

Survey of contents

Preface VII

Table of contents XI

List of abbreviations XXI

Introduction 1

§ 1. Research questions 5

§ 2. Research goals 6

§ 3. Methodology 7

§ 4. Scope of the study 9

§ 5. Terminology 16

Part One: Statutory regulation of circumvention of law
under Polish, German and European law 19

§ 1. Statutory regulation of circumvention of law under Polish law . . . 19

§ 2. Absence of general statutory regulation of circumvention
of law in German law 49

§ 3. Scattered regulation of circumvention of law in European law . . . 53

§ 4. Comparison of the regulation of circumvention of law 55

Part Two: Circumvention of law as a subcategory
of different legal concepts 57

§ 1. Introduction 57

§ 2. Circumvention of law as a problem of interpretation of
declarations of intent and their classification 59

§ 3. Circumvention of law as an ostensible declaration of intent 80

§ 4. Circumvention of law as a legal transaction contrary to law 99

§ 5. Circumvention of law as a contract contrary to the nature
of a legal relationship 163

§ 6. Circumvention of law as a legal transaction contrary to
good morals (principles of community life) 190

§ 7. Circumvention of law as an abuse of rights 218

§ 8. Conclusions 235

Part Three: Circumvention of law in the case law of
the Polish Supreme Court 239

§ 1. Introduction 239

§ 2. Definition of circumvention of law 240

§ 3. Transactions circumventing the law 265

§ 4. Prerequisites for finding a circumvention of law 360

§ 5. Legal consequences of circumvention of Polish private law 433

§ 6. Functions of circumvention of law 468

§ 7. Circumvention of the law as an independent legal concept 473

§ 8. Conclusions 477

Conclusions 479

Bibliography 485

Subject index 573

Table of contents

Preface	VII
Survey of contents	IX
List of abbreviations	XXI
Introduction	1
§ 1. Research questions	5
§ 2. Research goals	6
§ 3. Methodology	7
§ 4. Scope of the study	9
§ 5. Terminology	16
Part One: Statutory regulation of circumvention of law under Polish, German and European law	19
§ 1. Statutory regulation of circumvention of law under Polish law . .	19
I. History of statutory regulation of circumvention of law	21
II. Scope of application of art. 58 PCC	24
1. Regulation of circumvention of law under civil law	24
2. Regulation of circumvention of law under labour law	25
a) Principle of employee privilege	26
b) Regulation of termination of an employment contract . .	27
c) Special sources of labour law	34
d) Social security law	36
e) Conclusions	36
3. Regulation of circumvention of law under commercial law .	37
a) Resolutions circumventing the law	39
aa) Resolutions as legal transactions	39
bb) Resolutions of shareholders circumventing the law . .	40
b) The principle of equal treatment of a capital company's shareholders	44
c) Conclusions	47
4. Conclusions	47

- III. Proposed regulation of circumvention of law in drafts
of a new Polish Civil Code 47
- § 2. Absence of general statutory regulation of circumvention
of law in German law 49
 - I. History of statutory regulation of circumvention of law 49
 - II. Special legal provisions extending the content and scope
of application of other provisions 50
- § 3. Scattered regulation of circumvention of law in European law . . . 53
- § 4. Comparison of the regulation of circumvention of law 55

- Part Two: Circumvention of law as a subcategory
of different legal concepts 57
- § 1. Introduction 57
- § 2. Circumvention of law as a problem of interpretation of
declarations of intent and their classification 59
 - I. Introduction 59
 - II. Interpretation of a declaration of intent under Polish law 59
 - 1. Statutory regulation 59
 - 2. Directives on the interpretation of a declaration of intent . . 60
 - III. Legal classification of a declaration of intent under Polish law . 63
 - IV. Circumvention of law as a problem of interpretation of
a declaration of intent and its legal classification? 64
 - V. Legal transactions considered to circumvent the law
as a problem of interpretation of a declaration of intent
and its legal classification 65
 - 1. Work performed on a basis other than an employment
contract 65
 - a) Employment contract concluded between the company
and its sole shareholder 67
 - b) Contract of a manager 70
 - 2. Additional contract to the employment contract 70
 - 3. Contract with an employer subsidiary 75
 - VI. Conclusions 79
- § 3. Circumvention of law as an ostensible declaration of intent 80
 - I. Introduction 80
 - II. Ostensible declarations of intent under Polish law 81
 - 1. Statutory regulation of an ostensible declaration of intent . 81
 - 2. Definitions of an ostensible declaration of intent 82
 - 3. Establishing an ostensible declaration of intent 83
 - a) A pretextual declaration of intent 84

