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DEAR READERS,

By the Oriental Calendar, the year of 2019 is the year of the Brown Pig. People born in such years are said to be persistent: they always achieve their ends even if they have to elbow their ways (though certainly not everybody does that). Besides, people born in the year of the Brown Pig are said to be reserved, prudent and cautious. They always try to find a common language with all people they have to speak with, and they are never the first to start a conflict.

Russia has had a rich history, full of events. Many of such events have become an integral part of our history contributing to the development of the country. Commemorative dates seared into our memory are stated in the calendar and are annually celebrated:

For example, on March 31, we will celebrate the 205th anniversary of the capture of Paris by the Russian troops. After a triumph victory over the capital of France, Emperor Napoleon abandoned his throne.

On May 12, we will witness the 75th anniversary of the Crimea Campaign. It took the Soviet troops 35 days to free the Crimea and Sevastopol from the German troops.

On July 10, 1709, there was a legendary battle of Poltava, decisive in the Great Northern War.

This year many workers of arts and other famous people celebrate their anniversary, among them writers, scholars, musicians and many others. On January 5, 2019, Brian Hugh Warner, who is more famous as Marilyn Manson, turned 50. On January 7, Francis Poulenc was born 120 years ago. The same date is another birthday — a famous actor, producer and director Nicolas Cage will celebrate his 55th anniversary. Jeff Richmond, a famous composer and actor, celebrated his 60 years, and Vladimir Dashkevich, a Soviet and Russian composer, celebrated his 85th birthday anniversary in January as well. V. Dashkevich is the author of symphonic and chamber music, with more than 80 soundtracks and songs to motion pictures. The most well-known music by V. Dashkevich is his music to the Soviet series of "Adventures of Sherlock Holmes and Doctor Watson". On February 3, 1809, a famous German composer Felix Mendelssohn Bartholdy was born. This year the composer whose music is performed at weddings would have turned 210 years. On March 21, 180 years ago, a world-known Russian composer Modest Mussorgsky was born. The same date, but 60 years later, one of the most famous Soviet composers, singers and authors of numerous songs and poems was born, and namely Aleksandr Nikolaevich Vertinsky. On April 1, 210 years ago, a famous Russian dramatist Nikolai Gogol was born. In 1879, a composer and musician Ilya Shatrov was born. This year a famous journalist and host — Vladimir Posner — will celebrate his 85th anniversary. The same year, we will congratulate none the less famous person as Vladimir Krainov on his birthday, who will turn 75 this year.

Dear readers, take care of yourselves and your family. Love your neighbors as yourselves. Not to lose yourself in this raging world is very important.

Editor-in-Chief, Doctor of Law, Professor V.S. Belykh

Congratulations to V.A. Bublik!

Vladimir Aleksandrovich Bublik was born on February 1, 1959 in the Krasnoyarsk krai into the family of workers. In 1976, he entered the Sverdlovsk Law Institute named after R. A. Rudenko (at present it is the Ural State Law University) which he graduated from with honors in 1980. He was assigned to work as the district prosecutor assistant in the Kustanay region (Kazakhstan) where he worked for two years.

After defending his Candidate's thesis on "Civil Law Means of Fighting against Illegal Income" (1983), he was appointed as the head of the research department of the Sverdlovsk Law Institute.

In 1991–1995, V. A. Bublik worked in Moscow as the Deputy Director of the Scientific Department of the RF Ministry of Education.

In 2000, he defended the Doctor's thesis entitled "Public and Private Law Basics in Regulating Foreign Economic Activity" (his scientific supervisor was professor V. S. Belykh). In 2001–2003, V.A. Bublik held the position of the Vice-Rector of Scientific Activity, and since April 2003, he was the First Pro-Rector of the Academy.

Since 2009, V. A. Bublik has been Professor of the Department of Entrepreneurial Law. In 2007, he was chosen to be the Rector of the Ural State Law Academy. In 2018, he was appointed the Rector of the Ural State Law University by the decision of the RF Ministry of Science and Higher Education.

Alongside with teaching (with his authorship course "Legal Regulation of Foreign Economic Activity in the Russian Federation"), V. A. Bublik is an active scholar, with more than 100 scientific works and 5 monographs on the issues of arbitration procedure, civil, business and private international law.

V. A. Bublik has the following rewards and diplomas: Certificate of Appreciation of the Supreme Arbitration Court of the Russian Federation (2001), Certificate of Appreciation of the Ministry of Justice of the Russian Federation (2003), Certificate of Appreciation of the Supreme Arbitration Court of the Russian Federation (2003), First Degree Medal of the RF Federal Chamber of Lawyers "For Achievements in Protecting Rights and Freedoms of Citizens" (2006), Title of Honour "Honorary Lawyer of the Republic of Buryatiya" (2006), Award Badge "Honorary Worker of the Prosecution of the Russian Federation" (2008), Certificate of Appreciation of the Trade Union Central Committee of Workers of People's Education and RF Science (2009), Second Degree Medal of the RF Ministry of Justice "For Persistence" (2010), A. Koni Medal of the RF Ministry of Justice (2011) and others.

On 20 December 2018, the Governor of the Sverdlovsk oblast, E. V Kujvashev, was granting state awards of the Russian Federation, of the RF President and recognition badges of the Sverdlovsk oblast to the most outstanding people of the region. One of them was the Rector of the Ural State Law University V. A. Bublik who received the third degree badge of distinction "For Achievements for the Sverdlovsk region".

The Jurist Publishing Group congratulates Vladimir Aleksandrovich on his birthday wishing him health, happiness and much success in this life!

Deputy Director of the Jurist Publishing Group, Professor
V. S. Belykh

CONSTITUTIONAL JUSTICE: UNDERSTANDING LAW

Gadis A. Gadzhiev
Judge of the Constitutional Court of the Russian Federation,
Doctor of Law, Professor

Abstract
The article focuses on understanding constitutional law rules. The author notes that the objects of interpretation when implementing the constitutional proceedings are very different from conventional products. In particular, the interpretation of the Constitution of different crosses of conceptual spaces — art, theology, morality, law. Thus, the rules of constitutional law are not only in the legal context, but also in the context of individual consciousness of judges constituting the Board, i.e. the subject of the constitutional understanding and in a complex cultural and historical context.

Keywords: constitutional law, interpretation, hermeneutics, legal understanding.

1. The unique capacity to perform the functions of "a negative legislator" peculiar to constitutional justice agencies requires the science to pay attention to such a category as "understanding of constitutional law rules" the content of which does not coincide with the content of the concept "interpretation" and "legal understanding" of its basic values (these are the values of justice, aim, legal stability and complex contextuality).

Navigating the juridical world, one can find out that the categories under consideration — "understanding" and "understanding of law" — may be attributed to the range of issues that constitute the theory of constitutional justice. The comparison of ordinary courts with the constitutional ones convinces us that the main difference between them manifests depending upon the fact that the first ones interpret the rules of current legislation while the second ones have to understand the constitutional principles and create their own system of coordinates, i.e. legal understanding of constitutional law that forms the doctrinal part of decisions made by the constitutional justice agencies. N.S. Bondar points out, "the specificity of the normative energy peculiar to the Constitutional Court decisions is as such that *the subject (sphere) of its influence is primarily normative values of the highest, abstract level — general principles of law, constitutional values and principles,* realized in all branches of the current law system…In this capacity, the main peculiarity of

constitutional justice norms lies in the fact that being a constitutional source of law they combine normativity with doctrinal fundamentals"[1].

The culture is constantly developing, so the humankind objectively finds itself in "the turbulence zone". Most obviously, this phenomenon is associated with the development of social life connected with the complexity of contradictions, mainly legal ones. This calls for the need to create more complex theoretical models in order to resolve the most difficult contradictions between fundamental rights. New cognitive categories are beginning to appear. They are the abstract and specific equality of fundamental binary rights, dilemmas of choice, paradox in constitutional law, complex metalegal contextuality. These categories form the framework for the constitutional justice theory as a part of the constitutional law theory that must be based upon the methodology of philosophical contradictions.

2. The achievements of modern hermeneutics (section of philosophy) make it possible to use the language of the most abstract concepts in describing the activities of constitutional justice agencies. This is the language of constitutional law philosophy.

Friedrich Schleiermacher, pioneer of hermeneutics, writes that the language as a community includes understanding which is always inner and outer speech (as in "Ulysses" by James Joyce). Every act of understanding is the reverse side of an act of speaking, and one must grasp the thinking that underlies a given statement. The object of understanding is language[2].

To understand a text means to penetrate into the spiritual world of its creator. Modern hermeneutics substantiates the thesis that we understand not a person, but oral or written texts based on the use of language and created by this person. Understanding does not imply the discovery of meanings which are contained in the text but attaching, attributing the sense to linguistic expressions and various cultural objects (creations — literary, musical, art, etc.). The activity of judges aimed at interpreting the texts in the Digest of Justinian was understood approximately the same. The meaning of language expressions falls into two parts: general or social meaning that is generally accepted in linguistic (or academic) community and

[1] Bondar' N. S., Sudebnyj constitutsionalizm v Rossii [Judicial Constitutionalism in Russia]. Moscow, 2011, p. 122.

[2] Novaya Filosofskaya Entsiklopedia [New Philosophical Encyclopedia]. Volume 3, p. 390.

individual or personal meaning that a certain person attributes to this expression. Mutual understanding is possible only with the use of social meanings[3].

The author of the text (especially literary or musical) attaches content to it, which includes thoughts and feelings. To understand the text means to open and grasp its content; the text contains information about feelings, so to understand the text means to empathize with another person.

The object of understanding always has meaning because it nearly always has a symbolic nature. This means that the text is important not as such but as a carrier and expression of some meanings.

The objects of interpretation in constitutional proceedings are quite different from ordinary works.

Quite unexpectedly, the problem of interpreting the constitution transforms into the crossing point of different contextual areas — art, theology, moral and law. We should bear it in mind in order not to make methodological mistakes. Interpretation of constitution as interpretation of symbols has much in common with interpretation of notes, linked text, and literary works.

The use of symbols is a part of cultural heritage of all humankind. Symbols as elements and instruments of culture are the domain of the special branch of humanitarian knowledge — culturology, which treats culture (including the legal conceptual object) as a specific symbolic reality existing side-by-side with the reality of life.

The symbols in culture presuppose the presence of special methodology of "decoding" the meaning that was willfully or non-willfully given to the object of culture. The symbols in law are most always the result of conscious creativity (undermining every culture including legal one), so in jurisprudence the notion of "decoding of the meaning and the idea" was replaced by a particular act of decoding — the notion of interpreting legal rules, though these are the general type of phenomena.

Every constitutional principle is a sacrament. Article 1 of the RF Constitution states: "The Russian Federation — Russia is a democratic federal rule-of-law state with a republican form of government". What is a state, democracy, or federation, or republicanism? A rule-of-law state is a norm containing a principle. This is a mark in

[3] *See:* Nikiforov A. L., Jazykovye universalii v strukture ponimaniya [Language Universalia in the Structure of Understanding] / Epistemologia i Filosofiya Nauki [Epistemology and Philosophy of Science], 2017. No. 4, pp. 49-50.

the text of the Constitution that provides reference to the widest legal information. The first part of the said article contains four principles. Each of them relates to a huge scope of the legal rules by logical and legal links. These legal rules are included into the Russian legal system. Without applying to these rules, constitutional norms (principles) will represent Silentium (i.e. keeping secret; a namesake poem was written by F. Tyutchev, a famous Russian poet). The first chapter of the Constitution "The Fundamentals of the Constitutional System" consisting of 16 Articles can be called the treasury of legal knowledge.

The text of the constitutions contains words and word combinations that play the role of certain symbols that many informed lawyers associate with systemic legal ideas and concepts (both doctrinal and judicial). These symbols (or marks) are the words "democracy", "republic", "rule-of-law state', "social state", "people", etc. For better understanding, the constitutional text can be compared with stenography, i.e. a system for rapid writing based on the use of special symbols or shortcuts that can be made to present words, or phrases. The method allows rationalizing the writing technique. The text of the Constitution is distinct in shortness, extensiveness, and polysemy. The said leads to the rationalization of the writing techniques for its enforcement. The stenography distinguishes the constitutional law from other branches of law (here we mean the rational correlation between the text and the doctrinal idea about symbols composing the text). Different "symbols" of the constitutional text encompass different value of legal information. It may be measured using the notion of hermeneutic radius of a symbol — the norm of the Constitution. So, the marks and symbols in the text of the Constitution can be presented as circles with different radii: the circle created by the symbol "rule-of-law state" will be larger than a circle created by the symbol "secular state"[4].

The evaluation activities of constitutional justice agencies are impossible without the phenomenon of understanding in constitutional law. The latter cannot be limited to the discovery of the meaning which was put into the norms by the "founding fathers". Such an approach to understanding is called the method of historical interpretation and is fairly criticized as a conservative one in literature[5].

The Constitutional Court uses the text that contains norms — marks and symbols, but this goes beyond the limits of discovery and accurate identification of the

[4] *See:* Gadzhiev G. A., Ontologiya Prava [Ontology of Law]. Moscow, 2013, p. 237.

[5] *See:* Interpreting Constitutions. A comparative study. Edited by Jeffry Goldsworthy, Oxford University Press. 2000.

meaning which can be found only in the inner world of those people who took part in drafting the text of the Constitution. It is necessary to get rid of rudimentary elements containing fiction in constitutional law. The court cannot consider that its aim is to understand only what was conceived by the lawmakers and the creators of the constitutional text. The Constitutional Court attributes new meanings to linguistic textual expressions. According to G. Radbruch, legal interpretation is not a rethinking of the intended but the final understanding of the reasoned. It represents a mixture of theory and practice, cognizable and creative, reproductive and productive, scientific and intuitive, objective and subjective that cannot be degraded into elements (amalgam — G.G.)[6]. The aim of interpretation is to understand the will of the legislator. It is not a single declaration of a will that is materialized and frozen in the law. T. Hobbes wrote that it was a longevous will that was carrying the law. It is capable of constant changes. And the legislator is he, not by whose authority the laws were first made, but by whose authority they now continue to be laws (with the help of court — G.G.)[7].

The subject of understanding attributes such meanings to the object of understanding that he/she finds in the inner world — the world of individual consciousness, forming the basis of understanding.

A. L. Nikiforov calls this world of individual consciousness "the individual notional context". It is formed on the basis of the language and includes sensory and abstract images, links between them, knowledge, moral attitude, and ideals. Abstract images are coming to the forefront in understanding the rules of constitutional law. Individual context is a system of interconnected units of meaning, the content of which is defined by their place within the context, i.e. their links with other units and attitude towards individual "I". Coming across linguistic texts, the subject of understanding uses his/her inner context, associates individual estimative units of meaning with the objects, evaluates them and gives the meaning. G. V. Mal'tsev says, "subjectivism and voluntarism were the old and the worst shortcomings of law"[8].

[6] Radbruch G., Filosofiya Prava [Philosophy of Law]. Moscow, 2004, p. 129.

[7] The symbolic meaning of this statement is reflected in the legend about solon. The outstanding Greek legislator finished drafting the legislation and demonstratively exiled. This means that the empiric legislator makes way for the ideal lawmaker that lives in the law itself.

[8] Mal'tsev G. V., Sotsial'nye osnovaniya prava [Social Fundamentals of Law]. Moscow, 2007, pp. 106–107.

Legal scholars have long known that the interpretation of a legal norm presupposes its "imbedding" in the system of other legal norms[9]. The said is elementary and simple contextuality. A. L. Nikifirov suggests considering the context of individual consciousness. This is very useful and necessary within the context of a collegiate character peculiar to the process of understanding the meaning attributed to the constitutional norms. Understanding the constitutional norm leads to a new complex theoretical model that differs from interpretation. A legal norm is situated in a more complex context because of its elusiveness and secrecy. This is a cultural and legal context that is created by the modern generation of people and those generations which made up the nation for hundreds of years. This legal idea is found in the preamble to the RF Constitution which defines the notion of the multinational people of the Russian Federation united by the common fate in our land (the principle of land and blood) due to preserving the historically established unity of the state. The multinational people of the Russian Federation reveres the memory of ancestors who have conveyed to the modern Russian generation (if we take into account the definition of the people as a civil but not cultural nation[10], then to the modern generation of the Russians as we are all Russians according to the theory of civil nation — and this is the fact of legal reality) love and respect to the Fatherland, belief in good and justice. The people, more precisely, the Russian nation is the basic factor of the legal life. It exists as a successor of the previous generations and is embodied in the further generations. As it is known, the past, the present, and the future of the existence form the reality in their unity. The past, the present and the future generations of the Russians also form the unity — the unity of fate, land, traditions, culture, and the responsibility for their Motherland to present and future generations, proceeding from the sense that we are part of the world community. This is the place of the people (nation) in the legal life (reality).

Thus, the norms of the constitutional law are contained not only in 1) the legal context but also 2) in the context of individual consciousness of judges forming the collegium, i.e. the subject of constitutional understanding, and 3) in a complex cultural and historical context.

[9] Interpreture et concordare leges legibus, est optimus interpretandi modus — to interpret the rule means to harmonize it with other rules.

[10] *See:* Guseinov A. A., Natsia i lichnost'. Dialog kul'tur v usloviyakh globalizatsii. [Nation and Personality. Dialogue of Cultures in Modern Conditions]. XII International Lakhachev Readings. St. Petersburg, 2012, p. 74.

The phenomenon of Roman law reception clarifies this observation. O. Spengler wrote: "If the Western jurisprudence took over ancient words, yet only the most superficial elements of the ancient meanings still adhered to them. The consistency of the text disclosed only the *logical* use of the words, not the life that underlay them. No practice can reawaken the silent metaphysic of old ideas. No laws in the world make this last and deepest element explicit, because — just because — it is self-evident. In all of them the essential is tacitly presupposed; in application it is not only the formula but also, and primarily, the inexpressible element beneath it that the people inwardly understand and can practice. Every law is, to the extent that it would be impossible to exaggerate, customary law. Let the statute define the words; it is life that *explains* them"[11].

So, when scholars or politicians are eager to inflict alien legal norms of another social and historical context on national law, the notions turn out to be hollow, and the life — silent.

The idea of law has a contextual character to a large extent. This means that the sense of law and its rules always depend upon several contexts which exist in different realities created by a man's mind. The lawyers pay attention primarily to the legal context of the norm. To define the meaning of certain words that constitute the text they put the norm in a wider legal text of the law. The Latin word "*contextus*" means close relationship. Sociologists of law complement the legal context with the context of all the array of cultural norms existing in the society, including ethic, and economic principles and practices.

R. O. Dvorkin thought that the judge did not change the legal rule while administering justice, but conceptualized it using various cognitive methods. The judge should consider the normative text in its integrity, including the context of previous institutional experience.

Trying hard cases, coming out of the collision of equal fundamental human rights, the judge pays attention to the need to consider social principles and values acknowledged by the society. The integrity concept allows the judge to introduce the current norms of social order into reasoning[12]. This idea reflects the thoughts of G. Fechner who wrote that law is a part of order of the part of order[13].

As other social systems of regulation, law presumes the integral link with the mind of a person who the norms are addressed to, that means that the law lies within both legal and complex cultural and historical contexts.

[11] Oswald Spengler. Zakat Evropy. [The Decline of the West]. Moscow, 1998, p. 85.
[12] Dvorkin R. O., O pravakh vser'joz. [Seriously about Rights]. Moscow, 2004, pp. 120–184.
[13] Fechner G., Filosofiya prava [Philosophy of Law] / Ural'sky Ezhegodnik Teorii Prava [Russian Year Book of the Theory of Law]. 2010. No. 3, p. 555.

That is why, unlike ordinary courts, constitutional courts use practically all new methodologies known to legal science: ontological and legal, hermeneutic, axiological, positivist and the methodology of structuralism. Their application underlines the judicial doctrine of constitutional identity which was drafted during consideration of complaints filed by Anchugov and Gladkov (Ruling of the Constitutional Court of the Russian Federation of 19 April 2016 No. 12-P). This doctrine presumes non-contextual understanding of constitutional provisions with the use of modern hermeneutics gone beyond the limits of text interpretation and considering individual semantic context.

Understanding the activities of the constitutional justice agencies differs from the traditional text interpretation and includes the use of new cognitive structures being developed by other branches of science that study society.

