VOLUME 6 / ISSUE 4 / 2026

DOI: <https://dx.doi.org/10.51788/tsul.jurisprudence.6.4>.



Crossref
Content
Registration

ISSN: 2181-1938

DOI: <https://dx.doi.org/10.51788/tsul.jurisprudence>

MUASSIS: TOSHKENT DAVLAT YURIDIK UNIVERSITETI

“Yurisprudensiya” – “Юриспруденция” – “Jurisprudence” huquqiy ilmiy-amaliy jurnali O'zbekiston matbuot va axborot agentligi tomonidan 2020-yil 22-dekabrda 1140-sonli guvohnoma bilan davlat ro'yxatidan o'tkazilgan.

Jurnal O'zbekiston Respublikasi Fanlar akademiyasi huzuridagi Oliy attestatsiya komissiyasi jurnallari ro'yxatiga kiritilgan.

Mualliflik huquqlari Toshkent davlat yuridik universitetiga tegishli. Barcha huquqlar himoyalangan. Jurnal materiallaridan foydalanish, tarqatish va ko'paytirish muassis ruxsati bilan amalga oshiriladi.

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E-mail: lawjournal@tsul.uz

Obuna indeksi: 1387

Tasdiqnoma
№ 174625, 29.11.2023.

Jurnal 2026-yil 26-avgustda
bosmaxonaga topshirildi.
Qog'oz bichimi: A4.
Shartli bosma tabog'i: 24,5
Adadi: 100. Buyurtma: № 81.

TDYU bosmaxonasida chop etildi.
Bosmaxona manzili:
100047. Toshkent shahri,
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Журнал включён в перечень журналов Высшей аттестационной комиссии при Академии наук Республики Узбекистан.

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Ответственный за выпуск:

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Редакторы:

Э. Мустафаев, Е. Ярмолик,
Э. Шарипов, К. Абдувалиева,
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lawjournal@tsul.uz

Подписной индекс:

1387.

Свидетельство

от 29.11.2023 № 174625.

Журнал передан в типографию
26.08.2026.

Формат бумаги: А4.

Усл. п. л. 24,5. Тираж: 100 экз.

Номер заказа: 81.

Отпечатано в типографии
Ташкентского государственного
юридического университета.

100047, г. Ташкент,

ул. Сайилгох, 37.

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“Yurisprudensiya” – “Юриспруденция” – “Jurisprudence” legal scientific and practical journal was registered by the Press and Information Agency of Uzbekistan on December 22, 2020 with certificate No. 1140.

The journal is included in the list of journals of the Higher Attestation Commission at the Academy of Sciences of the Republic of Uzbekistan.

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Agreed-upon price.

Publication Officer:
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Editors:
E. Mustafaev, E. Yarmolik, E. Sharipov,
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Sayilgoh street, 35.
Phone: (0371) 233-66-36 (1169)

Website: jurisprudence.tsul.uz
E-mail: lawjournal@tsul.uz

Subscription index: 1387.

Certificate
№ 174625, 29.11.2023.

The journal is submitted to the Printing house on 26.08.2026.
Paper size: A4. Cond.p.f: 24,5.
Units: 100. Order: № 81.

Published in the Printing house of
Tashkent State University of Law.
100047. Tashkent city,
Sayilgoh street, 37.

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Kelib tushgan / Получено / Received: 02.07.2026
Qabul qilingan / Принято / Accepted: 12.08.2026
Nashr etilgan / Опубликовано / Published: 26.08.2026

DOI: <https://dx.doi.org/10.51788/tsul.jurisprudence.6.4./JZAT5071>

UDC: 341.9(045)(575.1)

ANIMUS FRAUDANDI: DOCTRINAL LEGAL FOUNDATIONS FOR PROVING EVASION OF LAW IN PRIVATE INTERNATIONAL LAW

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Abstract. This article analyses the procedural dimension of evasion of law (*fraus legis*) in private international law, focusing on proof of its subjective element, *animus fraudandi*. It examines the systemic difficulties of proving intent, including information asymmetry and the multiplicity of motives. Drawing on comparative analysis and the case-law of the Court of Justice of the European Union, the author proposes a model that establishes intent through objective indicators of artificiality rather than as a psychological state. A shifting burden of proof is substantiated, whereby a *prima facie* showing of artificiality transfers the burden of proving a genuine economic purpose to the defendant. Methodological foundations for applying this doctrine under Article 9 of the Civil Code of the Republic of Uzbekistan are developed.