b) A declaration of intent made to another party	85
c) Parties' agreement to conclude a pretextual legal transaction	85
d) Establishing a qualified <i>simulatio</i>	86
4. Legal consequences of an ostensible declaration of intent . .	87
III. Circumvention of law as a case of <i>simulatio</i> ?	89
IV. Legal transactions considered to circumvent the law as cases of <i>simulatio</i>	96
V. Conclusions	98
§ 4. Circumvention of law as a legal transaction contrary to law	99
I. Introduction	99
II. Transactions contrary to law under Polish law	102
1. Statutory regulation of a transaction contrary to law	102
2. Definition of a transaction contrary to a statute	102
3. Establishing a transaction as contrary to a statute	103
a) Elements of a legal transaction contrary to a statute	103
b) A statute	105
c) Rules on the interpretation of law and legal analogy	107
aa) Interpretation of law	107
(1) Directives on the interpretation of legal provisions	108
(2) Extensive and restrictive interpretation of legal provisions	110
(3) Circumvention of law as a problem of interpretation of law	111
bb) Analogia legis	114
(1) Definition of analogia legis	114
(2) Applicability of analogia legis in Polish private law	115
(3) Circumvention of law as a problem of legal analogy	119
cc) Conclusions	122
4. Legal consequences of a transaction contrary to a statute . .	122
III. Circumvention of law as transactions contrary to law?	122
IV. Legal transactions considered to circumvent the law as contrary to law	124
1. Legal transactions contrary to law	124
a) Revocability of the power of attorney subject to a time limit	125
b) Determining the beginning of the prescriptive period of a claim for performance	126
c) Form of the novation agreement	127

d) Settlement of a void relationship	128
e) A usufructuary lease agreement concluded for ninety years	129
f) Excluding the consigning agent's liability for a legal defect in a sold item	131
g) Transfer of employees without a transfer of the undertaking	132
h) Task-based working time	133
i) Providing a non-competition clause in employment regulations	133
j) Applying mixed working time	133
k) Coverage of shares in the increased share capital of a limited liability company with the difference in value determined as a result of re-estimation of value of in-kind contributions	134
l) Depositing a bearer share certificate	136
2. Circumvention of law as a sham result of the interpretation of law	138
a) Extension of the prescriptive period for a claim for party performance	139
b) Contractual limitation of the employee's possibility of taking up additional employment	141
c) Compensation of an heir who did not join a limited liability company	144
d) Compulsory redemption of all shares of a shareholder	147
e) Resolution introducing compulsory redemption of shares in the articles of association	151
f) Increase in the share capital done in simplified mode changing the ratio of shares of existing shareholders	153
g) Delegation of all powers of the supervisory board to one of its members	157
h) A claim against a merger resolution in relation to the procedure aimed at establishing a correct share exchange ratio	160
V. Conclusions	162
§ 5. Circumvention of law as a contract contrary to the nature of a legal relationship	163
I. Introduction	163
II. A contract contrary to the nature of a legal relationship under Polish law	163
1. Statutory regulation of the nature of a legal relationship	163
2. Definition of the nature of a legal relationship	164