We think that the systemic theory of German sociologist Niklas Luhmann[14] is a very perspective one for studying the phenomenon of constitutional justice. Our own theory of constitutional justice is based on it. He proposed such new cognitive structures as the legal system as an autopoietic system which is characterized by the thesis of normative closure and openness to cognitive issues. The requirement for normative closure exists due to a specific place that the legal system occupies in society; it rests on the border of being and reality[15]. The criterion of the sources of law is the official criterion for making value judgments. The doctrine works out the rules for their use and other technical conditions for the stability of the legal system. However, this system is not tight because there are ways for interaction with other normative systems such as ethic, economic, cultural, etc.

N. Luhmann discloses such notions as "vague concepts" and the open structure of law. He uses the language of philosophy to discuss the most complex problems of constitutional law and justice. He writes that the whole range of constitutional principles is built up upon the use of such vague concepts as "equality", "freedom of word and speech", "dignity of a person", etc. They differ from specific rules by their principal vagueness of their meaning and the flexibility of their understanding during administration of the law[16].

[14] *See:* Niklas Luhmann. Law as a Social System. Oxford University Press.

[15] Tuhvatullina L. A., Ratsional'nost' v prave: podkhod N. Luhmanna [Rationalism in Law; N. Luhmann's Approach] / Epistemologiya i Filosofiya Nauki [Epistemology and Philosophy of Science]. 2007. No. 4, p. 178.

[16] Tuhvatullina L. A., Ratsional'nost' v prave: podkhod N. Luhmanna [Rationalism in Law; N. Luhmann's Approach] / Epistemologiya i Filosofiya Nauki [Epistemology and Philosophy of Science]. 2007. No. 4, p. 187.

The notion "understanding" may be attributed to modern hermeneutics. It is connected with "legal understanding of constitutional law". These notions are very important for practical justice.

The courts of general jurisdiction (and other ordinary courts) make their decisions upon the methodology of legal syllogism. The courts exercise their valuation activities on the basis of conclusion which stands upon two logical messages: the first one is the facts of a certain dispute; the second is the relevant rules of positive law.

Constitutional courts, as a rule, resolve serious cases, when two legal interests of two subjects meet. These interests are guaranteed by the fundamental constitutional rights that are equal. When there is a collision between two fundamental rights there are no rules that are applied to cases resolved in ordinary courts (for them there are certain rules of resolving the collision). The general rule is that constitutions do not establish a hierarchy of fundamental rights.

For example, the voters during the electoral campaign are interested in enforcing their rights to free elections. The journalist should also respect the said rights of the voters. But journalists try to promote their own interests which are based on the constitutional right of the freedom of speech. So, sometimes they try to distribute incorrect information about the candidates. Should we "sacrifice" the right to free elections to the right to the freedom of speech? This is a typical constitutional legal dispute that was the subject of consideration in the Constitutional Court of the Russian Federation[17].

Such conflicts of equal rights attracted much attention. They are examined from the view of rhetoric[18], philosophy of law[19], and economy[20]. N. Luhmann in his communication theory described the collision of fundamental rights according to a new theoretical model based on the principle of paradox[21]. Here, paradox fulfills

[17] The Ruling of the Constitutional Court of the Russian Federatopn of 30 October 2003 in connection with the request made by the State Duma deputies and complaints of S. A. Buntman and K. S. Rozhkov.

[18] *See:* Soboleva A. K., Konflikt prav kak ritoricheskaya antinomiya [Conflict of Rights as Rhetoric Antinomy] / Sravnitel'noye Konstitutsionnoe Obozreniye [Comparative Constitutional Review]. 2018, No. 1.

[19] Schlink B., Proportsional'nost' [Proportionality]/ Sravnitel'noye Konstitutsionnoe Obozreniye [Comparative Constitutional Review]. 2012, No. 2; Aleksi R., Formula Vesa [Formula of Weight]/ Rossiiskii Ezhegodnik Teorii Prava [Russian Year Book of the Theory of Law]. 2010, No. 3.

[20] The lawyers — economists characterize the optimization of two fundamental rights as a legal equivalent to the optimality principle drawn by V. Pareto.

[21] Tuhvatullina L. A., Ratsional'nost' v prave: podkhod N. Luhmanna [Rationalism in Law; N. Luhmann's Approach] / Epistemologiya i Filosofiya Nauki [Epistemology and Philosophy of Science]. 2007. No. 4, p. 185.

productive functions. The lawyers agree with this statement of philosophers, supposing that the collisions of fundamental rights are the sources for legislation[22].

Abel O. Pérez develops the N. Luhmann's theory regarding the legal system. He thinks that paradoxes in the legal system are the specific feature and proof of its complicacy. Paradoxes in modern law reflect the dilemma between "consistency" and "pluralistic sensitivity". This dilemma can be attributed to the axiology of constitutional law as it has value-based nature: What is more valuable for the modern society? Is it formal equality and the universality of law administration, i.e. severity and unity in the process of administering the law? Or should the law be flexible and sympathetic to socio-cultural diversity of situations, i.e. just? This is the problem of legal understanding of constitutional law.

N. Luhmann proposed an interesting idea about the development of law, based on the principle of paradox. The paradoxes in the sphere of constitutional rights are resolved due to the fact that all fundamental rights are formulated in the constitutional text as vague concepts.

In case of a dispute this abstractedness enables to coordinate abstractive equal constitutional units in the form of fundamental rights without blocking each other. It so happens that in a specific situation one right "is sacrificed" to another one. Both disputing parties have opposite interests. They find the "formula of agreement" with the help of the constitutional justice agency.

The Constitutional Court frequently faces contradictions between the perceptions about different constitutional principles which may be internally controversial in fact (it is enough to remember about the constitutional principle of fairness, which is mentioned in the sixth paragraph of the preamble to Constitution). The controversy of a constitutional principle is a self-reflection as a controversial nature characteristic to aspirations of the people and those numerous conflicts which replenish the modern public life. The search for a balance and coordination of constitutional principles are the tasks of the Constitutional Court that develops the rules for their stabilization as all the constitutional principles are equally valuable and do not have hierarchy.

Rationalism lies in the basis of counterbalance and constitutional principles. It means that a) all constitutional principles must coexist; b) the best way for their

[22] Gadzhiev G. A., Printsipy prava i pravo iz printsipov [Principles of Law and Law out of Principles] /Sravnitel'noye Konstitutsionnoye Obozreniye [Comparative Constitutional Review]. 2008, No. 2.

coexistence is such an interpretation of a constitutional principle when new perceptions about it help to enhance the regulatory effect from another constitutional principle (principles); c) it is possible to balance two constitutional principles, to enhance and to exalt the meaning of one of them in a certain period of time.

Philosophical and legal beliefs that every constitutional principle reflects a certain interest of a big social group of people underpin the idea of the equality of constitutional principles. In terms of constitutional law, these interests and constitutional principles reflecting them are equal because constitutional and legal axiology does not recognize the hierarchy between them.

An interesting phenomenon arises in the sphere of constitutional and legal ontology. There are many social interests which are allocated within the equal constitutional principles. This is the most mysterious sphere of constitutional law! The information about the most important social interests existing in social real life is contained in a specific legal form of constitutional principles and in the fundamentals of constitutional order. In a constitutional legal conceptual environment, the constitutional principles are specific symbolic bearers of the most important legal information. The said forms their constitutional and legal value. The functional purpose of constitutional principles is becoming more evident. They are needed to work out basic concensi in the society that has often comprised controversial social interests.

The search for a balance between two equal but antinomic constitutional principles is a device for drawing a line under the opposite views serving the purposes of harmonizing the social life. The binariness of constitutional principles is the most important phenomenon to pay attention to. The basic principles of the constitutional order guarantee the principle of economic freedom which helps to ensure the social interests of economically energetic members of society — entrepreneurs, employers, private owners. Another category of citizens that requires social assistance is "under umbrella" of the constitutional principle of social state. The legal principle of economic freedom is in systemic interconnection with economic principles of efficiency and maximization of profits, and the principle of social state is connected with economic processes connected with the distribution of profits gained from entrepreneurial activities. The said represents an interconnected pair of constitutional principles.

Thus, constitutional legal principles are not isolated, they are interconnected. "Pair" constitutional principles become engaged in conflict relationships with each

other. This conflict character creates the dynamics of the entire environment — constitutional legal reality.

The said paradox can be explained by the position of the constitutional justice agency which, in one situation, somehow enhances a certain right (e.g. the right to freedom of expression), in another situation opts for another right (e.g. the right to inviolability of a person). By the way, from the view of the constitutional text fundamental rights according to the general rule are not hierarchical. The aforementioned situation happens when there is a conflict between antinomical equal rights. Such relativism can possibly be explained by the fiction phenomenon of the law.

Unlike material world, legal world contains legal images of real subjects and objects. The concept of a person (natural or legal, incorporeal things, etc.) is obviously a fiction.

The equality of like-kind fundamental rights declared by the doctrine has an abstract character. G. Radbruch wrote, "equality is not given in reality; always equality is but an abstraction from actual inequality, taken from a certain point of view"[23]. The situation of conflict between formally and legally equal fundamental rights in reality explicates the difference between the abstract and specific equality of equivalent fundamental rights. Most often, binary fundamental rights act as an "inspiration source" for the constitutional law (We think that the conclusions made by the Constitutional Court in resolving hard cases can be described as roughly specific equality). They have many layers and are based on the idea of "peaceful coexistence" of fundamental rights. This means that there is the optimal way for distinguishing between them: one conflict constitutional principle (fundamental right) should be understood in a situation when new ideas about both of them enhance the regulatory effect of each despite "exaltation" of one of them during a certain dispute. Solid authority of every constitutional principle (right) does not allow building the hierarchical relationships despite contradictions between them because the value of idea involving the formal abstract equality of constitutional principles (rights) is a key prerequisite for eliminating the inconsistencies and creating "civil peace" as it is said in the preamble to the RF Constitution. Humankind needs more complex ways for eliminating the conflict of fundamental rights as the social reality is becoming more complex as well. The methodology of the philosophy of contradictions should become the ground for the development of constitutional law.

[23] Radbruch G., Filosofiya prava [Philosophy of Law]. Moscow, 2004, p. 88.

LEGAL (SCIENTIFIC) OPINION. TO G. A. GADZHIEV

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Legal (scientific) opinion Basic normative acts:

1. Constitution of the Russian Federation;

2. Civil Code of the Russian Federation;

3. Federal Law "On Insolvency (Bankruptcy)" No. 127-FZ of October 26, 2002 (as revised in Federal Law No. 93-FZ of April 23, 2018).

Documents submitted for drafting legal opinion:

1. Letter of Secretariat of the Constitutional Court of the Russian Federation;

2. Complaint of V. S. Kaplanyan to the Constitutional Court of the Russian Federation (reg. No.1509/15-01/18);

3. Decision of Otradnevsky District Court of the Krasnodar Region of December 22, 2016 in case No. 2-1535/2016;

4. Appellate ruling of the Krasnodar Regional Court of June 6, 2017;

5. Extract from the State Register of Individual Entrepreneurs No. 4B/2017 of November 23, 2017.

Factual circumstances and findings:

V. S. Kaplanyan filed a complaint to the RF Constitutional Court for inconsistency of provisions of Article 132 (3) (4.2) of Federal Law "On Insolvency (Bankruptcy)" No. 127 of October 26, 2002 (further the Insolvency Law) [1] with the provisions of the RF Constitution, its Articles 19 (1 and 2), 45 (1), 46 (1), 47 (1), 55 (2) in part of recovering money in favor of the buyer under the contract for purchase and sale of socially significant facilities.

[1] Legal Reference System *ConsultantPlus*.

According to Article 132 (3) (4.2) of the Insolvency Law, if the court rescinds the agreement concerning compliance with the terms laid down in para 4 of the present Article and the contract for the sale of the facilities of social significance, such facilities are subject to transfer for ownership of the municipal formation, and the amounts of money paid under the contract for the sale of facilities of social significance shall be refunded to the buyer at the expense of the local budget.

The said Article of Insolvency Law regulates the issues of selling the whole group of specific facilities, including those that are socially significant. These facilities are characterized by a specialized regime and may be alienated on the condition of complying with certain restrictions provided for by the current legislation. Article 132 (2)(2) of the Insolvency Law names such restrictions including buyers' undertaking to ensure the appropriate maintenance and use of said items in accordance with their intended purpose. Moreover, para 2.2 of the Insolvency Law states that after the completion of bidding for the sale of property by tender, the local self-government body shall conclude an agreement on observance of the aforesaid conditions.

The need for concluding such an agreement is an obligatory consequence of acquiring of the said facilities and guaranteeing further maintenance of the status of the facility of social significance and fulfilling the necessary social needs by the owner of the object[2]. The legislator's approach limiting the freedom of the buyer's economic activities concerning the said facilities is fully justified and does not contradict the provisions of the civil legislation because of their social significance and the status of the normative act (Federal Law), which stipulates the additional encumbrance. In particular, according to Article 1 of the Civil Code of the Russian Federation (further the Civil Code), the civil rights may be restricted on the basis of the Federal Law and only to the extent to which it shall be necessary for the purposes of protecting the foundations of the constitutional system, morality, health, rights and legitimate interests of other persons and protecting the country and for the state security.

In the event of a substantial breach by the buyer, the conditions to ensure the appropriate maintenance and use of said items in accordance with their intended purpose that agreement and the contract for purchase / sale of the facilities of social

[2] Much attention is paid to these circumstances in the juridical literature (M. V. Telyukina, Commentary to the Federal Law "On Insolvency (Bankruptcy)" (article-by-article) // Legal Reference System *ConsultantPlus*) and in the provisions of judicial practice (Ruling of the Supreme Court of the Russian Federation No. 305-ES17-2845 of August 3, 2017, Ruling of the Commercial Court of Volgo-Vyatsky Okrug No. F01-5635/2014 of February 17, 2015).

significance shall be subject to rescission by a court on an application of the local self-government body. Such facilities are subject to transfer for ownership of the municipal formation, and the amounts of money paid under the contract for purchase / sale of the facilities of social significance shall be refunded to the buyer at the expense of the local budget (Article 132 (4.2) (2, 3) of the Insolvency Law).

The said legal consequences have resulted from the noncompliance with the legislation requirements concerning the maintenance and use of the socially significant objects. Here we do not mention all the cases of rescission of agreements and the contract for purchase / sale of the facilities of social significance but those cases which resulted from the guilty activities of their owner expressed in breach or failure to comply with conditions specified in Article 132 (4) of the Insolvency Law.

As evidenced in the provided documents, V. S. Kaplanyan knew about the specific status of the facilities acquired at the tender; corresponding conditions were set in the text of agreement No. 1 of January 11, 2010. On the other hand, the refunding mechanism provided for by the Insolvency Law is compensation for purchase costs of the buyer incurred during the public tender. This situation calls for a question: To what extent is this approach justified and does it not violate the buyer's interests?

Current civil legislation is based on fundamental principles of fair and reason. This excludes unfair realization of civil rights and prohibits unjust enrichment of somebody at the expense of other persons (Articles 1, 10 of the Civil Code).

Buying property at a public tender from a bankruptcy debtor has its own specific character. The Insolvency Law allows for a possibility of reducing the price of the alienated property to satisfy the demands of the creditors within the shortest time through, *inter alia*, the procedure of public offer (Article 132 (4.1) (1), Article 139 of the Insolvency Law). As a result, the price of the alienated property may be reduced by several times in comparison with its market price, which allows the willing parties to pay a symbolic price for the facilities within a short timeframe.

We think that adherence to the logic formulated in the complaint considering the market price refunding but not the contractual one as it is set in the disputed norm of the Insolvency Law may lead to unfair enrichment. This approach may lead to situations when the property (socially significant facilities) is redeemed at a very low price, the buyers do not comply with the requirements of maintenance and use deliberately. The said creates a prerequisite for rescission of an agreement and refunding at a market price, which is considerably higher than the contract price.

The statement about the refunding of money paid under the contract for purchase / sale is considered adequate, as it excludes a possibility of abuse by the parties to a civil transaction. Moreover, the consequences of transfer of the ownership to the municipal formation may be caused exclusively by the buyer's failure to comply with the requirements of maintenance and use provided for by the current legislation. It should be noted that the presumed reading of the situation in no way diminishes the buyer's rights and does not deprive of the right to protection if the actions concerning the transfer of objects to the municipal formation affect his/her legitimate interests. We think that in cases when the buyer of the socially significant facility has committed actions leading to the increase of their final price, compensatory measures are likely to be used. These measures may include the vindication of unjust enrichment or recovery of damages.

As for the possibility of accrual of interest under Article 395 of the Civil Code, the arguments set out in the claim seem to be not sufficiently substantiated. The possibility of calculating and paying the interest under this Article is a measure of civil liability for non-performance of a monetary obligation.

Considering the character of relationships between the buyer of the socially significant facility and the municipal formation, rescinding the purchase / sale contract and the agreement on the grounds provided for by Article 132, V. S. Kaplanyan's position that the budget of the municipal formation has used the money for more than 6 years seems unreasonable. The judicial documents establish that socially significant facilities were acquired from *Pischekombinat Otradnensky Ltd* at a public tender held within the bankruptcy procedure of the latter. Therefore, the buyer was not the municipal formation but an independent business entity that received money from the property sold. The municipal formation did not have any grounds for the use of money: it was neither the party to the purchase / sale agreement, nor did it receive any money.

It is not therefore accurate to say that the municipal formation was in breach of a monetary obligation leading to liability in the form of paying the interest for the use of others' funds. On the contrary, in such cases the municipal formation becomes the forced party to legal relationship that is obliged to control the socially significant facilities that are maintained and used by the owner with the violation of requirements provided for by the current legislation. The very actions (omissions to act) of such owners are a catalyst of behavior of a local government body aimed at rescinding

of agreement and the contract for purchase / sale of socially significant facilities and their subsequent transfer into the municipal ownership. We think that the said excludes the possibility to apply measures of liability to the municipal formations stipulated by Article 395 of the Civil Code within the context of the analyzed situation.

We think that the approach proposed by V. S. Kaplanyan — considering circumstances specific to invalidity of transactions and the return of the parties to the original position that could be extended to the relationships under consideration — will contradict the provisions of the current legislation. As it is seen, Article 132 of the Insolvency Law, on the one hand, provides for the rescission of the valid contract and agreement in line with the criteria applied to the validity of transactions. On the other hand, it speaks of relationships arising out the sale of facilities, to which the municipal formation is not a party. Moreover, the recovery of interest from the municipal formation may lead to another practice concerning the refunding of the profit gained from the use of socially significant facilities attributed to the buyer.

Under these circumstances, we think that the provisions of Article 132 (3) (4.2) of Federal Law "On Insolvency (Bankruptcy)" No. 127 of October 26, 2002) in part of recovering the money in favor of the buyer under the contract for purchase and sale of socially significant facilities do not contradict the Constitution of the Russian Federation, its Articles 19 (1 and 2), 45 (1), 46 (1), 47 (1), 55 (2) and do not deprive the buyer of the right to protect the legitimate interests by legal means if the transfer of socially significant facilities to the municipal formation has led to disturbing the balance of interests and suppressing the legitimate rights.

EXCLUSION OF A SHAREHOLDER FROM A NON-PUBLIC JOINT-STOCK COMPANY

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Abstract
The article reviews the issue of exclusion of a shareholder from a non-public joint stock company, the possibility of which is recorded in restated Article 67 (1) of the Civil Code of the Russian Federation. The author proceeds from the fact that the nature of a joint-stock company as a capital association does not allow exclusion of a shareholder. The article focuses on the fact that the Federal Law "On Joint-Stock Companies" does not provide for the grounds and procedure for the exclusion of a shareholder from a non-public joint-stock company, as well as the procedure for determination of the price of shares paid to an excluded shareholder. The author raises a question of applying other methods of protection of the company from unfair shareholders that meet the nature of a joint-stock company.

Keywords: non-public joint-stock company, reasonable shareholder, exclusion of a shareholder, repurchase of shares from shareholders.

According to Article 67 (4) (1) of the Civil Code (as amended by Federal Law No. 99-FZ of May 5, 2014) "along with the rights provided for the participants of corporations by Article 65.2 (1) of the Civil Code, a member of a business partnership or company is entitled to demand exclusion of another participant from a partnership or company (except for public joint-stock companies) in accordance with the court procedure with payment of the actual cost of their share of participation, if such a participant inflicted significant harm to the partnership or the company by his / her actions (omission) or otherwise hinders materially its activities and achievement of the goals, for which it was established, including by gross violation of his / her duties

provided for by the law or the foundation documents of a partnership or company. The waiver or limitation of this right shall be null and void".[1]

With regard to exclusion of a participant from a limited liability company, there is legislative certainty — Article 10 of the Federal Law "On LLC" allows a possibility of such an exclusion in accordance with the court procedure upon request of the participants of the company, whose shares in the aggregate make at least ten percent of the company's charter capital; and Article 23 determines the procedure of payment of the actual cost of the share to the excluded participant. In addition, there is a fairly extensive court practice on consideration of cases on exclusion of a participant from a LLC, summarized in Information Letter No. 151 of May 24, 2012 "Review of the Practice of Consideration of Disputes Related to Exclusion of a Participant from a Limited Liability Company by Arbitration Courts".[2] In particular, this letter states that the sanction in the form of exclusion of a participant from a company is aimed at removing the obstacles caused by his / her actions to the normal operation of the company.