Keywords: *animus fraudandi*, private international law, evasion of law, *fraus legis*, abuse of right, burden of proof, artificiality test, indirect evidence

“ANIMUS FRAUDANDI”: XALQARO XUSUSIY HUQUQDA QONUNNI CHETLAB O‘TISHNI ISBOTLASHNING DOKTRINAL HUQUQIY ASOSLARI

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Annotatsiya. Mazkur maqolada xalqaro xususiyl huquqda qonunni chetlab o‘tish (*fraus legis*) muammosining protsessual jihatlari, xususan, uning subyektiv elementi – *animus fraudandi*ni isbotlash masalalari tahlil qilinadi. Unda qasdni isbotlash bilan bog‘liq tizimli muammolar, jumladan, axborot nomutanosibliyi va motivlarning ko‘pligi masalalari ko‘rib chiqiladi. Qiyosiy tahlil hamda Yevropa Ittifoqi Sudining amaliyotiga tayangan holda muallif qasdni psixologik holat sifatida emas, balki harakatlarning sun‘iyligidan dalolat beruvchi obyektiv ko‘rsatkichlar asosida aniqlash modelini taklif etadi. Dastlabki bosqichda sun‘iylilik mavjudligini ko‘rsatuvchi dalillar taqdim etilganda, haqiqiy iqtisodiy maqsad mavjudligini isbotlash majburiyatini javobgarga o‘tkazish nazarda tutiladigan isbotlash yukini taqsimlashning o‘zgaruvchan modeli asoslab beriladi. Shuningdek, mazkur doktrinani O‘zbekiston Respublikasi Fuqarolik kodeksining 9-moddasi doirasida qo‘llashning metodologik asoslari ishlab chiqiladi.

Kalit so‘zlar: *animus fraudandi*, xalqaro xususiyl huquq, qonunni chetlab o‘tish, qonunni chetlab o‘tish (*fraus legis*), huquqni suiiste‘mol qilish, isbotlash majburiyati, sun‘iylilik testi, bilvosita dalillar

ANIMUS FRAUDANDI: ДОКТРИНАЛЬНО-ПРАВОВЫЕ ОСНОВЫ ДОКАЗЫВАНИЯ ОБХОДА ЗАКОНА В МЕЖДУНАРОДНОМ ЧАСТНОМ ПРАВЕ

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Аннотация. В статье анализируется процессуальный аспект обхода закона (*fraus legis*) в международном частном праве с акцентом на доказывание его субъективного элемента – *animus fraudandi*. Рассматриваются системные сложности установления умысла, обусловленные информационной асимметрией и множественностью мотивов. На основе сравнительно-правового анализа и практики Суда Европейского союза автор предлагает модель, в рамках которой умысел устанавливается посредством объективных признаков искусственности, а не как психологическое состояние лица. Обосновывается механизм переноса бремени доказывания, согласно которому при наличии достаточных признаков (*prima facie*) искусственности бремя доказывания реальной экономической цели переносится на ответчика. Разработаны методологические основы применения данной доктрины в контексте статьи 9 Гражданского кодекса Республики Узбекистан.

Ключевые слова: *animus fraudandi*, международное частное право, обход закона, обход закона (*fraus legis*), злоупотребление правом, бремя доказывания, тест на искусственность, косвенные доказательства

Introduction

The problem of evasion of law remains one of the classical weak points of any legal order. It arises, first and foremost, in situations where private-law relations afford the parties freedom to choose the applicable law, the forum, and the form of a transaction. Under such conditions, an economic actor seeks to attain a targeted result through structures that are formally lawful in appearance yet substantively contrary to the purpose of a mandatory rule. It is precisely at this point that the classical question arises: where does “legitimate avoidance” end and “impermissible circumvention” (*fraus legis*) begin?

The doctrine surrounding this question has been the subject of sustained scholarly debate. On the one hand, Tetley (1994) argues that the doctrine deserves express recognition in private international law. Parra-Aranguren (1988), by contrast, regards *fraus legis* as one of the most frequently abused concepts in the field and questions its independent significance. Muranov (2004), in turn, maintains that the doctrine lacks independent legal content and can be replaced by more specific legal doctrines, such as abuse of rights, simulation, and deceit. Against this doctrinal background, the present article shifts the focus to the procedural dimension of the debate, examining the possibility of proving *animus fraudandi* and the limits of such proof.