3. Establishing a legal transaction contrary to the nature of a legal relationship	167
4. Legal consequences of a violation of the nature of a legal relationship	169
5. Functions of the nature of a legal relationship	170
6. Independent nature of the nature of a legal relationship as a limitation of the freedom of contract	171
III. Circumvention of law as a contract contrary to the nature of a contractual relationship?	173
IV. Legal transactions considered to circumvent the law as contracts contrary to the nature of legal relationship	174
1. Irrevocable power of attorney to conclude an agreement transferring ownership of real estate as performance in relation to an earlier obligation	175
2. Earnest money set in an excess amount	178
3. An excessively long period for exercising the contractual right to terminate a contract	179
4. A long-term fixed-term employment contract	182
5. Waiving compensation for not undertaking activities competing with a former employer	188
V. Conclusions	189
§ 6. Circumvention of law as a legal transaction contrary to good morals (principles of community life)	190
I. Introduction	190
II. A transaction contrary to the principles of community life under Polish law	191
1. Statutory regulation of transactions contrary to the principles of community life	191
2. Definition of the principles of community life	192
a) Principles of community life	193
b) Principles of community life and good morals	196
3. Establishing a legal transaction as contrary to the principles of community life	197
a) Formal compatibility of a considered legal transaction with statutory law	197
b) Elements of a legal transaction contrary to the principles of community life	197
c) Identification of a violated principle of community life . .	198
4. Legal consequences of a transaction contrary to the principles of community life	200
5. Function of the principles of community life	200

III. Circumvention of law as a transaction contrary to the principles of community life?	201
IV. Legal transactions considered to circumvent the law as contrary to the principles of community life	204
1. Additional charges in a loan agreement	204
2. Exploitation of social insurance system	205
a) Conclusion of a contract in order to obtain social insurance benefits	205
b) Changing work position in order to obtain a higher severance payment	209
c) Conclusion of a civil law contract to reduce the amount of social insurance contributions	209
3. Conditioned subscription of shares in private subscription .	215
V. Conclusions	217
§ 7. Circumvention of law as an abuse of rights	218
I. Introduction	218
II. Abuse of rights under Polish law	219
1. Statutory regulation of an abuse of rights	219
2. Definition of an abuse of rights	219
a) The social and economic purpose of a right	220
b) The principles of community life and the social and economic purpose of a right	221
c) The scope of application of articles 5 and 58 § 2 PCC . . .	222
3. Establishing an abuse of rights	223
a) Elements constituting an abuse of rights	223
aa) (Subjective) legal right	224
bb) Factual circumstances	225
cc) The clean hands doctrine	225
b) Inapplicability of art. 5 PCC	226
4. Legal consequences of an abuse of rights	227
5. Function of art. 5 PCC	228
III. Circumvention of law as an abuse of rights?	229
IV. Legal transactions considered to circumvent the law as an abuse of rights	233
V. Conclusions	235
§ 8. Conclusions	235

Part Three: Circumvention of law in the case law of the Polish Supreme Court	239
§ 1. Introduction	239
§ 2. Definition of circumvention of law	240
I. Introduction	240
II. Definitions of circumvention of law proposed in German legal literature	241
III. Definitions of circumvention of law proposed in Poland	247
1. Historical definitions of circumvention of law	247
a) Historical definitions (1918 – 1939)	247
b) Historical definitions (1945 – 1989)	248
c) Conclusions	250
2. Contemporary definitions of circumvention of law	251
a) The first understanding of circumvention of law	251
b) The second understanding of circumvention of law	253
c) The third understanding of circumvention of law	254
d) The fourth understanding of circumvention of law	257
e) Conclusions	259
3. Judicial definitions of circumvention of law	260
IV. Conclusions	263
§ 3. Transactions circumventing the law	265
I. Introduction	265
II. Single legal transactions circumventing the law	268
1. An irrevocable power of attorney authorizing the conclusion of a promised contract	268
2. A contractual peremptory date	271
3. Interest on late interest	274
4. Fixed-term employment	277
a) Annex to a fixed-term employment contract	277
b) Conclusion of an employment contract other than a fixed-term contract	280
c) Fixed-term employment under German law	281
5. Waiver of a claim for payment of remuneration	281
III. Sequence of legal transactions circumventing the law	283
1. A statutory pre-emption right	284
2. Transfer of an undertaking	288
a) Amendment of an employment contract or termination of an employment relationship based on a mutual agreement	289