Resolution of the Plenum of the Supreme Court No. 25 of June 23, 2015 "On Application of Some Provisions of Section I of Part One of the Civil Code of the Russian Federation by Courts" defines those violations of obligations by the participants of a business company, which can be the ground for exclusion. Such violations, in particular, "can include systematic evasion of participation in the general meeting of participants of the company without good excuse, depriving the company of the opportunity to take significant economic decisions on the agenda of the general meeting of participants, if a failure to take such decisions inflicts significant damage to the company and (or) makes its activities impossible or significantly complicates it; execution of actions by the participant, which are contradictory to the interests of the company, including in execution of the functions of the sole executive body (for example, infliction of significant damage to the company's property, unfair settlement of a transaction in prejudice of the company's interests, economically unjustified dismissal of all employees, engagement into

[1] Civil Code of the Russian Federation (part one) of November 30, 1994 No. 51-FZ (as amended on August 3, 2018) (with amend. and add., effective from September 1, 2018) — Collection of Legislation of the Russian Federation", December 5, 1994, No. 32, Art. 3301.

[2] http://www.arbitr.ru/as/pract/vas_info_letter/55530.html; *See* also Resolution of the Plenum of the Supreme Court No. 90, Plenum of the Supreme Arbitration Court No. 14 of December 9, 1999 "On Some Issues of Application of the Federal Law "On Limited Liability Companies". — Bulletin of the Supreme Court of the Russian Federation, No. 3, 2000.

competitive activity, voting for approval of a knowingly unprofitable transaction), if these actions inflicted significant damage to the company and (or) made the company's activity impossible or significantly complicated it".[3]

The attitude to exclusion of a shareholder from a non-public joint-stock company is ambiguous. Some experts consider it acceptable by analogy with the exclusion of a participant from a limited liability company and consider exclusion of a participant (shareholder) as a sanction for his / her misconduct, and as a way to protect the interests of the corporation itself.[4]

Shareholders have rights and bear duties provided for by the law (Article 65.2. of the Civil Code) and the foundation documents of the corporation. Hereby the fundamental right of a shareholder to participate in management of the company's affairs is not only a right, but also, under certain circumstances, a duty of shareholders. Thus, a shareholder is obliged to participate in adoption of corporate decisions, without which the company cannot continue its activities in accordance with the law, if his / her participation is necessary for adoption of such decisions. Besides, the Civil Code of the Russian Federation obliges the shareholder not to perform actions knowingly aimed at infliction of damage to the corporation; not to perform actions (omission) that complicate significantly or make it impossible to achieve the goals for which the corporation was established".

In doing so, shareholders should exercise their rights in good faith and reasonably. In particular, Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation No. 3221/13 of June 18, 2013 in case No. A40-50320/12-138-470 notes that a reasonable shareholder who acquired a stake of shares of a major issuer and "as a result, made significant investments in securities, has an expected desire to demonstrate interest to the fate of his / her investments (directly or with the help of the respective consultant), that is, to obtain information on the activities of the joint stock company, to check the validity of forecasts regarding increase of the price of shares, including through the analysis of documents disclosed by the joint stock company, to control the income (dividends) due on shares, etc."[5] If a shareholder

[3] Resolution of the Plenum of the Supreme Court of the Russian Federation No. 25 of June 23, 2015 "On Application of Some Provisions of Section I of Part One of the Civil Code of the Russian Federation by Courts". — Bulletin of the Supreme Court of the Russian Federation, No. 8, August 2015.

[4] *See:* Corporate Law: a Textbook. In two volumes. /ed. by I. S. Shitkina, Vol. 2, M., Statut, 2018, pp. 666-680.

[5] http://kad.arbitr.ru/PdfDocument/7292de57-114b-4869-802f-1817722b446c/.

behaves unreasonably, in bad faith, especially in order to inflict damage to the company itself, one should get rid of his / her participation in the company.

At the same time, the Russian corporate legislation, recording the shareholder's right to participate in the general meeting on all issues within its competence, does not oblige the shareholder to participate in the meeting. Hereby, failure of a shareholder to participate in the general meeting of shareholders of a public joint-stock company does not entail any legal consequences for shareholders, although this may have a negative impact on the company's activities. In this connection, approaches are discussed, which could encourage the shareholders (especially minority shareholders) to participate more actively in adoption of key decisions by the joint-stock company at meetings of shareholders, voting as fair and reasonable shareholders. One of the legal consequences of non-fulfilment of such an obligation by the shareholders of a public joint stock company is exclusion from the number of shareholders of a public joint stock company in case of systematic evasion of participation in the general meeting without good excuse.[6]

However, it seems that exclusion of a shareholder from both a public and non-public joint-stock company is impossible for the following reasons.

First, joint-stock companies (both non-public and public ones) belong to capital associations. This very organizational and legal form of entrepreneurial business acts "as the most complete, consistent embodiment of the institute of a legal entity. Some bourgeois authors come even to equate a legal entity and a joint-stock company".[7]

Historically, the first forms of entrepreneurial associations are personal associations, or associations of persons, existing in the form of a full partnership and a limited partnership (special partnership), as well as in the form of a production cooperative.[8]

The existence of a personal association depends on the members of such an association and is inseparably related to the identity of the participants (members).

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[6] Report of the Central Bank of the Russian Federation for public consultations "On Approaches to Encouragement of the Activity of Shareholders and Investors on Participation in the Management of the Russian public joint-stock companies" — http://cbr.ru/Content/Document/File/50695/Consultation_Paper_170925.pdf

[7] Kulagin M. I. Selected Works. M: Statut, 1997, p. 47.

[8] *See:* Makarova O. A., Korporativnoe pravo: kurs lektsij [Corporate Law: a Course of Lectures]/ O. A. Makarova — M.: Wolters Kluwer, 2010, p. 21 and further on.

A personal association is based on the common interest that coincides with the individual interests of the members of such association. In principle, personal associations are conflict-free. If a member of a personal association does not act in accordance with the interests of the association, he / she may be excluded upon the decision of other participants. The possibility of exclusion is established for both partnerships and production cooperatives.

Foreign states belonging to the continental legal family know this form of the company (limited liability partnership). Can we consider this form of entrepreneurial association as pooling of capital, or as a personal association, or as an intermediate form that combines the features of a personal association and capital association?

Y. I. Funk, analysing emergence of a LLC as modification of a structure of a "joint-stock company", comes to the conclusion that from the viewpoint of the legal nature of the structure, a LLC can be considered as a sort of a joint-stock company.[9] A number of specialists (S. D. Mogilevsky, I. S. Shitkina, V. V. Dolinskaya) refer LLC to corporations or organizations of a corporate type.[10]

We believe that LLC should be considered as the most convenient and simple form of execution of entrepreneurial business, taking an intermediate position between personal associations and the capital association — JSC. A member of LLC does not lose relation to the company, in other words, there is a personal element in LLC. The existence of LLC depends to some extent on the participants. In this form of entrepreneurial association, the limited liability company itself does not coincide in many ways with the participants of the company but cannot completely break with it. As a result, we can say that in this form of association people interact with each other and their entrepreneurial association. Hereby the emphasis, of course, should be made on the relationship of people concerning their association, taking into account the presence of a certain will of people aimed at the property.[11] A. V. Gabov notes, "There is no doubt that the right of some participants to demand exclusion of

[9] Funk Y. I., Aktsionernoe obschestvo: istoriia i teoriia (Dialektika svobody) [A Joint-Stock Company: History and Theory (Dialectic of Freedom)] /Y. I. Funk, V. A. Mikhalchenko, V. V. Khvaley, Minsk, 1999, p. 309.

[10] Mogilevsky S. D., Samoylov I. A., Korporatsii v Rossii: pravovoj status i osnovy deiatel'nosti: ucheb. posobie [Corporations in Russia: their Legal Status and Activity Basis: a Textbook]. M, 2006, p. 31; Dolinskaya V. V., Aktsionernoe pravo: osnovnye polozheniia i tendetsii [Company Law: Main Provisions and Trends]. Monograph, M. 2006, p. 469; Corporate Law: a Textbook / ed. by I. S. Shitkina, M., 2008, p. 12.

[11] Funk Y. I. et al., Ibid. pp. 576–577.

others is a friendly, i.e. personal, element".[12] That is why the legislator allows a possibility of exclusion of a participant from a limited liability company.

The highest form of entrepreneurial association, which is based not only and not so much on the personality, but, first of all, on property (capital) is a joint stock company. "Personal participation of members of such an association is not expected. This form of association is the highest expression of the capitalist element".[13] In JSC, persons involved in its establishment are practically indistinguishable, not personal communication, but communication of properties comes to the fore, as a result of which there is no legal connection between the participants of the joint-stock company, but there is only property allocated and combined by them (or only allocated, if there is one participant).[14]

The personal element, i.e. the specific participants, does not matter for a joint-stock company, as their "emergence" or withdrawal does not have any legal impact on the company. Therefore, we can say that their relationship with the company depends on property only.[15]

In this connection, it is impossible to exclude a shareholder from a public joint-stock company. If we assume that it is possible to exclude a shareholder from a non-public joint-stock company, which is done by the legislator in Article 67 of the Civil Code of the Russian Federation, it means to recognize that such a company does not belong to capital associations, but rather has the features of a personal association, which would be wrong.

Secondly, the Federal Law "On Joint-Stock Companies", which is in force in the wording harmonizing it with the rules of the Civil Code of the Russian Federation, does not contain articles on exclusion of a shareholder from a non-public joint-stock company. Unlike the Law on joint-stock companies, the Federal Law "On LLC" (Article 10), the laws governing the legal status of production cooperatives (Federal Law "On Production Cooperatives", Federal Law "On Agricultural Cooperation"), the rules of the Civil Code of the Russian Federation on partnerships directly indicate the possibility of exclusion of a participant (partner, member) from such organizations.

[12] Gabov A. V., Obschestva s ogranichennoj i dopolnitel'noj otvetstvennost'u v rossijskom zakonodatel'stve [Limited and Additional Liability Companies in the Russian Legislation]: Monograph, M., Statut, 2010, p. 64.

[13] Shershenevich G. F., Uchebnik torgovogo prava (po izdaniiu 1914 goda) [Textbook of Commercial Law (in the Version of 1914), M.: 1994, p. 110.

[14] Funk Y. I. et al., Ibid. p. 323.

[15] Funk Y. I. et al., Ibid. p. 565.

Is it possible in the absence of special rules on exclusion of a shareholder from a non-public joint stock company in the law on joint-stock companies to be guided directly by Article 67 of the Civil Code of the Russian Federation? If we follow the way of application of Article 67 of the Civil Code, any shareholder will have the right to demand exclusion of a shareholder from a non-public joint stock company, regardless of the package of shares owned by him or her and the category of such shares. This can lead to the risk of exclusion of a major shareholder upon the request of a minority shareholder and, in fact, to the termination of activity of the corporation itself.

So, in case No. A 55-26417/2014 considered by the Arbitration Court of the Volga district, a shareholder, holding 28,428 ordinary shares, which makes 24.999340% of the total number, claims exclusion of the shareholder, holding 85,287 ordinary shares, which makes 75.000660% of the total number.

In the applicant's opinion, the shareholder inflicted significant damage to the company by his actions, as well as complicated significantly its activities and achievement of the company's statutory goals. In support of the claim, the applicant indicates that the aggregate of the shareholder's actions, including:

— evasion of *LIGA-S LLC* from return of the loan and interest on the loan to the company as per the terms and conditions of the contracts dated February 3, 2014, and April 25, 2014;

— conclusion of a contract of a non-renewable credit line with *OJSC Sberbank of Russia* of April 28, 2014 No. 70900 on unfavorable conditions for the creditor (paragraph 8 of the contract);

— adoption of the decision by the members of the Board of Directors of *CJSC ZSM* acting exclusively in the interests of *LIGA-S LLC*, on provision of additional onerous (target) funding to the debtor in the amount of 35,000,000 rubles;

— acts of the Chairman of the Board of Directors of *CJSC ZSM* Isakov D. V. (which is a participant and the Director of *LIGA-S LLC*) on transfer of loans into non-interest bearing ones and with granting of deferred payment to *LIGA-S LLC* on their payment on unfavorable conditions;

— adoption of the decision by the members of the Board of Directors of the company, acting on behalf of *LIGA-S LLC*, on early termination of powers of the General Director of *CJSC ZSM* Spirin S. V., with a view to his replacement with the employee of *LIGA-S LLC* Gelich A. L. violates the rights and legitimate interests

of the company, significantly complicates its current activity and achievement of the Company's statutory goals.

Rejecting to satisfy the claim, the court of cassation has pointed out that "based on the subject of the stated claims, the only indication in support of the shareholder's actions is evasion from the repayment of the loan amount and conclusion of the credit agreement with the right of the creditor to claim the repayment of the loan amount before schedule. Other actions specified by the applicant are the actions of the members of the Board of Directors of the company itself". In addition, the court of cassation has pointed out that exclusion of the majority participant will lead to termination of the activities of the company, which is contradictory to the purpose of the rule of Article 67 of the Civil Code of the Russian Federation.[16]

One cannot but agree that, in order to claim exclusion of a shareholder, the number of shares of the excluding participant must in any case exceed the number of shares of the participant to be excluded.[17] However, the number of shares owned by the shareholder that claims exclusion of another shareholder, as well as an indication of the categories of shares that give the right to claim such exclusion, must be explicitly specified in the special law on joint-stock companies.

Third, a question emerges on the consequences of exclusion of a shareholder from a non-public joint stock company. Article 67 (1) (4) of the Civil Code of the Russian Federation states that a member of a business partnership or a company has the right to claim exclusion of another participant from the partnership or company (except for public joint-stock companies) in accordance with the court procedure with payment of the actual cost of his / her share". And what is paid to the excluded shareholder of a non-public joint-stock company? If the market value of his / her shares (share) is paid to him / her, how is it determined? Must the Board of Directors in this case attract an independent appraiser? Can the excluded shareholder contest the decision of the Board of Directors on determination of the market value of the share? Finally, why are these issues not reflected in the Federal Law "On Joint Stock Companies"?

Judicial practice tries to find answers to these questions. Thus, in case No. A21-4475/2016, which was considered by the Arbitration Court of the North-Western district, shareholder S., who owns 49.99% or 22,494 shares of CJSC claims

[16] http://kad.arbitr.ru/Card/74e3f0bd-ce14-4820-b971-b1a5d458e86a.

[17] Korporativnoe pravo: uchebnyj kurs [Corporate Law: an Educational Course]. In two volumes. / ed. by I. S. Shitkina, Vol. 2. M.: Statut, 2018, pp. 671 — 672.

exclusion of shareholder K., who owns 50% or 22,500 shares with payment of the actual value of his shares in the amount of 79,803,500 rubles.

The court of first instance came to the conclusion that the existing corporate conflict between the excluding shareholder and the shareholder to be excluded was based on the conflict of commercial interests of two shareholders. Hereby the court considered that the civil law sanction in the form of exclusion of a shareholder from the number of shareholders of CJSC could not be applied under these circumstances. With regard to the claim of payment of the actual value of the shares to the defendant, the court of the first instance found that with the company's proceeds for 2015 in the amount of 49,836,000 rubles and profit in the amount of 19,480,000 rubles, the cost of the stake of shares of the shareholder to be excluded at 79,803,500 rubles (specified by the applicant), will lead to significant damage for CJSC, because it is the latter that shall make payment.

The court of cassation also pointed out that it is impossible for CJSC to pay 79,803,500 rubles in favor of the shareholder to be excluded, mentioning the following hereby: "First, Article 67 (1) of the RF Civil Code does not imply a procedural requirement of a participant claiming exclusion of another participant from the corporation, on payment of money amounts by the latter. In this case, the corporation is not a defendant in the corporate dispute. Besides, such a claim can be of an independent nature, but on the part of the member of the corporation to be excluded (or already excluded). Second, the size of the actual value of the shares must be determined in accordance with the procedure established by the law, for example, in accordance with Article 75 (3) of Federal Law No. 208-FZ".[18]

In the opinion of S. Y. Filippova, the order of calculation of the redemption price of the shares of the shareholder, purchased from him / her by a joint-stock company in the order of Articles 75 — 77 of the Law on JSC, shall be applied by analogy of the law. The shares of the excluded shareholder shall come to the company, which must dispose of them within a year. Based on the court decision on exclusion of a shareholder from a joint-stock company, the registrar shall make an appropriate entry in the register.[19]

If the legislator allows exclusion of a shareholder from a non-public joint-stock company (although this contradicts the nature of a joint-stock company), in any case,

[18] http://kad.arbitr.ru/Card/656b5bab-13d7-4d13-9598-6c392aa33d64.

[19] Korporativnoe pravo: uchebnyj kurs [Corporate Law: an Educational Course]. In two volumes. /ed. by I. S. Shitkina, Vol. 2. M.: Statut, 2018, pp. 679 — 680.

Article 67 of the Civil Code of the Russian Federation must be supplemented with provisions on determination of the redemption price of the shares paid to the excluded shareholder and the order of such payment. The respective provisions should also be included in the law on joint-stock companies.

One can raise the question of other possible consequences of the shareholders' failure to fulfil their duties that meet the nature of a joint-stock company (both public and non-public). For example, it may be a compulsory repurchase of shares by the company from the shareholders who do not participate in adoption of corporate decisions, without which the company cannot continue its activities in accordance with the law, if his / her participation is necessary for adoption of such decisions, with their subsequent redemption or distribution among other shareholders.

In the meantime, it should be concluded that exclusion of a shareholder from non-public joint-stock companies contradicts the nature of a joint-stock company as a capital association. If the legislator still allows such a special method of protection of corporate rights, applied by the court only in exceptional cases, the grounds, the procedure for its application and the consequences must be clearly regulated by the law on JSC.

ON THE ISSUE OF THE LEGAL NATURE OF ACTS OF BUSINESS PLANNING

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Abstract

The article discusses the legal nature of acts of business planning. Objective: to determine the legal nature and features of business planning acts. Research methods: the general scientific dialectical method of cognition and particular scientific methods resulting from it: sociological, logical, system-structural, technical-legal, legal modelling methods. Results: in the conditions of modern economic development, planning is an important tool for regulating business activities. The acts of strategic planning, being specialized norms, refer to the regulatory and legal requirements. Conclusions: acts of strategic business planning are based on positive obligation and allow systematization of legislation in the field of business regulation, provide directions for improving the development of such regulation, contributing to the implementation of processes of modernization of the market economy.

Keywords*:* planning, act, forecasting, entrepreneurial activity, normative regulation.

Introduction. One of the doctrinal signs of entrepreneurship is its implementation on an ongoing basis. This feature can be characterized through the prism of regularity, which is understood as the construction of entrepreneurial activities in a certain order (according to a plan) for profit. By itself, the goal of business activity indicates the need for its systematic implementation. At the same time, regularity is peculiar to all business contracts.

Modern scientific studies on entrepreneurial contracts rather rarely mention a plan. At the same time, regularity is typical not only for the essence of the economic activity in the times of socialism. Plans have certainly changed over time, but for

entrepreneurial activity, it is precisely the regularity that characterizes the special stability of economic ties and, in particular, in the field of rail transportation, delivery, and others.

The degree of scrutiny of legal planning in the field of entrepreneurial activity is not high enough. There are only a few studies on some elements of business planning. At the same time, the question of the legal nature of acts of planning in the legal literature remains open.

Results. In Federal Law No. 172-FZ of June 28, 2014 (as amended on December 31, 2017) "On Strategic Planning in the Russian Federation",[1] forecasting is defined as one of the elements of strategic planning (Article 3).

In its turn, forecasting refers to one of the modeling methods. The possibility of obtaining information on the main directions of development of legal phenomena is achieved through the knowledge of laws and tendencies inherent to these phenomena. At the same time, forecasting is closely related to management. If we consider management from the standpoint of cybernetics as a part of legal regulation, then in order to anticipate the development of entrepreneurial activity in the future, forecasting makes it possible to determine priority areas for the development of entrepreneurial activity, so that the state, in the first place, can provide effective support for the development of such areas, in particular, in the field of investment in high-tech production, development of social entrepreneurship and small business.