The aim of this article is to propose a model for proving *animus fraudandi* that (a) accounts for the limited availability of direct evidence; (b) relies on verifiable objective indicators; and (c) is consistent with contemporary comparative-law approaches. To achieve this aim, the article addresses the following tasks: identifying the

principal difficulties in proving intent; examining the principles governing the allocation of the burden of proof; developing criteria for assessing the totality of the relevant circumstances; and substantiating a graduated scale of sanctions.

The definition of the doctrine of circumvention of law, the criteria for its qualification, and its legal consequences are causing extensive academic debate. Kegel and Schurig (2004) define “*fraus legis*” as the use of formally permissible means to achieve a result contrary to the purpose of a mandatory rule. Symeonides (2016) indicates that in modern codifications, the problem of circumvention is partially resolved through the mechanism of connecting factors in conflict-of-law rules. Batiffol and Lagard (1993) advance a comparative argument in favor of retaining the subjective element, while Dicey, Morris, and Collins (2022) emphasize the need to develop a procedural distinction between evasion and avoidance in English practice.

However, the doctrine has not paid sufficient attention to procedural mechanisms, standards of proof, or the possibility of drawing inferences from objective facts. While Fawcett (1990) analyzed the problem of circumventing the law and mandatory rules in the Cambridge Law Journal, he did not develop a model for proof. Taruffo (2009), in his theory of evidence, proposes a model based on a set of indirect evidence and indicators, yet the application of this approach within the context of *fraus legis* is not reflected in the literature. Muir Watt (2011) highlights the convergence of the doctrines of abuse of right and *fraus legis* in EU law but does not focus on the evidentiary aspects. The scientific novelty of this article lies in filling this gap.

Main part

Within the framework of circumvention of the law, *animus fraudandi* performs the functions of separating circumvention of the law from the use of legal alternative methods and limiting the discretion of the court. This is because identifying circumvention requires not only a result that does not correspond to the legislative intent but also the demonstration of the instrumental specificity of the chosen form (Batiffol & Lagarde, 1993).

The debate between subjective and objective approaches has a long history. Mattias (1953), drawing on classical French legal doctrine, emphasizes the subjective criterion of *dessein frauduleux*. According to this approach, *fraude à la loi* requires more than an inadvertent violation of the law; it presupposes a deliberate intention to circumvent the applicable legal rules. The objective approach, by contrast, questions the practical feasibility of proving such intent (Römer, 1955). A more nuanced position retains the subjective element while allowing it to be established through systematic inferences drawn from objective circumstances (Muir Watt, 2011; Weatherill, 2016).

The case law of the Court of Justice of the European Union illustrates this compromise. In *Halifax* (C-255/02, 2006), the Court combined two elements—an objective element and the essential purpose of the transactions—thereby allowing the subjective component to be inferred from objective indications of artificiality rather than requiring direct evidence of a party's psychological state (Teixeira, 2018). *Cadbury Schweppes* (C-196/04, 2006) further developed this approach through the concept of “wholly artificial arrangements.” *Akrich* (C-109/01, 2003), in the context of free movement rights, likewise addressed the relevance of conduct designed to obtain a legal advantage through the strategic use of applicable rules.

The main difficulty of proof lies in the number of reasons. Accordingly, commercial organizations typically pursue objectives such as tax, regulatory, administrative, and compliance simultaneously. Therefore, considering any reason for control to be illegal effectively hinders legitimate planning. Importantly, whether the primary purpose of the structure was primarily to circumvent mandatory regulations or to

pursue independent economic goals (Muir Watt, 2011), it is important for the plaintiff to prove the disproportion between this structural complexity and any well-intentioned business goal.

The second difficulty is the logic of inference. Since intention is rarely directly observed, *animus* should be determined through indirect evidence and indirect inferences rather than through an intuitive assessment of fraud (Taruffo, 2009). According to the sum of the indicators, individual neutral facts become sufficient evidence if their combination renders any alternative explanation unreliable. Relevant indicators include:

- (a) the transfer of assets during an unusual period, for example, on the eve of a mandatory provision entering into force;
- (b) unchanged economic risk despite an officially changed legal basis;
- (c) structural costs justified solely by circumvention effects;
- (d) selecting a jurisdiction or regulatory law that lacks significant connectivity or infrastructure;
- (e) includes replicating the scheme as a sample. (Simeonides, 2016; Graveson, 1930).