b) Termination of an employment contract with an employee in order to facilitate the disposal of an undertaking	292
c) Transfer of a part of the business not involving particular employees	294
d) Bankruptcy or liquidation of an undertaking	295
3. A unilateral set-off of the receivables	298
4. Conflict of the company's interests with those of a member of the management board	302
IV. Legal transactions capable of circumventing the law	304
1. Fiduciary transfer of ownership for security purposes	305
a) Movable property	308
aa) Failure to disclose a fiduciary transfer of ownership of movable property for security purposes	309
bb) Satisfaction of the creditor by means other than judicial enforcement proceedings	311
cc) A fiduciary transfer of ownership of movable property for security purposes under German law	314
b) Immovable property (real estate)	316
aa) Absence of entry in the land and mortgage register	316
bb) Inability to dispose of the object of appropriation by the transferor	318
cc) Satisfaction of the creditor by means other than judicial enforcement proceedings	319
dd) A fiduciary transfer of ownership of immovable property for security purposes under German law	322
2. Commercial general attorney-in-fact managing the company	322
3. Natural person who is a member of the management board guaranteeing a loan made to the company	325
V. Legal transactions not circumventing law	329
1. A right to withdraw from a contract	330
2. An employment contract for a probationary period	330
3. An underestimation of the value of a contribution in kind	333
4. A member of the management board of a limited liability company as the company's attorney-in-fact	334
5. Objection that a resolution of a capital company should be declared invalid	340
6. Representation of the company by a member of the management board as attorney-in-law	343
7. Limited liability company without management board	347
8. Voting agreements	349

a) Admissibility of a voting agreement made by a shareholder of a limited liability company	349
b) Granting an irrevocable power of attorney to vote	352
VI. Conclusions	357
§ 4. Prerequisites for finding a circumvention of law	360
I. Introduction	360
II. Prerequisites for circumvention of law proposed to date	361
III. A proposed set of prerequisites for circumvention of law	365
1. Can the contested legal transaction be found void or invalid based on a legal ground other than circumvention of the law?	366
a) A legal transaction	366
b) A non-defective legal transaction	368
2. Would a legal transaction contrary to the circumvented legal norm lead to the same result as the contested legal transaction?	369
a) A circumvented norm	370
aa) Scope of application of art. 58 § 1 PCC	371
bb) The legal nature of the circumvented provision(s)	374
cc) Norms that can be circumvented	376
dd) Difficulties in determining the content of the potentially circumvented norms	383
b) A result of the legal transaction	385
aa) A result that is prescribed by law for the concluded legal transaction	387
bb) A result that is not prescribed by law for the concluded legal transaction	390
cc) An achieved or achievable result	391
c) The mental state of the persons undertaking questioned legal transaction	393
aa) Concerns regarding subjective elements	393
(1) Parties possessing the intention	404
(2) Parties' knowledge and intention	406
(3) Moment of creating the intent	408
(4) Good faith	409
bb) Role of intention in finding a circumvention of the law	410
3. Is there a rational justification for concluding the contested legal transaction?	412
4. Additional factors for consideration	416
5. Compatibility of the proposed prerequisites with EU law	420
a) Introduction	420

b) Prerequisites for finding an abuse of EU law 422
 c) Compatibility of the proposed prerequisites
 with EU law 428
 d) Conclusions 431
 IV. Conclusions 431
 § 5. Legal consequences of circumvention of Polish private law 433
 I. Introduction 433
 II. Legal consequences of transactions circumventing the law . . 433
 1. Voidness of the entire legal transaction 434
 2. An effect other than voidness 438
 3. Validity of a part of a legal transaction 446
 4. Conversion of a legal transaction 450
 5. Rectification of a legal transaction 454
 III. Consequences of a legal transaction having the objective
 of circumventing labour law 455
 IV. Consequences of a legal transaction having the objective
 of circumventing commercial company law 459
 V. Sanction for an abuse of EU law 467
 VI. Conclusions 468
 § 6. Functions of circumvention of law 468
 § 7. Circumvention of the law as an independent legal concept 473
 § 8. Conclusions 477

 Conclusions 479
 Bibliography 485
 Subject index 573