In the Soviet times, planning was a part of the state economic policy and was embodied in mandatory acts, while forecasting contained only probabilistic judgments on state-legal phenomena.

We can also see the difference in forecasting and planning in time periods. Forecasting is designed for the long term, while planning involves binding action plans and activities for the near future.

In modern economic conditions, the attitude towards planning should change qualitatively, since competent forecasting and planning will enable to overcome the economic crisis. Such planning in the framework of a market economy, in contrast to the total directive used in a centralized economy, is called indicative in the scientific literature; it indicates the main strategic goals, directions for the development of the economy, and also can eliminate the imbalance in economic development.[2] Of

[1] Collection of Legislation of the Russian Federation, 2014, No. 26 (Part I), Art. 3378.

[2] Gavrilov O. A., Strategiia pravotvorchestva i sotsial'noe prognozirovanie. — M.: Institut gosudarstva i prava RAN [Law Making Strategy and Social Forecasting. — M.: Institute of State and Law, Russian Academy of Sciences], 1993, 128 p., p. 84.

course, entrepreneurial activity should be based not on external (from the state), but on internal planning (within the organization, business planning[3]). For example, Standard STO RZhD 08.015-2011 "Innovation Activity in *OAO Russian Railways*. The Procedure for Reviewing Innovative Projects" provides for a technical and economic feasibility study (a business plan) of an innovation project.[4] However, the complete elimination of external planning is inexpedient, and the state should assist (primarily by creating comfortable conditions for) entrepreneurial activities, starting with simplifying the creation and control of entrepreneurial activities[5], and regulating innovation and investment policies.

Discussions. Considering that more and more strategic planning documents are recently being adopted both at the federal, and at the regional and local levels, there is a problem of compulsory execution of the norms set forth in such acts. In order to answer this question, it is necessary to analyse the legal nature of the norms used in the planning acts. According to Article 11 of the Federal Law "On Strategic Planning in the Russian Federation", strategic planning documents are developed in the framework of goal-setting, forecasting, planning and programming at the federal level, at the level of the subjects of the Russian Federation and at the level of municipalities. In the theory of law, specialized norms are distinguished, which differ in structure and meaning from the usual, traditional norms that follow the "if-then-different" scheme. These norms, along with norms-principles, include norms-goals and norms-programs. V. M. Gorshenev calls specialized norms as atypical regulatory requirements,[6] N. N. Voplenko considers them general legal regulations,[7] and Yu. A. Tikhomirov emphasizes their normative-orienting meaning.[8]

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[3] *See:* Barinov V. A., Biznes-planirovanie: Uchebnoe posobie. 3-e izd. [Business Planning: a Coursebook. 3rd ed.] M.: Forum, 2009. 256 p., Romanova M. V., Biznes-planirovanie: Uchebnoe posobie. [Business Planning: a Study Guide.] M.: ID FORUM: INFRA-M, 2012. 240 p.

[4] http://lawru.info/dok/2012/06/26/n170829.htm

[5] *See:* Osnovnye napravleniia nalogovoj politiki Rossijskoj Federatsii na 2016 god i planovyj period 2017 i 2018 godov [The Main Directions of Tax Policy of the Russian Federation for 2016 and the Planning Period of 2017 and 2018] // http://www.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n= 183748.

[6] Gorshenev V. M., Netipichnye normativnye predpisaniia v prave // Sovetskoe gosudarstvo i pravo. [Atypical Regulatory Requirements in Law // Soviet State and Law], 1978, No. 3, pp. 113–118, p. 114.

[7] Kruglyj stol "O ponimanii sovetskogo prava" (Prodolzhenie) // Sovetskoe gosudarstvo i pravo. [Round-table Discussion "On Understanding the Soviet Law" (continued) // Soviet State and Law], 1979, No. 8, pp. 48–77, p. 51.

[8] Ibid. p. 54.

We can note that the legal literature also gives a different understanding of the types of norms. So, in the view of S. V. Boshno, special norms are such norms that relate to individual institutions of a particular branch of law and regulate a certain kind of generic social relations, and initial norms are norms-principles and other similar norms that are of a general nature and are distinguished by a high degree of abstraction.[9]

Planning acts, being specialized regulations, are regulatory requirements. V.K. Babaev has called them initial legislative prescriptions and emphasized their special significance: "they contain starting points for specific regulation of social relations by means of legal norms".[10] Therefore, planning acts should be attributed to such legal regulations. In turn, these rules are of systemic importance. A.F. Cherdantsev in relation to the norms-principles writes, "In the legal system itself, there must be certain beginnings which shall guide and direct the legal regulation of social relations, cementing the legal system as a whole. These beginnings should be expressed in certain systemic links, one of which is the subordination link within the legal system".[11] It seems that the norms set forth in the acts of planning, like norms-principles, enable to systematize legislation in the sphere of business regulation, to provide directions for improving the development of such regulation, contributing to the implementation of the processes of modernization of the market economy.

In strategic planning there is positive obligation, which, in the opinion of N.V. Omelekhina, is expressed in the presence of a prescription defining the behavior of persons, recognized by the state as necessary and proper.[12] Accordingly, negative obligation is based on a ban, but since there is no prohibition in the planning acts, they can only deal with positive obligation.

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[9] *See:* Boshno S. V., Norma prava: poniatie, svojstva, klassifikatsiia i struktura // Pravo i sovremennye gosudarstva [The Rule of Law: the Concept, Properties, Classification and Structure // Law and Modern States], 2014, No. 4, pp. 49–60, pp. 53–54.

[10] Kruglyj stol "O ponimanii sovetskogo prava" (Prodolzhenie) // Sovetskoe gosudarstvo i pravo. [Round-table Discussion "On Understanding the Soviet Law" (continued) // Soviet State and Law], 1979, No. 8, pp. 48–77, p. 59.

[11] Cherdantsev A. F., Tolkovanie prava i dogovora: Uchebnoe posobie dlia vuzov [The Interpretation of the Law and the Contract: a Study Guide for Universities]. — M.: UNITY-DANA, 2003, 381 p., p. 32.

[12] Omelekhina N. V., Pozitivnoe obiazyvanie v finansovom prave: diss. ... doktora iurid. nauk. [Positive Commitment in Financial Law: Thesis for ... Doctor of Legal Sciences]. Novosibirsk, 2015, 541 p., p. 16.

Then another question arises: how to implement positive obligation not based on prohibitions? Execution in and of itself does not make such obligation unconditional, although it presupposes the existence of active obligation of the subject. N. V. Omelekhina says that positive obligation is the main method of financial and legal regulation.[13] As noted by S. S. Alekseev, this method of regulation from the legal side is expressed in the imposition of active content on legal entities, i.e. in the responsibilities to build their active behaviour as provided for in legal norms.[14] At the same time, such duties are not supported by measures of legal responsibility for their non-performance.

Conclusion. Acts of business planning are based on positive obligation and allow systematizing legislation in the field of business regulation, providing directions for improving the development of such regulation, contributing to the implementation of the processes of modernization of the market economy.

[13] Omelekhina N. V., Ibid, p. 61.

[14] Alekseev S. S., Sobranie sochinenij. V 10 t. [+ Spravoch. tom]. Tom 2: Spetsial'nye voprosy pravovedeniia. [Collected Works. In 10 vol. [+ Reference Volume]. Vol. 2: Special Questions of Jurisprudence]. M.: Statute, 2010, 471 p., p. 275.

ECONOMIC AND LEGAL FEATURES OF TECHNICAL REGULATION OF BUSINESS ACTIVITY IN RUSSIA

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Abstract

The research focuses on the economic and legal analysis of the institution of technical regulation of business activity in Russia. The author views economic features of technical regulation within the institutionalism theory, revealing the specificity of technical regulation as a legal institution.

Keywords: technical regulation, standardization, institutionalism, institutional environment, personalization of goods, credence goods, deals (transactions), legal regulation, legal institution, functions of the legal institution of technical regulation.

Technical regulation is a component of the institutional environment. The notion of an "institutional environment" was developed within the frameworks of institutionalism — one of the directions of Economics characterizing the role of the state in economy. Institutionalism is understood as a doctrine aimed at integrating economic and legal sciences. According to this doctrine, institutions are forms and limits of people's activity — political organizations, forms of entrepreneurship, systems of credit establishments, financial legislation, and social provision.[1] It should be noted that, generally, the issue of correlation between economics and law can be viewed not only from juridical positions. First of all, the above issue is of an economic character. Therefore, it is natural that the analysis of economic theories and views at the correlation between economics and law comes first in the scientific literature.[2]

[1] Semyakin M. N., Ekonomika i pravo: problemy teorii, metodologii i praktiki / pod obsch.red. A. I. Tatarkina [Economics and Law: Issues of Theory, Methodology and Practice /under general editorship by A. I. Tatarkin]. Yekaterinburg, 2006. p. 42.

[2] Ibid. pp. 41–65.

One should agree that lawyers have to pay more attention to economic conditionality of legal regulators. Often, a legislator (or a supreme court) only participates in juridical stipulation of already objectively established economic regulators.[3]

In the opinion of institutionalists, law determines the rules of behavior in the market. At that, the state must set the rules of the game and provide such a course of action, which would yield the best results for the system as a whole.[4] In turn, the institutional environment is a set of fundamental social, political, juridical and economic rules determining the frameworks of human behavior.[5] The above rules and norms are called "institutes" in the contemporary interpretation of institutionalism. On their basis, institutions are formed. Specialists in the field of institutionalism believe that an institution is "the means of regulating the living processes, the prescribed patterns of coordinated behavior, the rules and mechanisms of their implementation and many others".[6] In general, the advantages of institutionalism are such of its conceptual provisions as: recognition of a special role of institutions in the society and economy; an interdisciplinary approach, search for new scientific decisions "at the intersection of disciplines", close relations with sociology, political science, history, law, etc.; researching the public contradictions related to the implementation of economic power, monopolization processes, intervention of the state into social and economic processes, etc.[7]

As a component of the institutional environment, technical regulation is a set of rules (norms), procedures and sanctions, drawing the frameworks of interaction between economic subjects and state bodies regarding the quality and safety of marketed goods (works, services). The necessity for technical regulation is due to the failures (imperfections) which are characteristic for the market economy. Under market conditions, the essence of state regulation implies the observance of common

[3] Gadzhiev G. A., Pravo i ekonomika (metodologiia): uchebnik dlia magistrantov [Law and Economics (Methodology): a Coursebook for Master Students]. Moscow: Norma: INFRA-M, 2018. p. 54.

[4] Sazhina M. A., Chibrikov G. G., Ekonomicheskaia teoriia: uchebnik [Economic Theory: a Coursebook]. 3d edition. Moscow: ID Forum: INFRA-M, 2011. pp. 528, 529, 533.

[5] Institutsional'naia ekonomika: novaia institutsional'naia ekonomicheskaia teoriia: uchebnik/ MGU im. M. V. Lomonosova; pod obsch. red. A. A. Auzan [Institutional Economy: a New Institutional Economic Theory: a Coursebook. Moscow State University named after M.V. Lomonosov; under general editorship by A. A. Auzan. 2nd edition. Moscow: INFRA-M, 2011. p. 45 (the author of the relevant chapter is V. L. Tambovtsev).

[6] Lebedeva N. N., Nikolaeva I. P., Institutsional'naia ekonomika [Institutional Economy]. Moscow: Dashkov i K, 2017. p. 30.

[7] Ibid. p. 20.

rules of behavior in the market by all economic subjects, which is controlled by competent state authorities.[8] The market failures do not always allow relying on an individual rational choice and make the active state regulation and limitation of free economic circulation inevitable.[9] The economic theory studies different types (kinds) of market failures and imperfections. These are: imperfect competition, external effects, impossibility to provide public goods (welfare) in the necessary amount, unstable economic growth, imperfection of informational provision of the market, etc.[10]

Influence of the state on the market through technical regulation is also determined by the fact that the more complicated the nature of goods is and the harder it is for the consumer to assess their characteristics and distinguish between high and low quality, the less reliable the invisible hand of the market works and the less intensively bad quality goods are washed out by competition. Accordingly, as the "consumer product" becomes more sophisticated and assessment of its properties becomes more complicated, the more intensively the state starts to amend this market failure.[11] Often, the market process starts conflicting with non-economic utilitarian considerations (such as, for instance, internal or national security, environmental safety, democracy, etc.).[12] In this regard, one may assume that producing goods characterized by high risk of doing harm during their use may become economically effective for the producer. However, the necessity to provide safety to consumers significantly limits actions of a producer aimed at manufacturing such goods, or bars its production altogether.

Deregulation processes, alongside with the centralized principles of market regulation, are inherent in technical regulation. These processes are characteristic for the contemporary system of standardization, which promotes business development through transferring a part of state functions of market regulation to its

[8] Gosudarstvennoe regulirovanie ekonomicheskoj dejatel'nosti v usloviiakh chlenstva Rossii vo Vsemirnoj torgovoj organizatsii, Evrazijskom ekonomicheskom soobschestve i v Tamozhennom soiuze [State Regulation of Economic Activity under Russia's Membership in the WTO, EAEU and Customs Union]. Exec.editor Doctor of Law, Professor I. V. Ershova. Moscow: Norma: INFRA-M, 2014. p. 13 (the author of the relevant chapter is G. D. Otnjukova).

[9] Stiglitz J. E., Freefall: America, Free Markets and the Sinking of the World Economy. W. W. Norton, 2010.

[10] Gubin E. P., Gosudarstvennoe regulirovanie rynochnoj ekonomiki i predprinimatel'stva: pravovye problemy [State Regulation of the Market Economy and Entrepreneurship: Legal Issues]. Moscow: Yurist, 2006. p. 15.

[11] Karapetov A. G., Ekonomicheskij analiz prava [The Economic Analysis of Law]. Moscow: Statut, 2016. Legal Reference System *ConsultantPlus*.

[12] Ibid.

participants.[13] Reduction of the state involvement in the technical regulation system is promoted by the concept of the global standard; it implies encouraging the final users of standards to independently fulfill their needs by directly participating in elaboration of coordinated standards, which can be applied anywhere in the world on the basis of national organizations with open international membership. Thus, reduction of the state involvement in the technical regulation system (self-regulation) consists of decreasing the role of the state intervention in the management of technical regulation processes by transferring the state functions to the private sector.[14] Such an approach generally corresponds to the trends characteristic for the contemporary Russian law. The methods of permission, prescription and prohibition are increasingly more often substituted by discretionary methods of regulation, economic means of stimulating the behavior of the parties of legal relationships. At that, legal methods of market regulation based on economic stimulation of behavior of its participants do not substitute the methods of direct invention of the state, when this is required by the current situation in the market.[15]

Another economic feature of the institution of technical regulation is its promotion of informing consumers about the goods and personalization of goods. Below we briefly describe this feature. The size of a market directly influences the quality of immediate knowledge by consumers about a product and its personalization. The smaller the market for a specific product is, the easier it is for consumers to recognize the producer without any special identification sign. Modern, mostly large, markets are often called "depersonalized". Their depersonalization creates a demand for personalization.[16] The high cost of information about the quality of goods and

[13] Ratushnjak E. S., Problemy razvitiia natsional'noj sistemy standartizatsii v Rossi i EAES //iz.kn. "25 let vneshnej politike Rossii": sb. materialov X Konventa RAMI (Moskva, 8-9 dekabrija 2016g.). V 5 t. T.4: Rossiia i sovremennyj mir: ekonomika i pravo [Issues of Developing a National Standardization System in Russia and EAEU// from the book: 25 Years of External Policy of Russia: Collection of Works of the X Convent of RAIR (Moscow, 8–9 December 2016). In 5 vol. Vol. 4: Russia and the Modern World: Economics and Law]. In 2 parts. Part 1/ under gen. editorship by A. V. Malgin; [scientific editors: I. N. Platonova et al.]; Moscow State Institute for International Relations (University) of the Ministry of Foreign Affairs of the Russian Federation, Russian Association of International Research (RAIR). Moscow: MGIMO-University, 2017. pp. 178–179.

[14] Ibid. p. 179.

[15] Khabrieva T. Ya., Ekonomiko-pravovoj analiz: metodologicheskij podkhod // Zhurnal rossiyskogo prava [The Economic and Legal Analysis: a Methodological Approach // Journal of Russian Law]. 2010. No. 12. p. 6.

[16] Posner R. A., Rubezhi teorii prava [Frontiers of Legal Theory] transl. into Russian by I.V. Kushnareva; edited by M. I. Odintsova. National Research University "Higher School of Economics". Moscow: Publishing House of HSE, 2017. p. 50.

services is due to the growing number of goods and producers, increased variety of goods and their complexity, and increased specialization. As a result, consumers possess limited information about the construction and production of goods. The higher the cost of such information is, the more difficult it is to assess the product, hence, the higher value of information about the producer. In other words, more and more goods today are what economists call *credence goods* – the goods purchased only due to believing in the producer, not the direct knowledge about the product.[17] Through a special set of tools (technical orders, standards, certification, tests, measurements, etc.), technical regulation promotes forming reliable information about the goods: its appearance and name, variety, main consumer properties, compliance with safety requirements, name of a manufacturer, date of manufacturing, regimes of storing, transportation, using, utilization, etc. Technical regulation participates in personalizing the goods in the markets by using the system of indications of the goods compliance to the quality and safety requirements: a sign of circulation in the market, and a sign of the national standardization system, signs of voluntary certification systems. Various juridical sanctions are to be imposed for different violations, including misleading consumers in regard to the purchased goods. A high level of per capita income leads to the growing demand for high quality goods, including their safety. On the contrary, under an economic crisis and decreased incomes of the population, fewer consumers strive to purchase high quality goods; hence, producers of high quality and expensive goods can be partially ousted from the market, giving their market shares to producers of lower quality goods. However, the state regulation, within the frameworks of technical regulation of the minimally necessary requirements to marketed goods, makes the producers of cheaper and lower quality goods meet these minimal requirements, thus increasing the quality of cheap goods, as far as it is possible.

A peculiar feature of the institution of technical regulation is its relation to the costs inherent in market deals (transactions), which are called transaction costs in the economic theory.[18] The latter are connected with changing the legal properties of the object (product) and may include the costs related to marketing of the product, signing contracts with suppliers of raw materials and buyers of the final product,[19]

[17] Ibid. p. 50.

[18] Lebedeva N. N., Nikolaeva I. P., Institutsional'naia ekonomika [Institutional Economy]. Moscow: Dashkov i K, 2017. p. 69.

[19] Institutsional'naia ekonomika: novaia institutsional'naia ekonomicheskaia teoriia: uchebnik/ MGU im. M. V. Lomonosova; pod obsch. red. A. A. Auzan [Institutional Economy: a New Institutional Economic Theory: a Coursebook. Moscow State University named after

searching for the goods with characteristics necessary for the buyer, etc. At that, the rights, obligations and privileges of individuals will be largely determined by law. As a result, the legal system deeply influences the functioning of the economic system and, in a way, controls it.[20]

A part of the above transaction costs are the costs of assessing the quality of goods intended for market exchange. Such costs include the costs of the producer related to obtaining, within the frameworks of certification, tests and other assessment procedures, information on the compliance of the goods with the requirements of specialized legislation, provisions of standards, and terms of contracts (agreements). The necessity to undergo the assessment procedures is due to reducing the probability of marketing low quality goods (signs of which are stipulated by law) and to the need to fulfill contracts.

Thus, the regime with positive transaction costs is inherent in the market deals mediating the movement of goods. Accordingly, "as we transfer from the regime with zero transaction costs to the regime with positive transaction costs, we immediately see the decisive importance of the legal system",[21] of which the technical regulation institution is a component. This institution is based on the legal, including technical and legal, rules (norms), which stipulate the requirements regarding goods (works, services), the procedures of implementing the said norms and rules, and are an element of the juridical regime of circulation of goods (works, services) in the market. Through the above rules and procedures, the functions of technical regulation are implemented, namely: a protective function (protection of customers against purchasing inferior goods); an environment protection function (protection of the environment against negative influence on the part of producers, performers, and sellers); a resource saving function (providing rational use and economical consumption of resources). Also, technical regulation performs a preventive function (prevention of fraudulent practices). The category of "fraudulent practice" implies misleading consumers in regard to the purchased goods. Fraudulent practice may consist of presenting false information about the goods, distorting information about measurement results (size, weight, etc.). Thus, it may appear in various forms. Technical

M.V. Lomonosov; under general editorship by A. A. Auzan. 2nd edition. Moscow: INFRA-M, 2011. p. 74 (the author of the relevant chapter is P. V. Kryuchkova).