The third difficulty is the standard of proof. In civil cases, the balance of probabilities or the court's inner conviction is ordinarily applied. However, the consequences of characterizing conduct as evasion of law often amount to sanctions: invalidity of the transaction, denial of protection, and the application — contrary to party autonomy — of other rules of law. For this reason, some legal systems bring the standard of proof for claims of bad faith or abuse of right closer to a requirement of a heightened degree of certainty (Taruffo, 2009). It follows that proving *animus fraudandi* should be directed not at finding a smoking gun, but at constructing a coherent overall picture in which the most reasonable explanation of the conduct turns out to be precisely evasion of law.

Comparative-law analysis indicates a modern tendency towards the partial objectivisation of *fraus legis*, bringing it closer to the doctrine of abuse of rights (Weatherill, 2016; Teixeira, 2018). In EU law, the subjective element is frequently established by reference to objective indicia of artificiality: *animus* is not proved

through direct evidence of a party's psychological state but inferred from the objective structure and circumstances of the arrangement. Methodologically, this approach brings the proof of evasion of law closer to the proof of simulation and sham transactions (Egorov, 2011): the court examines the relationship between legal form and substantive reality and may infer the requisite intent from a material discrepancy between the two. The same underlying principle can be traced to the civilian foundations of the doctrine, according to which that which is prohibited directly should not be achieved indirectly (Zimmermann, 1996). At the level of the general principles of EU law, this idea is also reflected in the maxim *fraus omnia corrumpit* (Lenaerts, 2013).

English law has traditionally been sceptical of recognizing a general doctrine of evasion of law. Tetley (1994) observes that English law primarily addresses circumvention through specific statutory provisions and tends to distinguish between lawful avoidance and unlawful evasion on a case-by-case basis rather than by reference to a general doctrine. Fawcett (1990) draws attention to the inconsistency and unpredictability associated with this *ad hoc* approach and advocates greater reliance on the continental concept of mandatory rules. Parra-Aranguren (1988), drawing on the practice of Latin American States, particularly Uruguay, argues that the application of the *fraus legis* doctrine in private-law relations should be restricted.

In Russian legal scholarship, Muranov (2004) argues that *fraus legis* lacks independent legal significance and that the issues attributed to it can instead be addressed through more specific doctrines, including simulation, abuse of rights, and transactions undertaken for a purpose contrary to public order (Article 169 of the Civil Code). Egorov (2011), in turn, examines the criteria for distinguishing *fraus legis* from simulation. Uzbek law adopts a related but distinct approach: Article 9(5) of the Civil Code treats the deliberate circumvention of a mandatory rule as a form of abuse of rights but does not establish *fraus legis* as a separate doctrine. This distinction is significant because it affects both the legal characterization of circumvention and the methodology used to establish the requisite intent.

To minimize arbitrariness as far as possible and to make the process of proof predictable, it is expedient to divide the analysis into two stages. The first stage is the contrivance test: it verifies the presence of structural features indicating that the model was designed to neutralize a mandatory rule — the temporal sequence, the mismatch between economic substance and legal form, the disproportion of transaction costs, and the like. The second stage is the dominant-effect test: where the principal expected effect of the construction is to neutralize a mandatory rule and the other effects are secondary, an inference as to intent is permissible, provided that the indicia of planning are present (Symeonides, 2016).

In allocating the burden of proof, the problem of information asymmetry must be addressed separately. If that burden is placed entirely on the claimant, the protection afforded by mandatory rules may prove ineffective, since the key information about motives and planning lies in the hands of the alleged evader. As a compromise solution, comparative doctrine recognizes a shifting model of the burden of proof (Taruffo, 2009; Briggs, 2019): the claimant adduces the basic totality of indicators of artificiality — the initial *prima facie* case; thereafter the burden of providing a credible and *bona fide* explanation shifts to the opposing party.