[20] Coase R., The Institutional Structure of Production. Alfred Nobel Memorial Prize Lecture in Economic Science. 1991. https://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/1991/coase-lecture.html (open access; accessed on June 16, 2018).

[21] Ibid.

orders are aimed at protecting consumers against fraudulent practices by placing information in the form of requirements to marking (labels, tags, tallies). Fraudulent practices can be prevented by setting requirements to packing and measurements.

In the legal context, technical regulation plays the role of a specific kind of legal regulation. As a social regulator, it aims at providing order and developing the relations of material production. Developing the institution of standardization, involving producers, scientific, engineering, technical, and consumers' communities, self-regulated organizations, and business communities in standardization procedures, the state facilitates the shaping of conditions necessary for high quality production and increases the consumer and technical and economic parameters of goods.

The aim of technical regulation is to establish the frameworks, borderlines of behavior of economic entities regarding the marketed goods, on the assumption that "the market should regulate quality …but with one exception — safety of goods".[22] At the same time, it is intended to direct and coordinate the activity of manufacturers (performers, sellers), maintain the dynamic balance between the system of goods' quality and safety standardization and the business environment. Within its frameworks, first of all, the aspects of goods safety are controlled.

Summarizing the above, we should emphasize that the economic essence of technical regulation is that technical regulation, being one of the components of the institutional environment, is aimed at eliminating the failures characteristic for a market economy, at informing consumers about the properties and condition of goods, and at personalizing goods in the market. Technical regulation is intended to define the frameworks of interaction between economic entities and state authorities concerning the quality and safety of marketed goods (works, services) and is closely connected with the costs inherent in market deals (transactions).

As a specific kind of legal regulation, technical regulation consists of organization and coordination of a specific range of public relations: regarding the technical standardization of the characteristics of goods (processes, works, services) and the assessment of fulfilling the above characteristics through a specific set of legal, including technical and legal, means (technical orders, standards, civil law contracts, certification, etc.).

[22] Broslavskiy L. I., Problemy bezopasnosti avtomashin v SSHA: grazhdansko-pravovoj aspect [Issues of Automobile Safety in the USA: a Civil Law Aspect]. Tsivilist. 2004. No. 1. p. 118.

RUSSIA'S LEGISLATION ON ACCESS TO INFORMATION: CURRENT STATE AND DEVELOPMENT PERSPECTIVES

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Abstract
The author analyzes a current state of the Russian legislation which concretizes regulations of international law and the Constitution of Russia on the right to seek and receive information, identifies problems of legal regulation of this right and specifies the perspective directions of developing the Russian information legislation. The author makes an analysis of this legislation, its system communications and a ratio between legal acts.

Keywords: the right to seek and receive information, confidentiality of information, freedom to impart information, information legislation, information rights and freedoms, protection of personal information.

Introduction

The development of contemporary law, both national and international, is heavily influenced by the context of the information society. This context requires a new perspective on an array of legal concepts, including the major human rights and freedoms. The interaction of individuals and the state is characterised by new media that make it necessary to recalibrate traditional mechanisms of maintaining human rights and freedoms. This is especially important with regard to such notions as information technology, electronic forms, telecommunications, transnationalism, and anonymity.

The enhanced role of computer technology triggers qualitative changes in social relations. The implementation of human rights is hardly an exception, which engenders a host of practical issues. First and foremost, these include the need to balance conflicting rights in the information sphere and to harmonise state and

private interests. Ascertaining the jurisdiction is another problem, especially in terms of dispute resolution. Furthermore, transactions governed by information law might involve both *bona fide* and unscrupulous parties. Their interaction and interdependence generate collisions that need to be handled in the most efficient and adequate way. Finally, the technological capabilities of rights protection are also important.

The development of effective means for conflict resolution in the information sphere is a vital precondition allowing to tackle the legal problems we have listed and to create the groundwork for seamless implementation of human rights. Such means must rest on a comprehensive regulatory framework.

Constitutional provisions on rights and freedoms in the information sphere

Information law and legislation are quite new concepts in Russian legal studies. However, they have experienced a rapid growth in the recent decade. The development of information law is driven by a number of strategic documents that define the evolution of the Russian state.

Information is a cross-disciplinary phenomenon that has many dimensions. **Therefore**, it requires legal regulation of a comprehensive nature. Specifically, the information sphere is governed by the principles of both public and private law.

The Constitution of the Russian Federation serves as the backbone of the entire system of Russia's law, including all its branches. In terms of information law, the Constitution secures the rights connected with information exchange and processing. It also sets forth the principles of access to information, information distribution, and protection of freedoms and interests in the information sphere. These principles accord with the fundamental provisions of international law, the latter being an integral part of Russia's legal system (Article 15 (4) of the Constitution).

Federal Law No. 149-FZ "On Information, Information Technology and Data Protection" of July 27, 2006 (Law on Information)[1] is the major legal document that finally cemented the trend of legal recognition of the respective sphere. Today, information law can be treated as well-established and independent. The law distinguishes the authority of the State (federation level) and that of Russia's provinces (or 'federal subjects') in terms of regulating the information sphere. It also outlines

[1] Federal Law No. 149-FZ of July 27, 2006 "On Information, Information Technology and Data Protection" // Collection of Legislation of the Russian Federation, July 31, 2006, No. 31 (Part 1), Art. 3448.

the conceptual framework and lays down the fundamental principles of access to information resources.

First and foremost, the Law on Information clearly defines the sphere it applies to. It includes "legal relations arising from 1). the exercise of the right to search, obtain, transfer, produce, and distribute information; 2). the use of information technology; 3). measures for information protection" (Article 1 of the Law on Information). Meanwhile, the relations connected with protection of intellectual property rights are not covered by the Law on Information, unless it explicitly specifies otherwise.

The Law on Information is a cornerstone of the information legislation. It defines the system of national sources of law that govern the information sphere. The list of sources includes 'the Constitution, international treaties of the Russian Federation, and other federal laws having the provisions of information law' (Article 4 (1)), including special federal laws on mass media and public records (Article 4 (2), (3) respectively).

This kind of legislative design rests on the formula that 'information and telecommunications' are the exclusive domain of the federal authorities (Article 71 (i) of the Constitution). However, the federal legislature can devolve certain issues to the provinces. The access to information about the activities of regional governments is an example of such devolution (Article 8 (5) of the Law on Information). The Law on Information sets forth the regime of access to information and distribution of information using the following language: "subject to compliance with provisions of federal law", "according to the procedure set forth in the legislation of the Russian Federation", "in compliance with federal laws, laws of the federal subjects of the Russian Federation, and municipal regulations", "only where specified by federal laws", and "unless otherwise specified by federal laws". Articles 8 and 9 alone contain 16 references to other regulations, mainly of the federal level.

This proves the following logic of Russia's legislators. They see the sphere of information governed by a fundamental federal law that sets the basic principles of legal regulation, but not exhaustive in nature. It is augmented by other special laws (predominantly, federal and regional) and regulations.

The analysis of Russia's information legislation allows a conclusion that it mirrors the list of rights and freedoms specified in international treaties. In other words, the international rules are quite congruent with Russia's law. For instance, similar provisions are contained in the Universal Declaration of Human Rights, the European

Convention on Human Rights, and International Covenant on Civil and Political Rights. They prohibit interference with a person's privacy, family, and correspondence, as well as attacks on honour and reputation. They also recognise the right to freedom of opinion and expression, as well as the right to seek, receive and impart information through any media and in any form without interference of public authority and regardless of frontiers[2].

These international instruments not only use identical phraseology to refer to information rights. They also set the objective conditions that justify restrictions of such rights: protection of rights and interests of others, protection of national security and territorial integrity, prevention of disorder and crime, protection of health and morals, and ensuring economic prosperity. These criteria have been established since a long time and leave no room for doubt. They are based on the need to consider not only individual rights, but also the public interest — that is, the need to find a balance between human rights and the public good.

The Constitution follows the same logic and provides both formal and substantive criteria of human rights limitation: 'The rights and freedoms of man and citizen may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the State' (Article 55 (3) of the Constitution). The information rights and freedoms are specified in Articles 23, 24, 28 and 29 of the Constitution. Specifically, Article 23 recognises the inviolability of private life, personal and family secrets, privacy of correspondence, and the right to protection of honour and good name. Article 24 prohibits collecting, keeping, using, and disseminating information about the private life of a person without his consent; it also obliges state and local self-government bodies and their officials to ensure for everyone the possibility of acquainting themselves with the documents and materials directly affecting their rights and freedoms. Article 28 guarantees the freedom of conscience, the freedom of religion, including the right to possess and disseminate religious and other views. Finally, Article 29 guarantees the freedom of ideas and speech; prohibits the propaganda of any kind of discrimination or supremacy over others; proclaims that

[2] Universal Declaration of Human Rights accepted and proclaimed Resolution 217 A (III) of the United Nations General Assembly of December 10, 1948; European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, Rome, 4.XI.1950; Covenant on Civil and Political Rights (New York, December, 1966).

no one may be forced to express his views and convictions; proclaims the right to freely look for, receive, transmit, produce, and distribute information by any lawful way; guarantees the freedom of mass communication; and prohibits censorship.

Furthermore, the information sphere is governed by constitutional rules that proclaim a number of human rights and rights of citizens, including the right to address state and local self-government bodies (Article 33), the right to participate in managing state affairs (Article 32), the right to peaceful assembly (Article 31), etc. The provisions of the information law are contained in the rules that differentiate between the authority of the federal and regional governments, because these rules allow regional government bodies to operate a legislative database that is, in essence, an information resource.

The general rights and freedoms we have mentioned include fundamental information rights and freedoms governed by special legislation: the right to access information, the right to disseminate information, and the right to confidentiality. Their implementation is largely influenced by the features of the information sphere. We believe the right to access information to be the major one in this list. The reason is the following: the principles governing access to information serve as a starting point for the erection of the entire system of interconnected rules. These set the regime of information (either open or restricted access) and determine the procedure of information distribution, provision, and protection, including prevention of confidential information disclosure. The holistic nature of the information legislation is manifest in the close links between the legal regimes of access to information and information dissemination. These links are underlain by the need of comprehensive regulation of the interconnected dimensions of information exchange: the category of information, the required level of public control over a particular information domain, and the opposition of the public and private interests. Such regulation needs to pay due attention to the mutual influence of these dimensions. In other words, the state regulation of access to information requires a statutory solution that defines the categories of information and the procedure of its creation, storage, protection, processing, dissemination and provision. There is also a need for a solution of various closely related issues concerning other rights and freedoms in the information sphere.

Statutory regulation of the right to access to information

The right to access information is not explicitly set out in the Constitution. However, it directly follows from its provisions that proclaim the right to take part in

managing state affairs (Article 32 (1)), the right to information about circumstances that pose a threat to life and health of people (Article 41 (3)), the right to reliable information about the environment (Article 42), the right to enjoy cultural heritage (Article 44 (2)), and other rights directly connected with the availability of information resources. Such rights underlie the entire life and activity of a modern individual.

The Law on Information defines the concept of 'access to information' as 'the opportunity to receive and use information' (Article 2 of the Law on Information). Article 8 of the Law on Information elaborates the concept: 'the right to search and obtain any information in any form and from any sources, subject to limitations contained herein and other federal laws.' The Law on Information distinguishes between the information with open and restricted public availability (such restrictions shall be contained in federal laws) and sets the list of information categories whose availability shall not be restricted. Remarkably, this list in not exhaustive: it includes 'other information, the public availability of which is mandatory according to federal laws.' Therefore, it is only federal laws that can restrict access to information or, conversely, make the information publicly available.

Russia's information legislation accommodates the need to harmonise public and private interests. This balance is a distinctive feature of any state governed by the rule of law. Specifically, the principle of public availability and accessibility of information (the default regime) largely prevails over restrictions, which shall be explicitly introduced by means of a federal law. In this respect, the Law on Information plays the major role by laying down the legal grounds for any restrictions, exemptions, and derogations. These grounds correspond to the principles of rights limitations mentioned in international instruments and the Constitution. The Law on Information contains the requirement that other federal laws shall include grounds for access restriction and the respective procedure. This shall be made with due regard to the particularities of both the content of the information itself and the rights to be affected by such restriction.

There are special laws containing the conditions of and the requirements for information availability in the following spheres: environmental protection; consumer relations; anti-corruption efforts (e.g., the information on the income of state officials); corporate relations (i.e., information that shall be made publicly available); the work of judiciary (e.g., secrecy of jury deliberations); protection of personal data, state and commercial secrets; client-attorney relations (client-attorney

privilege); notarial services; tax relations (confidentiality of tax related information); budget, banking, and financial spheres; information on loans; auditing; adoptions; family relations; medical confidentiality (e.g., physician-patient privilege); insurance agreements; pawnshop loans; communications (e.g., privacy of correspondence, including postal mail); criminal intelligence; etc. All these requirements are based on either the principle of public availability of information or the principle of confidentiality, the latter being the legal ground for exemptions and reservations.

According to our analysis, the majority of publicly available information resources are operated by the state. This is explained by a heightened value of such information and the willingness of the state to ensure its protection in terms of integrity, invariability, and its official status. Therefore, there arises a need to ensure an access procedure that could rule out the possibility of abuse leading to withholding of publicly available information.

Russia's legislation has adopted the provisions of the Council of Europe Convention on Access to Official Documents of 27 November 2008[3]. The Convention recognises the vital role of transparency in the work of state bodies in the context of a democratic political system by stressing that 'exercise of a right to access to official documents (i) provides a source of information for the public; (ii) helps the public to form an opinion on the state of society and on public authorities; (iii) fosters the integrity, efficiency, effectiveness and accountability of public authorities, so helping affirm their legitimacy.'

The availability of official documents enjoys the attention of Russia's legislators in terms of both general strategy and statutory regulation. The key strategic documents in the sphere include The Strategy of Information Society Development in the Russian Federation and The State Programme of the Russian Federation 'Information Society 2011-2020'[4]. Their provisions are further developed in The Concept of Transparency of the Federal Executive[5]. These documents *inter alia* mention the

[3] The Russian Federation has not ratified the Convention. However, the Constitutional Court refers to it in the text of its decisions. In particular, Decisions of the Constitutional Court of the Russian Federation No. 1624-O-O of December 8, 2011 and No. 2066-O of December 24, 2013 mention that Russia's statutory regulation of information transparency of state and local self-government bodies is compliant with the Convention.

[4] Resolution of the Government of the Russian Federation No. 313 of April 15, 2014 (an edition of June 17, 2015) "About the Statement of a State Program of the Russian Federation "Information Society (2011–2020)"// Collection of Legislation of the Russian Federation, May 5, 2014, No. 18 (part II), Article 2159.

[5] Order of the Government of the Russian Federation No. 93-r of January 30, 2014 "On the Approval of the Concept of Transparency of the Federal Executive"// Collection of Legislation of the Russian Federation, February 3, 2014, No. 5, Article 547.

following strategic guidelines for the information society: 'increased transparency and accountability of public authorities', 'a qualitative change in the level of information transparency of the federal executive', 'freedom and equality of access to knowledge and information', 'creation of conditions for equal access of citizens to information', 'guarantees of human rights and fundamental freedoms, including the right of any person to information', and 'the level of technology that ensures personal and family privacy, and security of classified information'.

Access to information on activities of state and local self-government bodies

The information on the activities of public authorities is accessed under the Federal Law 'On Access to Information on Activities of State and Local Self-Government Bodies' (the Law on Access to Information)[6]. The law sets forth the categories of information whose availability cannot be limited.

The accessibility of this kind of information allows effective interaction between individuals and the state. In essence, the information awareness of a person largely builds on his ability to familiarize himself with the records held by state bodies. Furthermore, the right to access the data on state affairs is a fundamental precondition for maintaining most of the rights and freedoms proclaimed by the Constitution and international treaties.

Remarkably, the information on the activities of state and local self-government bodies is legally defined in quite a broad way. According to the Law on Access to Information, it is subdivided into three categories: the information created by these bodies within the scope of their authority; the information received by these bodies; and the information contained in laws and regulations. With respect to local self-government bodies, such information also includes 'other information' on their activities. This 'other information' encompasses the data specific for the municipal level — for instance, decisions made at public meetings of local inhabitants.

The availability of information contained in laws and regulations does not entail any substantial problems: this information has a defined written form and shall be made publicly available. Furthermore, neither Russia's legislation nor the Berne Convention provide any copyright protection for such kind of materials[7]. However,

[6] Federal Law No. 8-FZ of February 9, 2009 "On Access to Information on Activities of State and Local Self-Government Bodies"// Collection of Legislation of the Russian Federation, February 16, 2009, No. 7, Article 776.

[7] The Bern Convention on protection of literary works and works of art of September 9, 1886 (changed on September 28, 1979).

other categories of information specified in the Law on Access to Information require further comments. Both the information created by state and local self-government bodies and the information received by them do not include the entire dataset held or operated by these bodies. The definition in the Law on Access to Information shall be read in connection with the provisions of other federal laws and those of the Constitution. In other words, the definition does not invalidate the safeguards for privacy, protection of personal data, and protection of state and other secrets.

The massive capability of public authorities to collect confidential information from physical and legal persons is incomparable to that of ordinary citizens. Such information is processed and stored in databases, which are accessed from institutional networks. However, the public authorities do not automatically acquire the right to treat this information as publicly available — that is, as governed by the principle of transparency. They shall limit the access to such information, so as to protect the data considered confidential by law. This means that the regime of public availability is subject to compliance with other legal principles underlying the information sphere.

The Law on Access to Information sets forth special rules on accessing certain categories of information. The procedure of obtaining an access can be set out not only by federal laws and constitutional laws, but also by other regulations. For instance, the procedure of accessing official information is stipulated by the Resolution of Government of the Russian Federation No. 1233 of 3 November 1994[8].

The Law on Access to Information allows other laws and subordinate legislation to set special procedures for accessing the information on the activities of state and local self-government bodies (Article 2 (2)). Such procedures prevail over the provisions of the Law on Access to Information. This rule was challenged at the Constitutional Court, which upheld it. However, the Constitutional Court also ruled that where subordinate legislation, while specifying the ways and forms of providing access to information, does not govern the access to certain categories of information that shall be provided to citizens and their associations according to the Constitution (Article 1 (1); Article 2 (2), Article 4 (4)), this information shall be provided under the Law on Access to Information. Importantly, this implies that access to information

[8] Resolution of the Government of the Russian Federation No. 1233 of November 3, 1994 "On Adoption of Provision of an Address Order with Office Information of Limited Distribution in Federal Executive Authorities and Authorized Body of Management of Use of Atomic Energy"// Collection of Legislation of the Russian Federation, July 25, 2005, No. 30 (h. II), Article 3165.

cannot be denied on the ground that the subordinate legislation does not contain the respective procedure[9].

The Law on Information singles out the following categories of information, the access to which cannot be restricted (publicly available information): 1) laws and regulations affecting human rights and freedoms and the constitutional status of citizens, or establish the legal status of organisations and the authority of state and local self-government bodies; 2) the information on the environment; 3) the information on the activities of state and local self-government bodies and the information on public spending (unless this information is classified as a state secret); 4) the information held in open-access repositories by libraries, museums, and archives, and in state, municipal and other systems created with a view to provide physical and legal persons with such information; 5) any other information which shall be publicly available according to federal laws. As for the information on the activity of state and local self-government bodies (No. 3 in the list above), there is a rule providing that 'a person willing to access such information shall not be required to specify a sufficient ground for his request' (Article 8 (5) of the Law on Information). According to the Law on Information, this category is the only one covered by this rule. However, the Law on Access to Information extends this rule so as to include laws and regulations. These are deemed an instance of the information created by state and local self-government bodies within their authority or received by them. Moreover, it directly follows that the rule is further extended to cover the laws and regulations affecting human rights and freedoms and the constitutional status of citizens, or establishing the legal status of organisations and the authority of state and local self-government bodies (No. 1 in the list above). Thus, there are several categories of information whose availability is not contingent on any sufficient ground for a request.

We believe this rule should be the default and govern the access to all categories of information set forth in the Law on Information. Otherwise, we observe an unjustifiably different treatment of the following two rights: the right to information on the activity of state bodies, on the one hand, and the right to the information on the environment, on the other hand (by virtue of Article 8 of the Law on Information,

[9] Determination of the Constitutional Court of the Russian Federation of December 24, 2013 No. 2066-O "to refuse to accept complaints from citizen Sokolov Modest Mikhailovich on infringement of his constitutional rights provisions of paragraph 2 of Article 2 of the Federal Law" on providing access to information about the activities of state bodies and local self-government" // Legal Reference System *ConsultantPlus*.

the latter requires a sufficient ground to be exercised). Meanwhile, the access to all these categories of information is implemented as part of the rights that are guaranteed by the Constitution to an equal degree. So, the requirement of substantial grounds for a request should not be the general rule for publicly available information.

Particularity of state secrets regulation

The confidentiality of certain information is guaranteed by the state. For such information, the confidentiality is the default regime, though it is also held and handled by state bodies. The access to such information can be granted either by statutory provisions or by a court decision. Similarly to the regime of public availability, the confidential regime entails certain problems that are still unresolved in the legislation.

Specifically, the Law on State Secrets (1993)[10] does not allow to classify the following information: the information on accidents and catastrophes posing a threat to public health and safety, on the consequences of such accidents and catastrophes, on natural disasters, on the official forecasts concerning the possibility and consequences of natural disasters; the information on the state of the environment, healthcare, sanitation, demography, education, culture, agriculture, and crime rates; the information on privileges, compensations and social benefits provided by the state to citizens, holders of public offices, and organisations; the information about the cases of violation of rights and freedoms of man and citizen; the information on the size of the gold reserves and the currency reserves of the Russian Federation; the information on the health status of high-ranking officials of the Russian Federation; the information on the cases of law violations by state bodies and holders of public offices.

According to the Law on Information, almost all these categories constitute the information the access to which shall not be restricted (publicly available information). This displays a comprehensive approach adopted by Russia's legislation and the close links between various legal rules governing access to information. The information on the health status of high-ranking officials is the only item that seems somewhat outdated and even vague in terms of its possible interpretation. The current legislation employs a different terminology (the possible translation is 'senior state officials' and 'civil servants') and does not mention 'high-ranking officials' of the Russian

[10] Law of the Russian Federation No. 5485-1 of July 21, 1993 "On the State Secret"// Collection of Legislation of the Russian Federation, October 13, 1997, No. 41, pp. 8220-8235.

Federation, though it does employ this term related to the regional level. Therefore, it is unclear what group of persons is implied in this law. Furthermore, there is a collision of the Law on State Secrets and healthcare legislation. The latter guarantees the patient-physician privilege that makes any information on a person's health status (medical diagnosis and related data) confidential. To resolve this collision, we can use the concept of 'protected interest'. Here, 'the protected interest' cannot consist in the general public receiving medical information about a state official, because there are no health requirements related to persons holding such offices (either by election or by appointment). For instance, parliamentary candidates do not need to satisfy any health standards, with the exception of mental capacity. Therefore, the public interest cannot consist in accessing such information, because this information exerts impact on neither the status of such officials nor their professional competence.

Transparency of activities of state bodies, including the process of classifying information, is ensured by certain provisions of the Law on State Secrets. Specifically, the law requires creating the following publicly available lists: The List of Information Classified as State Secrets, including the state bodies in charge of managing this information; The List of State Bodies and Organisations Entitled to Classify Information as State Secrets; and The List of Job Positions with Access to State Secrets.

The policy makers attempt to introduce order in the sphere of state secrets by means of providing a very clear procedure for classifying information. This procedure allows both courts and other bodies to ascertain whether a public authority adheres to the rules set out in the Law on State Secrets and the respective presidential decree. However, the competent authorities often misuse their right to classify information in order to classify the lists of classified information as such. They even endeavour to classify the procedures for classifying information. For instance, the court practice includes a case where the plaintiff had to challenge the 'official document' status of the Regulations on Declassifying and Extending the Period of Secrecy for Archive Records adopted by the Decision of Interdepartmental Committee on State Secrets No. 178 of March 12, 2010 in order to protect his right to familiarize himself with these Regulations. This example demonstrates the imperfection of the current legislation on state and official secrets. It shows that the public authorities adopt far too broad interpretation of their powers to classify information. Such an approach is hardly well-grounded, which was vividly illustrated by the case of Alexander Nikitin,

a journalist of Bellona, an environmental organisation. He faced criminal changes for alleged disclosure of a state secret, but neither he nor his attorneys were allowed to access the Order of the Minister of Defence No. 55 of August 10, 1996 'On Giving Effect to the List of Information Classified by the Armed Forces of the Russian Federation'. The text of the Order was classified, and the defence were unable to determine whether the information published by A. Nikitin belonged to state secrets. The defence won the trial, while the case once again highlighted the major problem of classifying information at the institutional level.

The law allows classifying the information held not only by state bodies, but also by individuals and various types of legal entities. Therefore, the Law on State Secrets provides for certain guarantees for the owners of such information. Specifically, they are entitled to be compensated for damage caused by classification. The amount of payment is stipulated in a contract between the owner of information and a public authority acquiring possession of the information. The contract is governed by administrative law, with the freedom of contract being severely undermined. In essence, the information owner cannot choose with whom to contract, and whether to contract or not. In the event the owner refuses to contract, he is notified about the liability for disclosing this information. The disposition principle in such contracts is reduced to zero.

The procedure of granting access to classified information sometimes becomes a matter of paramount importance in terms of maintaining human rights and freedoms, as well as interests of bodies corporate. This is mainly connected with security clearance that is based on the criteria set forth in the Law on State Secrets. Furthermore, a person who obtains such access acquires additional obligations on state secrets protection and also additional liability.

Certain groups of persons are subject to a special procedure of accessing state secrets that does not involve security clearance. These include parliamentary representatives (State Duma deputies and members of the Federation Council), judges in office, and attorneys in criminal proceedings involving classified information. Such persons are notified, against signature, about the obligation to keep this information confidential and about the liability for non-compliance. In this event, the information is protected by means of federal laws that set the liability of the persons mentioned. The absence of security clearance in respect to such persons is explained by their privileged status and based on a comprehensive approach to

legal regulation. For instance, parliamentary representatives, as they are, either to satisfy many of the requirements needed for the clearance or are exempt from them by definition. State Duma deputies are public representatives who enjoy a high level of legitimacy and play a pivotal role in a democratic society. Therefore, they cannot be disqualified based on medical condition, which shall meet only the minimal requirements. The current law contains a number of requirements with respect to applicants to judicial positions, but does not prohibit them to have relatives abroad. This is what distinguishes judges from high-ranking officials. In general, judges, parliamentary representatives and attorneys in criminal cases often deal with state secrets as part of their job. Therefore, any security clearance procedures in respect to such persons would run counter to the comprehensive nature of legal regulation.

Until recently, the attorney status has aroused the fiercest controversy with regard to attorneys' access to state secrets. To resolve the issue, the Constitutional Court passed Decision No. 8-P of March 27, 1996 that recognised the right of individuals to select defence attorneys in criminal cases, including state secrets cases, at their own discretion. The practice of mandatory security clearance for attorneys willing to access the materials of a criminal case containing classified information was recognised to be inconsistent with the Constitution. Before Decision No. 8-P, the defendant in a state secrets case had to accept the investigator's choice of attorney selected from a special pool[11]. The publications of that time stressed the revolutionary character of this decision, because it secured the right of the accused to choose the attorney independently of the investigation office. Thereafter, the Law on State Secrets was supplemented with an article on special procedure of accessing classified information for certain groups of persons. In late 2002, the Constitutional Court extended the effect of its Decision No. 8-P to civil and commercial cases[12]. Though

[11] Resolution of the Constitutional Court of the Russian Federation No. 8-P of March 27, 1996 "On the Check of Constitutionality of Articles 1 and 21 of the Law of the Russian Federation of July 21, 1993 "On the State Secret" in connection with complaints of citizens V. M. Gurdzhiyantsa, V. N. Sintsov, V. N. Bugrov and A. K. Nikitin"// Bulletin of the Constitutional Court of the Russian Federation, No. 2, 1996; Definition of the Constitutional Court of the Russian Federation No. 10-O of March 11, 1999 "On the Check of Constitutionality of Article 21 of the Law of the Russian Federation of July 21, 1993 "On the State Secret" in connection with the complaint of open-joint stock company NPTs "Informatics"// Legal Reference System *ConsultantPlus*.

[12] Definition of the Constitutional Court of the Russian Federation No. 293-O of November 10, 2002 "According to the complaint of Omsk Rubber open joint stock company to violation of constitutional rights and freedoms under Article 21 of the Law of the Russian Federation "On the State Secret"// Reference Legal System *ConsultantPlus*; Definition of the Constitutional Court of the Russian Federation No. 314-O of 10 November 2002 "According to the complaint

the Law on State Secrets was not amended, the attorneys representing plaintiffs in civil cases are granted access to classified information according to this decision of the Constitutional Court. We should note that the Constitutional Court's decision covers only attorneys (lawyers admitted to the bar), not any legal representatives.

These examples clearly demonstrate that the Constitutional Court effectively fine-tunes the implementation of legislation on access to information. By doing so, it makes a major contribution to the interpretation of rules that ensure fundamental rights and freedoms in the information sphere.

The role of the Constitutional Court in this sphere is further exemplified by its position on the secrecy of adoption. The Court performed an analysis of the provisions of the Family Code prohibiting disclosure of adoption-related information. Specifically, the Family Code does not entitle the heirs of an adopted person to obtain information about adoption in the event they learned about the adoption after the death of both the adopted person and their adoptive parents. The Constitutional Court rules, "the legal possibility of a person's descendants obtaining information about their adoption after their death — in the event their adoptive parents did not express their will to disclose this information — cannot be viewed as having no constitutional grounds". According to the Constitutional Court, the provisions of the Family Code "do not allow the conclusion that the courts do not have the right to decide, in each particular case, whether the descendants of the adopted person can obtain information about their adoption after the death of this person and their adoptive parents to the extent necessary to implement their right to know their lineage (or the lineage of their parents)."[13]

Free of charge access to information

The free of charge access to information is an important indicator of its availability, while any access fee can severely undermine the rights and freedoms in the information sphere. The Law on Information sets forth mandatory rules requiring

of the citizen Romanov Yury Petrovich to violation of constitutional rights under Articles 21 and 21.1 of the Law of the Russian Federation "On the State Secret"// Legal Reference System *ConsultantPlus*.

[13] Resolution of the Constitutional Court of the Russian Federation of June 16, 2015 "On the Check of Constitutionality of Provisions of Article 139 of the Family Code of the Russian Federation and Article 47 of the Federal Law "On Acts of Civil Status" in connection with the complaint of citizens G. F. Grubich and T. G. Gushchinoy"// [http://doc.ksrf.ru/decision/KSRFDecision198856.pdf] (accessed on July 10, 2015).

free access to the information on the activity of state and local self-governance bodies uploaded by them to telecommunications networks; the information affecting rights and statutory obligations of a particular person; and other information stipulated by law. Furthermore, the Law on Information attempts to minimize the possibility of a fee-based access to information. In particular, state and local self-government bodies are entitled to charge a fee for providing information on their activity only in those cases and under such terms and conditions, which are set forth by federal laws.

The free of charge access to information held by state bodies shall be a combination of free access to both the information itself and the software required to receive it. Where users need to pay for commercial software enabling them to access the information in the Internet, the information cannot be taken to be provided free of charge.

However, the access to information on registration records and legal statuses is still an issue, because the Supreme Court of the Russian Federation upheld the possibility of access fees under condition that the received funds are spent on administration of such access[14]. This position seems to be quite controversial, since the administrative expenses are covered from the budget of the respective state body.

Comparing: "information provision on application" and "handling citizens' requests"

The interaction of laws governing the access to information on the activities of state and local self-government bodies constitutes another important issue. The differentiation between the matters subject to regulation is the major problem here.

For instance, the Law on Access to Information clearly provides that it does not govern 1) legal relations on access to personal data processed by state and local self-government bodies; 2) the procedure of handling citizens' requests to state and local self-government bodies; 3) and the procedure governing the submission of information by state and local self-government bodies to other state and local-self-government bodies in connection with their activity and exercise of their authority. All these spheres, being excluded from the matters regulated by the Law on Access to Information,

[14] Decision of the Supreme Court of the Russian Federation No. GKPI09-1460 of November 23, 2009 "On refusal in allowance of the application about recognition invalid points 23, 24 of Rules of maintaining the Unified State Register of legal entities and providing the data containing in it, approved Resolution of the Government of the Russian Federation of June 19, 2002 No. 438, and points 31, 32 of Rules of maintaining the Unified State Register of Private Entrepreneurs and providing the data containing in it, approved Resolution of the Government of the Russian Federation of November 16, 2003 No. 630"// Legal Reference System *ConsultantPlus*.

are governed by their 'own' law: the Federal Law on Personal Data, the Federal Law on Processing Citizens' Requests, and Federal Law on Organisation of State and Municipal Services (respectively). The Federal Law on Organisation of State and Municipal Services is also supplemented by a number of governmental decrees[15].

Remarkably, the procedure of information provision on application under the Law on Access to Information largely overlaps with the procedure of handling citizens' requests specified in the Federal Law on Processing Citizens' Requests. Specifically, the current legislation is not particularly definite as to grounds for choosing one of the two procedures for treating an inquiry: 'provision of information' and 'handling a request'. Obviously, the purpose of a person's request or application must be the main criterion: either it is 'to receive information, obtain data, and acquire knowledge' or 'the request to assist in implementation of rights and freedoms'. However, information might be a prerequisite of implementing rights and freedoms. In this event, the two purposes merge and become inseparable.

We believe it is unjustified to distinguish between 'applications' and 'requests' based on the form selected by citizens themselves. The nature of legal relations and the respective administrative procedure should not be dependent on the subjective view of an applicant (a user of information). There are two possible criteria that can be considered more substantial: the content of the information and a person's right (freedom) that needs to be implemented. Then the logic of policy makers becomes clearer, since the treatment of requests comes under a more stringent procedure and entails a more serious liability in case this procedure is violated.

The analysis of grounds for refusal to handle a request or to provide information allows the following conclusions. The grounds for refusal to provide information are largely formal and require neither additional assessment of the application nor substantial justification. Such formal grounds may be as follows: the applicant did

[15] Resolution of the Government of the Russian Federation No. 30 of January 19, 2005 "On the Model Regulations on the Interaction of Federal Executive Bodies"// Collection of Legislation of the Russian Federation, January 24, 2005, No. 4, Article 305; Resolution of the Government of the Russian Federation No. 797 of September 27, 2011 "On the interaction between multifunctional centers providing state and municipal services and federal executive authorities, state extra-budgetary funds, state authorities of the constituent entities of the Russian Federation, local governments"// Collection of Legislation of the Russian Federation, November 3, 2011, No. 40, Article 5559; Resolution of the Government of the Russian Federation No. 1233 of November 3, 1994 "On the adoption of provision on an address order with office information of limited distribution in federal executive authorities and authorized body of management of use of atomic energy"// Collection of Legislation of the Russian Federation, July 25, 2005, No. 30 (h. II), Article 3165.

not specify his contact details; the access to this information is restricted (classified information); the information is published in mass media or uploaded to the Internet; the information has been already provided to the applicant. Meanwhile, the rules on refusal to handle a request always contain additional obligations of the authorised official to substantiate the refusal. Specifically, an authorised official can treat a person's repeated request as unfounded in the event the person has repeatedly received substantive answers concerning the issue in question. If this request and the previous requests were sent to the same state body, local self-government body or to the same office holder, the authorised official is entitled to terminate exchange of correspondence with this citizen, who shall be notified about such termination. Clearly, such refusal requires much more substantial processing of all the materials, in-depth study of the situation, and analysis of all the circumstances underlying the request.

Importantly, the current legislation is still not definite in two respects: the formal grounds for refusal to provide information and the emphasis on the right of the applicant to refrain from substantiating his need to receive information. The fact is, an application can be turned down where the applicant failed to specify the reason for it — that is, 'in the event the application contains a request for a legal assessment of acts passed by a state or local self-government body; for an analysis of the activity of a state body, its regional branches, a local self-government body or affiliated organisation; or for any other kind of analytical work that is not directly connected with the protection of the applicant's rights.' This rule implies that the provision of such information is, in fact, contingent on the grounds specified by the applicant (i.e., on the link between the information and protection of his rights).

This rule sits uneasily within the concept of differentiating between the two administrative procedures based on the subject matter of the request or application. Therefore, it gives rise to a bunch of questions. This rule is consistent with the procedure for handling citizens' requests (whose subject matter is implementing rights and freedoms), but clearly undermines the formal nature of the procedure for information provision. In essence, it allows a state or municipal body, or, actually, a particular authorised person, to selectively determine whether the information applied for is directly linked to the protection of the applicant's rights — that is, to perform the actions typical of the procedure for handling citizens' requests: legal assessment of acts passed by state bodies, local self-government bodies, and other public authorities; and other analytical work.

We assume that it is the information per se that is the subject of the procedure for information provision on application, which is confirmed by all the arguments presented above. Therefore, this rule does not comply with other rules in this sphere. Moreover, it allows expanding the arbitrariness of decisions made by a public authority. This contradiction hardly facilitates the differentiation between of the two procedures (provision of information and handling requests) and entails problems of practical nature.

We believe it advisable to revise these rules to clearly distinguish between the procedures under consideration. There should be unequivocal criteria for the application of one or another of the federal laws discussed. Obviously, a blurred regulatory framework does not allow solid understanding of the limits of restrictions that can be imposed on the access to information about the activities of state bodies.

Conclusion

The paper analysed Russia's information legislation to ascertain whether it implements constitutional provisions and international regulations proclaiming the right to access to information. The analysis allows the conclusion that Russia is consistently building a comprehensive regulatory framework to maintain this fundamental right. However, there are certain irregularities of legal rules that entail practical problems.

We have provided examples of the collision of two conflicting interests: the open access to information, on the one hand, and the protection of confidential information, on the other. These examples demonstrate that there is much room for further development of Russia's information legislation in terms of democratic principles and the highest values of the global community.

There still remains a problem of legal regulation of access to the information that is publicly significant. Such regulation should rest on a reasonable balance between the availability of information and access restrictions, the latter being underlain by the need to assure the confidential regime of sensitive information. The regulation of procedures for access to information must rule out the possibility of arbitrary decisions made by public authorities and guarantee the implementation of the major human rights and freedoms as well as rights and freedoms of citizens.

SPACE STATE: POSSIBLE OPTIONS FOR FORMING

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Abstract
The article emphasizes the role, which the space activity plays at the present stage of the evolution of the human civilization and the inevitability of its activation over the next 10-15 years. Space-related elements emerge along with others in the structure and functions of a modern developed country. Besides, the scientific, economic, military and other values of its space activity are increasing. In the 21st century, the emerging states are gradually turning into one space state that coordinates and organizes not only the activity on the Earth, but the public and private activities far beyond the planet, in outer space too. Some pivotal countries have already reached the phase of this historical development of statehood. The article addresses main options of the formation of a space state: natural (nation-states and their alliances, mixed — a complex planetary state) and artificial which is exemplified for the last several years by the emerging of unrecognized space kingdom, Asgardia. Hypothetically, it is also possible that the speed of the establishment and evolution of the space state and its forms can depend on the external influence coming from outer space. The options of enshrining the character of the state activity, i.e. its cosmic status, politically and legally (by means of declarations, laws, constitutions, etc.), are also considered. The author thinks that this global and irreversible trend of the formation of space statehood should be taken into account both in the political and legal doctrine and in political perspectives, long-term and middle term strategic documents and modern state development programs.

Keywords*:* evolution of a state, space activity, space law, a space state, formation of a space state, ways of a space state formation, natural and artificial ways of a space state formation, internal and external impact on a space state formation.

For many centuries, humanity has had only theoretical ideas about the existence of life in space and a space state.[1] However, in the middle of the 20th century, the

[1] *See:* Udartsev S. F., Istoriia politicheskikh i pravovykh uchenij. Drevnij Vostok: Akademicheskij kurs. [The History of Political and Legal Theories. Ancient East: an Academic Course.] Publishing House of St. Petersburg University. Law Faculty of the St. Petersburg University.

technological progress was at such a level that allowed the humankind to explore space, and in the 21st century, we started to create a space infrastructure of a state[2] that was a beginning for the formation of the space statehood.

The pivotal countries in space-related activities — the US, Russia, People's Republic of China, India, the EU, Japan, etc. — intend to increase their activity in this field.

Increase of space activity of a modern state.
The concept of "statehood" in space.

Modern states increase their space activity by competing among themselves. At present, no state can be competitive without being involved in space exploration as far as telecommunication, navigation of land, maritime, and air transport as well as rescue work in distant regions, probing and photographing of the Earth required for agriculture to measure land, forecasting the weather and global environment changes, defense and security, etc. directly depend on it.