The proposed model is confirmed by comparative practice. The two-stage test of the Court of Justice in *Halifax* (2006), the principle of proportionality applied in *Kofoed v. Skatteministeriet* (C-321/05, 2007), and the wholly-artificial-arrangements criterion established in *Cadbury Schweppes* (2006) all correspond to the core elements of the model. In English law, the criteria proposed by Fawcett (1990) rest on the very same logic, albeit applied within the doctrine of mandatory rules rather than that of *fraus legis*.

The model is also effective from the standpoint of its application in the Uzbek context. Part 5 of Article 9 of the Civil Code captures the institution of abuse of right and encompasses deliberate departure from the legislator's purpose. The shifting model for proving *animus fraudandi* may serve as a methodological basis for the practical application of this rule:

once indicators of artificiality have been established, the opposing party assumes the burden of disclosing an independent economic purpose. This approach also dispels the risk of arbitrariness through subjectivity emphasized by Egorov (2011) and Muranov (2004), since the court substantiates its decision by reference to a contestable fact — the indicators of artificiality — rather than to subjective considerations.

In the course of the research, a number of methodological problems were identified. First, the content of the artificiality criterion remains contested: the Court of Justice itself was unable to apply this criterion consistently after *Halifax* and *Cadbury Schweppes*, and uncertainties persisted in *Roquette Frères*, *Kofoed*, and subsequent cases. Second, the proposed shifting model carries a latent risk: setting the initial *prima facie* standard for the claimant too low may, in practice, shift the burden of proof entirely to the opposing party, thereby weakening the presumption of good faith. Third, the disclosure of digital-era evidence (metadata, internal presentations) collides with commercial and attorney-client privilege — a problem that is especially acute given that the institution of discovery is underdeveloped in Uzbek law.

The proposed model is methodologically consistent with Fawcett's (1990) principle of a continental concept of mandatory rules. As Fawcett notes, in English law avoidance is the acceptable arrangement of connecting factors for legitimate purposes, whereas evasion amounts to purposeful and improper manipulation. Tetley (1994) describes this distinction as the intentional and improper manipulation of contacts. The proposed two-stage test rests on the same logic as these definitions: artificiality establishes the improper element, and the absence of an independent purpose establishes the intentional element. At the same time, the model differs from Parra-Aranguren's (1988) restrictive stance on the *fraus legis* doctrine: we consider it necessary not to abandon the institution but to clarify it methodologically. Rather than following Muranov's (2004) wholesale rejection of the institution, we conclude that criteria should be developed for applying it in conjunction with the institutions of simulation and abuse of right.

Conclusion

In cases involving evasion of law, proving *animus fraudandi* presents a systemic evidentiary difficulty: a party's internal purpose cannot be directly observed, while the relevant information is often asymmetrically distributed between the parties. An effective model of proof therefore cannot depend on direct admissions of fraudulent intent; rather, it must rely on the cumulative assessment of objective indicia of artificiality and the logical reconstruction of the predominant purpose underlying the conduct.

On the basis of the comparative analysis, three principal conclusions may be drawn. First, the contemporary tendency is to retain the subjective element while establishing it through a structured process of inference from objective circumstances. This approach brings the doctrine of *fraus legis* closer to the doctrine of abuse of rights without eliminating the requirement of intent. Second, a shifting model of the burden of proof—under which the claimant establishes objective indicia of artificiality, while the opposing party is given the opportunity to demonstrate an independent and legitimate economic purpose—offers an appropriate means of addressing information asymmetry. Third, a graduated framework of legal consequences, ranging from less restrictive measures to the denial of legal protection or restitution, depending on the nature and strength of the evidence, may reduce incentives for procedural manipulation and enhance the predictability of the doctrine's application.

On this basis, the following practical recommendations may be proposed for Uzbek law: (a) developing and applying a non-exhaustive set of objective indicia of artificiality when adjudicating cases involving evasion of law under Article 9(5) of the Civil Code; (b) considering the introduction of a shifting burden-of-proof mechanism into civil procedural law where sufficient objective indicia of circumvention have been established; (c) developing procedural mechanisms for the disclosure and production of digital evidence; and (d) establishing a legal basis for proportionate alternative legal consequences, including recharacterisation and the refusal to recognize an artificially created connecting factor.

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YURISPRUDENSIYA

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2026-YIL 4-SON

VOLUME 6 / ISSUE 4 / 2026

DOI: <https://dx.doi.org/10.51788/tsul.jurisprudence.6.4>.

DOI: <https://dx.doi.org/10.51788/tsul.jurisprudence>