With regard to the certain backlog of international space law that developed within the 1960s and 1980s and the existence of gaps in it, in the 20th century many countries promote national space law that springs up in other branches of law and creates, all together, its own cross-sectoral sub-system inside the national law. More than 30 countries currently have operational specific framework national laws or other legal-and-regulatory acts about space activity.[3] In 2007, 20 countries were

2007. — 664 p.; S. F. Udartsev, Ideia kosmicheskogo gosudarstva v istorii politicheskoj mysli// Pravo i politika [The Idea of a Cosmic State in the History of Political Thought// Law and Politics], No. 8, 2012, pp. 1386 — 1398. On the Publisher's website: http://nbpublish.com/view_post_368.html (January 23, 2019); S. F. Udartsev, A Cosmic State: Forming and Development the Idea in the History of Thought// SENTENTIA. European Journal of Humanities and Social Sciences. 2014. No. 1, pp. 37 — 50. DOI: 10.7256/1339-3057.2014.1.11412; the article has also been published in English in another journal, see: S. F. Udartsev, A Cosmic State: Forming and Developing the Idea in the History of Thought// Law and Politics. 2014. No. 4, pp. 548–561. DOI: 10.7256/1811-9018.2014.4.11415.

[2] *See:* S. F. Udartsev, Gosudarstvo, pravo i kosmicheskaia deiatel'nost' // Sotsiologiia prava: kurs lektsij: v 2-h tomakh. [The State, Law and Economic Activities// Sociology of Law: a Course of Lectures: in two volumes] V. 2 / edit. by M. N. Marchenko. M.: Prospekt, 2015, 344 p. pp. 307–338.

[3] *See:* E. S. Tabanbaeva, Formirovanie natsional'nogo zakonodatel'stva o kosmicheskoj deiatel'nosti v zarubezhnykh stranakh// Pravo i gosudarstvo [Forming National Legislation on Space Activities in Foreign Countries// Law and State] 2017. No. 3 — 4, p. 172. Retrieved from Magazine's online version: http://km.kazguu.kz/uploads/files/15.%20%D0%A2%D0%B0%D0%B1%D0%B0%D0%BD%D0%B1%D0%B0%D0%B5%D0%B2%D0%B0%20%D0%90.%D0%A1.%20%D0%A1.%20169-185..pdf (January 23, 2019).

active participants in space industry and more than 120 counties were involved in its developing. In 2012, 40 countries already had their own spacecrafts.[4] At present, there are over 50 foreign space agencies and international organizations around the world.[5] In 2016, the US and CNR, for the first time in several decades, surpassed Russia in the number of annual space launches (22, 22 and 19 launches a year respectively).[6]

Space activity is of great significance for ensuring the security for the country as a whole and the defense, in particular. Russia, the US, and China have currently formed space troops.[7] To be an active participant in space industry is an indispensable part of resources in any strong state. As previously noted, "the modern statehood is undergoing a specific transformation owing to a new level of military and technical strength, expanding the space for activity, using new information technology management... A state as a phenomenon is taking new forms, gains new resources to develop social forces and resources, to maintain order and apply legally based coercion for addressing challenges at the national, supranational, and global levels… A state continues transitioning out at the planetary level and in outer space. At the same time, new factors related to the onset of the fourth Industrial Revolution appear that accelerate this process".[8]

Overall trends in the evolution of statehood in the context of the evolution of the human civilization suggest that one of the natural elements of the modern strong state is the formation of the infrastructure, its participation in space industry and efficient management of this technology-intensive, costly, but promising area.

The deceleration of the space activity[9] starts to be replaced by a new momentum. By the end of 2020s — the first half of 2030s, experts predict another boom of

[4] *See:* Ibid. p. 169.

[5] *See:* The List of Space Agencies // Wikipedia. URL: https://ru.wikipedia.org/ (December 4, 2018).

[6] *See:* The List of Space Launches // Ibid. (December 4, 2018).

[7] *See:* Udartsev S. F., Sil'noe pravovoe gosudarstvo i novye vyzovy bezopasnosti: voprosy teorii// Gosudarstvo i pravo [A Strong Legal State and New Challenges to Security: Theoretical Issues// State and Law], 2018. No. 1 — 2, pp. 15 — 20. Retrieved from Magazine's online version: http:// km.kazguu.kz/uploads/ files/1.%20%D0% A3%D0%B4%D0%B0%D1%80%D1%86%D0%B5%D0 %B2%20%D0%A1.%D0%A4.%204-22.pdf (January 23, 2019).

[8] Udartsev S. F., Sil'noe gosudarstvo: voprosy teorii// Gosudarstvo i pravo [A Strong State: Theoretical Questions // State and Law] 2016, No. 2 (71), p. 13. Retrieved from Magazine's online version: http://km.kazguu.kz/uploads/files/1.%20%D0%A3%D0%B4%D0%B0%D1%80%D1%86% D0%B5% D0%B2%20%D0%A1.%D0%A4.%20%D1%81.%206-14.pdf (January 23, 2019).

[9] On the problems of current space activity, see: S. V. Krichevskij, Kosmicheskoe buduschee cheloveka i chelovechestva: problemy i perspektivy // Filosofskie nauki [The Cosmic Future of

competitive space activity, when cumulative knowledge, new techniques and technologies, considerable international expertise in the space activity will be realized in the new drive made by the humanity desiring to fall beyond the achieved space horizons. By that time, perhaps for the first time, humanity can also establish a basis for exploration and extract minerals on the Moon, asteroid, and other celestial bodies, whose natural wealth far surpasses the resources of our planet. The arrangements for completing the formation and the expansion of international law on issues relating to exploration, extraction, and utilization of space resources are being actively pursued. The international Hague Working Group created at the end of 2014 started actively to work on the issues relating to the management of space resources.[10] It is also important to note that the existing gaps in international space law started to be filled in by national space legislation.[11]

It seems that those countries that will not be ready to a new "cold rush" (space) and therefore will be unable to participate in it, to receive dividends, to lose competitiveness, and to be completely out of the running. The countdown has begun.

Modern states have created and are improving their space techniques and technologies, are conducting multidimensional scientific exploration of space and human vital activity in it, are forming space industry and telecommunication on the Earth, are launching and exploiting spacecrafts, international space stations. They create and equip military space forces, conclude treaties on the issues relating to space, form national space law, etc. In fact, the developed countries, especially pivotal countries, have already ventured into space, started their space industry in a variety of areas, and they will continue to develop and improve their space activity.

a Man and Mankind: Problems and Perspectives// Philosophical Issues — Russian Journal of Philosophical Sciences]. 2013. No. 9, pp. 38–43.

[10] Popova S. M., "Gaagskaia model" pravovogo regulirovaniia deiatel'nosti v oblasti kosmicheskikh resursov i perspektivy transformatsii mezhdunarodnogo kosmicheskogo prava // Issledovaniia kosmosa ['The Hague Model' of Legal Regulation of Activities in the Sphere of Cosmic Resources and Perspectives of Transforming International Space Law// Space Explorations], 2018. No. 2, pp. 144 — 174. DOI: 10.7256/2453-8817.2018.2.28631. URL: https://nbpublish.com/library_read_article.php?id=28631

[11] Under Obama's ruling in 2015 the law, which allowed private business to extract and appropriate minerals obtained in outer space, was approved and it triggered the involvement of private business to conduct such an activity, to design reusable spacecrafts and to increase the profitability of the whole process. The law used gaps in international outer space law. *See:* S.M. Popova, Sovremennye tendentsii razvitiia mezhdunarodnogo kosmicheskogo prava // Pravo i gosudarstvo [Current Trends in Developing of International Space Law// Law and State], 2016. No. 4 (73), pp. 66–71.

The evolution of nations on the Earth into space ones

In the 20th century — in the early 21st century the rate of technical, technological and information development of humankind is overwhelming the imagination. The thing, which was recently a science fiction is becoming a reality, and is crossing over into an ordinary, publicly available technique and technology. The vivid example is personal computers and mobile phones served as PCs, the Internet. At present, half a century later, the models of personal computers and mobile phones have such a processing power and the amount of memory that are several times more powerful than the speed and the storage of bulky on-board computers used in spacecrafts launched to the Moon.[12]

Take another example: The building of the first primitive low-speed aircraft just started in the early 20th century. There are over 500 thousand aircrafts in the world today. Over 2 billion people — about one third of the world's population — are annually transported by air. Meanwhile, there are simultaneously thousands of planes in the air, which transport daily between 300 thousand and one million people.[13] The concept of a "flying man" has been firmly established.[14]

The rapid advances in the space activity can be anticipated and must be expected, as the cost of space rockets, aircrafts, and vehicles is reduced in the transition to multi-stage space rockets, aircrafts and vehicles while new technologies, engines, materials, etc. are being adopted.

The states, which have emerged and develop on the Earth as the humanity advances explore the planets and create conditions for the exploration of the outer space, together with human beings becoming naturally the subjects of the space

[12] Hardesty and Iceman argue, "despite on-board computers at "Apollo" were important their operational capability were limited even in comparison with current desktop personal computers. For example, the targeting computer on "Apollo" board weighed 32 kg and was placed in the flat box sized 1m by one and a half. Its CPU speed was 1 MHz with RAM of 1 KB and with permanent memory of 12 KB. At the present, a usual personal computer has CPU whose speed is a hundred times quicker, and its RAM is about 500 thousand times more capable. A hard disk drive substituted the permanent memory. It allowed increasing capability in a million times". *See:* Von Hardesti, Dzhin Ajsman, Istoriia kosmicheskogo sopernichestva SSSR i SShA [The History of Space Competition between the USSR and the USA] // Electronic library in the format of fb2. URL: http://litresp.ru/chitat/ru/%D0%A5/hardesti-von/istoriya-kosmicheskogo-sopernichestva-sssr-i-ssha (November 15, 2018).

[13] *See:* S. V. Krichevskij, Aerokosmicheskaia deiatel'nost'. Mezhdisciplinarnyj analiz [Aero-cosmic Activity. Inter-branch Analysis]. M.: Knizhnyj dom "LIBROKOM", 2012. p. 16.

[14] *See:* ibid, p. 90. *See* also: S. V. Krichevskij, Aerokosmicheskaia deiatel'nost': metodologicheskie, istoricheskie, socioprirodnye aspekty: monografiia [Aero-cosmic Activity: Methodological, Historical, Socio-natural Aspects: a Monograph]. M.: Izd-vo RAGS, 2007. 316 p. P. 55.

activity. During the global evolution of such a phenomenon as a state embodied in the form of organization of social life at different levels, the state and the statehood, in general, as the set of existing and interacting states, are coming down the line, when they get energy and resources to start penetrating into the outer space actively and exploring its enormous natural wealth. It provides new, previously unknown opportunities but does not bear risks or danger with regard to ecology and adaptation to new extraterrestrial living conditions.

In order to penetrate into outer space the mankind has to solve a lot of issues, experience many patterns, cope with risk factors and threats, be adopted to space living conditions and activity that will be absolutely strange, create an artificial environment being as close as possible to the Earth one in this unfavorable space conditions, develop and transform gradually space objects. A great importance during this organizational activity will be attached to the revitalized and hi-tech state that achieved new levels of efficiency.

The more the Earth state penetrates into space, the more it is addressed as a space state whose activity will not be limited by the territory of the Earth and will decline to be conducted in outer space. The more mankind penetrates into space and explores it, the more powerful the space activity becomes. The potential of a state as a historical phenomenon will be fully realized in a space state. Its further evolution will be significantly connected with space, its infinite expense and resources.

Formation of space states: natural, artificial, internal and external

The process of forming a space state can have numerous options. Just as the previous evolution of the statehood had many options, so the next one can have many options too. Just as civilized, cultural, geographical and other peculiarities in the Earth history of different states and peoples had different influence on the speed and ways of evolution, forms, and other peculiarities of different countries, so the formation of space states in different historical and starting conditions will inevitably disclose the specificity of speed, forms, and the pace of development.

Some countries can hardly imagine or even foresee the precise modalities, details, and peculiarities during such a state-space evolution in advance. It is, however, possible to predict some general trends and typical options of running this global process.

We assume that the process of forming and fixing a space state from the Earth states or on the basis of the mankind of the Earth can have several options.

Firstly, *as a natural process,* transformation (sprouting) during the evolution of the Earth's states into space ones. Depending on their technical and economic development, the Earth's states achieve the level of a high and various space activity (including industrious, energy-related, extracting natural resource, processing them, building scientific, industrial, transport, tourism, military, law enforcement, and other infrastructure and activity in space), and penetrate deeply into space. Such a level of development can be achieved both by separate strong nation-states, their alliances, federations, confederations, and by planetary state entities (for example, federation or confederation of the Earth's states), which can exist along with strong nation-states or their alliances inside such a planetary federation (or confederation at a certain stage). This might also include a balanced and legally harmonized coexistence of all three levels of statehood within the planetary union of states (the first occasion of which is exemplified by the United Nations).

Besides, at the end of the 18th century the founder of German classical philosophy, Immanuel Kant, was the first to predict the inevitable emergence of the world federation of states to ensure peace in the world. He admitted that such a level of political development of the mankind allowed for the existence of dual citizenship — nation-state and world federation.[15]

Secondly, space states can emerge as a result of *an accelerated artificial process* that is due to the creation, the social and political construction of totally new space states by the founders. It will seem attractive for a certain part of the population, especially in the context of globalization and expectations as well as the beginning of a new active phase of space exploration and the realization of new major space projects by a group of states (it can be exemplified by the first but unrecognized space state, Asgardia), but only if dual citizenship is allowed.

At present, such a type of space state formation is exemplified by the unrecognized State Kingdom, Asgardia.[16] The formation of this entity began on the Earth at the end of 2016. It is a combination of a digital, virtual, network state and a state model formed from real (living) people, which hopes, even later on, to be recognized by

[15] *See:* S. F. Udartsev, Politicheskie i pravovye idei Immanuila Kanta // Immanuil Kant. Ideia vseobshhej istorii vo vsemirno-grazhdanskom plane. K vechnomu miru [Political and Legal Ideas by Immanuel Kant // Immanuel Kant. The Idea of All-Mankind History in the World Community. On the Way to the Eternal Peace]/ Introd. and comments by Udartsev S. F., 2nd edit. amend. Almaty: Zheti Zhargy, 2004, pp. 5 — 46.

[16] *See:* V. Fedorova, Kosmos dlia obychnykh liudej // Vozdushno-kosmicheskaia sfera [Space for Ordinary People // Air and Space Sphere], 2017. No. 4 (93) December, pp. 5 — 13.

other states and the United Nations. In December 2018, over 280 thousands of people living in different countries around the world were considered as the citizens of Asgardia. The number of its citizens was increasing. However, the citizenship was initially duty-free but when the fee was fixed at €100, not all citizens repaid it. On December 23, 2019, 17,970 people were accepted as residents, that is full-fledged citizens. 272,713 people are "in limbo", prospective residents. According to the website of the unrecognized state, the total number of the population living in Asgardia is 1,042,041 people.[17] At present, Asgardia has its own head of the state (Igor Ashurbeyli), Parliament, Government, ministries. It has its first small artificial Earth's satellite that contains information about first citizens of the space state.

This option of emergence of a new space state is likely to be a utopia. This project, however, is not completed; therefore, there are no grounds to exclude the possibility of its successful realization, in varying degrees, though the chances of making it are pretty slim. However, this project paves the way to other possible social and political innovations of this kind. So, of the internal and external conditions are favorable, some of them will be likely realized successfully in the future.

These two types of emergence of the space state can be assumed as *an internal (Earth's) process* of formation of a space state.

If, hypothetically, **the third option** is possible far in the future, which is connected with external cosmic factors of the evolution of the terrestrial civilization. This option presupposes the existence of extraterrestrial intelligence. As it is known, some US spacecrafts traveling beyond the solar system contains messages from extraterrestrial intelligence and information about the mankind, its peoples and languages. The contact with such highly developed extraterrestrial intelligence, states or other forms of entity can have a great impact on the development of nations on the Earth.

As early as in 1920, in several articles dedicated to space philosophy, the theorist of astronautics, K. E. Tsiolkovsky, argued that there was a possible alliance of highly developed, intelligent, sentient beings.

But in so doing, when we speak about the emergence of some forms of the space state it is unreasonable to exclude the possibility of combining the impact of internal and external factors.

[17] *See:* Asgardia (Official website): https://asgardia.space/en/ (January 23, 2019).

A possible formal status of a space state

Legal regulation of the evolutionary process of the Earth states into space states, and in future mostly space states (depending on the level of involvement into space activity), can take different forms. But in any case this process will be reflected in regulations of national law, in acts made by supranational or global (planetary) state organizations, as well as in international legal instruments (treaties, conventions, protocols, declarations) which are related to the issues regarding space activity or concluded between space states.

It is possible to suppose that states will apply such a form of a legal document common throughout legal history as a declaration; in this case that is a declaration on self-proclamation as a space state, on achieving such a level.

Sooner or later the status of a space state might be also enshrined in constitutions as a basic instrument of a state. For example, it may be stated in the preamble of the constitution of a state or in its articles of a general nature, which determine the status of a state. Separate provisions relating to a space state, its connections and interaction with other nations on the Earth and in space, space policy conducted by them, competences of central and local public authorities which participate in space industry, issues with regard to citizen rights, freedoms connected with their participation in space industry or being in space can be embodied both in more specific articles of the constitution and in laws or by-laws of space states.

In 2017, Space Kingdom Asgardia adopted its own Constitution by conducting a referendum. It contained general provisions, rights, freedoms and duties of citizens, the status of public authorities — the Head of the State, Parliament, Supreme Space Council, Court, Prosecutor's Office, Accounting Chamber, National Bank, etc. For the first time this unrecognized state tries to combine digital technologies, virtual reality and living citizens. But what remains unsolved is the constitutional problem of the proclamation of citizenship by Asgardia since it has another nature for citizens of other nations on the Earth (the citizenship of this state does not imply dual citizenship with regard to other states, therefore it does not fit into contemporary national concepts of traditional citizenship). Nevertheless, though there are some peculiarities of the constitution, which have a utopian and declarative character and some legal and technical defects, the constitution of the first space state is considered as a pilot, specific instrument which tries to master a new conceptual scope of legal awareness. At the beginning of the 21st century, this constitution is considered

utopian, but it can stimulate the development of the constitutional and legal thought, especially in the long term, when the space statehood is still in its infancy and will be likely developed within the 21st century.

In the long run, other space civilizations may be discovered, therefore we may expect specific treaties to be entered into at a much higher level, i.e. between different civilizations, where some space nations on the Earth, their alliances or their global planetary unions will participate in.

Conclusion

The analysis of perspectives and potential relating to the evolution of the state as a historical phenomenon makes us conclude that participation of the state in space activity will definitely increase, its space infrastructure will inevitably develop and we will witness gradual evolution of the developed nations on the Earth into space states. In this respect, the space state is one of the main strategic trends and stages of forming a state of the future.

Due to technological, economic, social, information, political and legal development, the gradual transformation of nations on the Earth offers us new tremendous opportunities. Reducing the costs and increasing the profitability of techniques and technologies will have a multiplier effect on all fields of human activity and increase its security and sustainability of development.

Space states can emerge *naturally* due to internal processes (in the form of a national space state, an alliance of national space states or a national organization created by them, but later on, it may be a global planetary organization of national states in the form of their federation or confederation) or *artificially* (the first prototype was the Space Kingdom Asgardia which was created in 2016), and externally too.

The emergence of space states and the increase of space activity in the context of the state activity will be reflected both in different legal instruments of national law (including a constitution) and in international legal acts, but further in the future in hypothetical inter-civilizational legal instruments.

The first constitution of the space state, the Constitution of Asgardia, can be assumed as the first attempt to design the constitutional act of the state notwithstanding the existence of utopian and declaratory provisions, legal and technical defects. Some of its ideas will be taken as a basis for constitutions of future states.

CONCEPT AND LEGAL NATURE OF CAPACITY IN THE ENERGY SECTOR

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Abstract

The author puts forward the concept of contracts for supply through the attached [connected] network, characterized by two stages of their development: at the first stage of contracts for power supply capacity is their legal object and it takes the form of activity of a supplying organization carried out to ensure the availability of equipment for generation and transmission of resources in the amount and of the quality agreed upon with the consumer, and at the second stage of the contracts capacity is a quantitative and qualitative indicator of a material object — electrical and thermal energy transmitted to the consumer. Used in the legislation on electricity, the term can also be extended to the contractual relationship arising out of supply through connected network of other resources — oil, petroleum products and cold water.

Keywords: power, energy, obligations to supply through the attached network (SCHPS), objects contracts for energy supply.

The issue of a concept and legal nature of capacity in the energy sector provokes much discussion. This is largely because both literature and legislation do not make a distinction between the notion of electrical energy (power) capacity and the capacity of generating units (generating capacity).

In the federal laws governing the energy sector, the mentioning of energy and capacity is generally confined to two variants: the first one contemplates synonymity of these categories; the other distinguishes between these notions as having an independent meaning.[1]

[1] *See:* A. N. Lysenko, Sobstvennost' v rossijskom grazhdanskom prave [Property in the Russian Civil Law]. M.: Delovoy Dvor, 2010, p. 65 / *ConsultantPlus*.

In Federal Law No. 41-FZ of April 14, 1995 "On State Regulation of Tariffs for Electrical and Thermal Energy in the Russian Federation"[2], where in its wording dated March 26, 2003 No. 38-FZ the capacity was mentioned almost for the first time, it was not considered as an independent object of economic turnover since it was paid simultaneously with electrical energy at a two-rate tariff. Application of those tariffs meant that the customer paid at a fixed rate for the amount of connected capacity (kVA or kW) and additionally paid for the amount of consumed energy (kW/h). The electrical energy tariff was included into a two-rate tariff as variable costs, whereas the capacity tariff — as semi-fixed costs of a consumer.

At the same time, Federal Law No. 250-FZ[3] of November 4, 2007 and the Rules of the Wholesale Electrical Energy and Capacity Market (hereinafter referred to as the WEECM Rules)[4] approved by Resolution No. 1172 of the Government of the Russian Federation of December 27, 2010 demonstrated a different approach, according to which the capacity is sold in the market as an independent commodity along with the energy. According to paragraph 36 of the WEECM Rules, "for the purpose of securing a safe and uninterrupted supply of electrical energy, trade in generating capacity (hereinafter referred to as capacity) — a specific commodity which purchase entitles a participant of the wholesale market to demand readiness of the generating equipment to produce electrical energy of an established quality in the volume required to satisfy the demand of this participant for electrical energy — is carried out in the wholesale market". According to paragraph 42 of the WEECM Rules, "the capacity is a specific goods the sale of which entails the duty of a participant of the wholesale market to maintain the generating equipment which is owned by it or belongs to it on some other legal grounds in the state of readiness for production of electrical energy, including by way of necessary repairs of the generating equipment, and the right of other participants of the wholesale market corresponding to the mentioned duty to demand its due performance in accordance with the terms of the capacity purchase and sale (supply) contracts".[5]

This position of a lawmaker can be recognized as the one which reflects sufficiently clear the economic substance of the concept of capacity as the activity of an energy supplying organization related to maintenance of its energy generating equipment in

[2] Collection of Legislation of the RF, April 17, 1995, No. 16, Art. 1316.
[3] Collection of Legislation of the RF, November 5, 2007, No. 45, Art. 5427.
[4] Collection of Legislation of the RF, April 4, 2011, No. 14, Art. 1916.
[5] Collection of Legislation of the RF, April 4, 2011, No. 14, Art. 1916.

a state securing the receipt of energy of a certain quantity and quality by a consumer. At the same time, we regard a statutory legal qualification of relations, which arise between a supplying organization and a consumer as the capacity purchase and sale contracts as erroneous, not corresponding to the nature of legal relations mediated through the energy supply contracts through connected network.

Economic and legal concept of capacity

There are different opinions in the literature concerning an economic and legal substance of the concept of capacity. The authors who do not recognize capacity as an independent commodity state such a reason that it represents only a quantitative indicator of electrical energy. A. N. Lysenko holds that capacity as such cannot represent anything else than a quantitative indicator of electrical energy[6]. S. Stoft writes, "capacity is the electrical energy flux"[7]. The same reasoning is given by S. A. Svirkov who notes that capacity is not an independent commodity, since it represents a quantitative parameter of another commodity — energy[8].

At the same time, academic lawyers who consider capacity as a separate commodity put forward different reasons and grounds for such an approach and, respectively, give different legal qualifications of this phenomenon. According to P. G. Lakhno and V. F. Yakovlev, the very wording of the Law gives a reason to regard capacity as a special commodity and object of turnover in the wholesale market; as such a commodity and object they recognize electrical capacity of the units generating electrical energy, i.e. their ability determined by operation conditions to generate any volumes of electrical energy[9]. Along with energy, L. Lapach equally considers capacity as a commodity in the wholesale market of electrical energy; moreover, under capacity he means a contractually stipulated energy consumption resource within a specified period of time[10]. Many authors qualify capacity as an activity of an energy

[6] *See:* A. Lysenko, "Capacity" as an Independent Object of Civil Turnover //Economy and Law. 2008. No. 12, pp. 43 — 47.

[7] S. Stoft, Power System Economics. Designing Markets for Electricity: Translation from English. M: Mir, 2006, p. 514.

[8] S. A. Svirkov, Key Problems of Civil Legal Regulation of Energy Turnover. M.: Statut, 2013, p. 31.

[9] *See:* V. F. Yakovlev, A Rule-of-Law State: Issues of Formation. M.: Statut, 2012, p. 307.

[10] E. V. Kiryukhina, Legal Problems of Shaping a Competitive Wholesale Market of Electrical Energy and Capacity: Thesis …for Candidate of Legal Sciences. M., 2008; L. V. Lapach, The

supplier related to securing the readiness of generating equipment (units) to generate electrical energy of a specified quantity and quality, and the capacity fee as a mechanism of compensation for costs related to maintenance of generating equipment by an energy supplying organization in an operating condition even when electrical energy is not generated by these units and the producer receives no payments for it[11]. Following the lawmaker, most proponents of this position qualify the evolving relations of the parties as a contract of capacity sale and purchase[12].

The above-described positions of the authors do not allow revealing to a full extent the concept of energy capacity, since each of them takes into account only one side of this concept and does not consider the other side. The matter is that a characteristic of capacity as an independent commodity results in its detachment from the main purpose of a contractual obligation of the parties which subject-matter is the duty of an energy supplying organization to supply a customer with energy through connected network (Article 539 (1) of the RF CC). On the other hand, capacity of energy transferred to a customer is definitely both an important quantitative and qualitative[13] characteristic of the received energy and disregard of this factor leads to detachment of a notion of capacity from its attribute which is energy. However, the characteristic of capacity as no more than a quantitative and qualitative indicator of energy cannot be accepted because it takes this notion beyond the scope of energy supply relations.

Problems of Structuring the Category "Property" in the Russian Civil Law: the author's abstract of a thesis ...for Candidate of Legal Sciences. Rostov-on-Don, 2007, p. 9, 21.

[11] *See:* A paragraph-by-paragraph scientific and practical commentary to the Federal Law "On Electrical Energy Industry"/ under general editorship of a Candidate of Legal Sciences V. Yu. Sinyugin. M.: Delovoy Express, 2003. pp. 29 — 30.

[12] *See:* S. V. Matiyaschuk, Comments to Federal Law No.35-FZ of March 26, 2003 "On Electrical Energy Industry", article-by-article, "Yustitsinform", 2012; S. Nikolsky, Trade in Capacity — What is This?/ http://www.vegaslex.ru/ db/msg/7051 (July 2008).

[13] Not only the quantity of current but its voltage and frequency characterize the capacity of electrical energy transmitted to a consumer. It was noted in the literature that capacity is the work of electric current in the unit time, in the direct-current circuit capacity is equal to a product of voltage and current (*See:* V. F. Yakovlev, Ibid, pp. 297 — 305). It was also noted that the frequency of electric current ensured by the energy system in general (hence, by a particular energy supplying organization as its element) is one of the indicators of quality of electrical energy and the most important parameter of the energy system regime, the frequency value indicates a present state of balance between the generated and consumed active capacity (real power) in the energy system (*See:* S. V. Matiyaschuk, Comments to Federal Law No. 35-FZ of March 26, 2003 "On Electrical Energy Industry" (article-by-article). "Yustitsinform", 2012, pp. 68–69).

Obligations to supply energy through connected network

The above-mentioned contradictions can be removed by qualifying the evolving legal relations as an independent contractual type — the obligations to supply energy through connected network where capacity is one of the objects of the contracts being a part thereof, inter alia, the contracts of electrical and thermal energy supply.

There is a motivated viewpoint in the literature according to which legal relations of economic entities pertaining to electrical and thermal energy, as well as to gas supply through connected network mediate the underlying specific relations which main peculiar feature is extension of these relations to the sphere of product consumption due to the fact that they do not provide for the stage of product accumulation, and the time of circulation is equal to zero here[14]. In elaboration of these ideas, we subsequently arrived at a conclusion that economic relations pertaining to supply through connected network of oil and petroleum products, cold water and other products are often built under the model of energy supply contracts covering not only the process of transfer, but consumption of energy resources as well[15] in cases when such relations mediate economic relations built under the "energy supply model"[16], i.e. which do not provide for any meaningful stage of product accumulation (water is consumed, oil is burnt)[17].

The concept of obligations under the STCN[18] as an independent contractual type which stands alone in the system of civil law obligations and includes the contracts

[14] *See:* A. M. Shafir, The System of Business Contracts for Supply of Electrical, Thermal Energy and Gas: Thesis …for Candidate of Legal Sciences. M., 1982. 208 p.; Id: Energy Supply of Enterprises (Legal Aspects), M.: Yurid.lit., 1990, 144 p.

[15] The concept prevails in the modern legal literature according to which not only the contracts for supply of electrical energy, but also the contracts for supply of thermal energy, gas, oil, petroleum products, water and other commodities through connected network are concluded under a model of the energy supply contract provided for in § 6 "Energy supply" Chapter 30 of the RF CC. The supply through connected network of all other commodities, except for electrical energy, will be governed by the rules applied to the energy supply contract, unless otherwise established by law and other legal acts (*See:* M. I. Braginsky, V. V. Vitryansky, Contractual Law. Book Two: Property Transfer Contracts. M.: Statut, 2000. pp. 137–138.)

[16] To characterize the specificity of economic relations mediated through these contracts, we applied the term by analogy with the notion of a model of the "energy supply contracts" recognized in literature.

[17] *See:* A. M. Shafir, A Model of the Energy Supply Contract through Connected Network and Specificity of Economic Relations Mediated by it. In the book: State and Contractual Regulation of Entrepreneurial Activity: a multi-authored monograph / under the scientific editorship of Professor V. S. Belykh — Moscow: Prospekt, 2015. pp. 205 — 236.

[18] Abbreviation STCN (supply through connected network) in respect of a group of contracts reviewed in this article was for the first time used by us in the thesis.

for supply of electrical, thermal energy in the form of hot water and steam, gas, oil, petroleum products and cold water through connected network suggests a new answer to the question which stirs up serious discussions in the juridical literature about the concept and legal nature of capacity in the energy sector which is considered here as one of the objects (subject-matter) of the mentioned contracts.

The issue about the subject-matter of energy supply contracts through connected network is not unambiguously solved in the juridical literature yet. This is largely connected with the polemical character of the issue about the object of a legal relationship, since the subject-matter of a contract is exactly the object in respect of which a civil law relationship arising out of the concluded contract is shaped. There are two basic viewpoints of a notion of the object. The first one is that the object is not a constituent part of the notion of a legal relationship, it is in which respect the legal relationship is established[19]. However, this position deprives us of the possibility to answer the principal question — to what end this legal relationship arises. The rights without their own object, which are not aimed at anything, are void of any sense for a holder of these rights and are therefore no rights in the actual meaning of the word. Critics see the ground for origination of an "objectless" understanding of the legal relationship in that as objects of civil relations only things (res) were named[20].

More well founded appears to be a view prevailing in the juridical literature of an object of a legal relationship as of something which this relationship is aimed at and with which it interacts. According to this view, any legal relationship fulfils a certain service function pertaining to regulation of the underlying public relations, phenomena, processes; therefore, there can be no objectless legal relationship, i.e. a legal relationship aimed at nothing[21].

However, there is no unanimity of opinion among scholars as to what exactly the object of a legal relationship is. A number of authors speak of a unity of an object

[19] *See:* N. G. Alexandrov, Legality and Legal Relations in the Soviet Society. — Gosyurizdat, 1955, pp. 117, 119; D. D. Grimm, On the Teaching about the Objects of Rights // Bulletin of law: Journal of the Saint-Petersburg Law Society. 1905. Book 7. pp. 161 — 162; Civil Law: a Textbook: in two volumes / under the editorship of M. M. Agarkov, D. M. Genkin. M., 1944. Volume. 1. p. 72; R. O. Khalfina, General Teaching on Legal Relationship, p. 214.

[20] *See:* O. S. Ioffe, Selected Works on Civil Law: from the History of Civil Law Thought. Civil Legal Relationship. Critics of the Theory of "Business Law". M. 2009. P. 589.

[21] *See:* Soviet Civil Law / under the editorship of D. M. Genkin. — M.: Yurizdat, 1950, pp. 110 — 111; O. S. Ioffe, Soviet Civil Law (Course of Lectures). L: Publishing House of the Leningrad University, 1958, p. 170; Yu. K. Tolstoy, To the Theory of Legal Relationship. — L: Publishing House of the Leningrad University, 1959, pp. 48 — 67.

classifying as such only things, for example[22]. Other authors recognize a plurality of objects of a legal relationship referring to them things, material benefits, and actions of people[23]. The position of O. S. Ioffe appears correct to us, who determined the object of a legal relationship as something at which the legal relationship is aimed or with which it interacts. Any phenomenon influences with its content any other phenomenon. However, a civil law relationship has a legal, material and ideological content. Therefore, it can be directed not only at legal but at ideological and material objects, too. A will of a holder of civil rights and obligations constitutes an ideological object of a civil law relationship. A legal object of a civil law relationship is that conduct of an obligor, which a right holder can claim. A material object of a civil law relationship is that the object which the underlying social relation fixed by it possesses[24].

In the STCN obligations, an important theoretical and practical meaning for understanding their subject-matter has a clear delineation of different objects at each of the stages of development of legal relations arising on the basis of these obligations.

Primarily, such an approach helps to draw a line between the STCN obligations and the delivery relations closest to them. This appears to be especially important in the light of the position detailed by us concerning extension of the STCN obligations to the supply through connected network of not only electrical and thermal energy in the form of hot water and steam, but of gas, oil, petroleum products and cold water as well. The point is that energy and gas, not to mention oil, petroleum products and cold water, can be a material object of both relations. Non-gratuitous sale of bottled gas, electrical energy in batteries, etc. are by their legal nature the relations of product delivery. The same is true for the relations of oil, petroleum products and cold water supply in cases when they are not consumed immediately after their transfer to consumers, but are stored by the latter. Thus, there is a differently lasting stage of circulation between transfer and consumption of these resources, which makes the supply of the mentioned resources not the relations of supply through connected network but the relations of delivery. And, if we recognize, as many

[22] *See:* N. G. Alexandrov, Legality and Legal Relationship in the Soviet Society. Gosyurizdat, 1955, p. 117.

[23] *See:* M. V. Gordon, Soviet Civil Law. M.: Gosyurizdat, 1955, pp. 168–169.

[24] *See:* O. S. Ioffe, Soviet Civil Law (Course of Lectures), pp. 168–169; Id: Selected Works on Civil Law: from the History of Civil Law Thought. Civil Legal Relationship. Critics of the Theory of "Business Law". P. 589.

authors do[25], that the subject-matter of contracts of energy supply through connected network is only a material object — electrical and thermal energy, gas, oil, petroleum products, cold water — this will have as a result that the relations which are substantially different in nature will have one and the same subject; however, this is not so.

Indeed, a material object of contracts of energy supply through connected network coincides with a material object of a contract of delivery: here it is also energy, gas, oil, petroleum products and cold water. However, a legal object and an intellectual object of the compared contracts differ substantially, since in the STCN contracts they are aimed at the activity of a supplying organization to secure for a consumer a possibility to consume resources. As it was already mentioned, this activity consists of maintenance (in case of energy supply) of generating units in a condition securing the generation of energy in a quantity and of a quality stipulated by a contract with a consumer, and in essentially similar actions of a supplying organization in case of transfer of other resources into use. In other words, when building economic and legal relations of business entities under the model of energy supply, in all cases of resources supply through connected network it concerns provision by a supplying organization of a certain technical and technological level of the equipment capacity for production of resources in the volume and of a quality required by a consumer.

Hence, in relations built under the model of energy supply, capacity as an economic and legal concept is a technical and technological or any other activity carried out by an organization supplying resources through connected network (and not only by an organization supplying electrical and thermal energy) related to maintenance of equipment (generating units in case of energy supply) in a state securing generation and transfer of resources into consumer's use in the quantity and of the quality stipulated by a contract with the consumer. These relations are economic and legal mediation of technical and technological processes, which take place during supply of resources through connected network at the moment of their immediate consumption by a recipient. Thus, capacity is a notion inherent to all types of STCN

[25] *See:* S. M. Korneev, Contract of Electrical Energy Supply, M.: Gosyurizdat, 1956, p. 6; O. N. Sadikov, Legal Issues of Gas Supply, M.: Gosyurizdat, 1961, p. 61; B. M. Seynaroev, Legal Issues of the Contract of Electrical Energy Supply of Enterprises and Organizations, Alma-Ata, Publishing House of Kazakhstan, 1975, p. 52; E. G. Pliev, Legal Regulation of Gas Supply in the USSR/ Thesis…for a Candidate of Legal Sciences, M.: 1974, p. 57.

contracts and not only to the contracts for electrical and thermal energy supply, as it is commonly understood in the literature.

Capacity as the subject-matter of energy supply contracts

Such an approach to understanding the subject-matter of a legal relationship helps to formulate a concept of capacity with regard to STCN contracts in general, and the contracts for supply of electrical and thermal energy, in particular. As it was already mentioned, the STCN contracts as a standalone contractual type which has been detached within the system of civil law obligation, mediating specific economic relations include as contract types the contracts for supply of electrical energy, thermal energy (in the form of hot water and steam), gas, oil, petroleum products and cold water. A key peculiar feature of the above listed contracts is the coverage by obligations of the sphere of resource consumption. The relations arising as a result of conclusion of STCN contracts are characterized by the presence of two main stages of development, each of which has its own objects.

The **first stage** of development of an STCN relationship has an ideological and juridical object. An ideological object is the right of a consumer to demand from a supplying organization maintenance of a due level of capacity of the equipment for resource generation, and a counter-obligation of a supplying organization to secure such a level; a juridical object is carrying out by a supplying organization of the activity related to securing readiness of the equipment for generation and transfer of resources in the quantity and of the quality agreed upon in a contract with a consumer.

The **second stage** of a STCN relationship is characterized by two ideological, two juridical and one material objects of the legal relationship, which is attributed to a special nature of resources transfer through connected network, which practically coincides with their use. The mentioned coincidence of the processes of resources transfer and consumption has a technical and technological character, whereas the substance of economic activity of the parties differs here, respectively different is legal mediation of the processes of resources transfer and consumption, as well as the substance of ideological and juridical objects of the legal relationship. An ideological object in the process of transfer is the right of a consumer to obtain resources for its business needs and a respective duty of a supplying organization to secure a possibility for a consumer to obtain resources in the quantity and of the quality stipulated by the contract, and a juridical object is the activity of a supplying

organization related to transfer of resources to a consumer. An ideological object in the process of use is the right of a supplying organization to demand from a consumer the expedient use of the received resources and due operation of its technical facilities in the process of resource use and the duties of a consumer of resources corresponding to these rights; and a juridical object is the activity of a supplying organization related to control over the expedient use of resources by a consumer and due operation by a consumer of its technical facilities. A material object of the second stage of a STCN relationship is the resources transferred by a supplying organization and used by a consumer — electrical and thermal energy, gas, oil and petroleum products, cold water.

It follows from the aforesaid about the stages of development of the STCN relations and their objects that energy capacity is the subject-matter of an energy supply contract and, namely, a juridical object of the first stage of development of a legal relationship arising during conclusion of electrical and thermal energy supply contracts.

In case of supply through connected network of resources other than electrical and thermal energy, a supplying organization has no obligation to maintain exactly the "capacity", since this notion is used in the legislation and literature only in respect of energy. However, in case of supply through connected network of other resources within the framework of relations built under the energy supply model, there is an absolutely similar, by its economic and legal nature, obligation of a supplying organization to carry out the activity agreed upon in a contract with a consumer related to securing readiness of the equipment to generate and transfer the resources into the use of a consumer. This is proved, in particular, by the fact that the contents of this obligation can be described with eventually the same wordings which are used in respect of the energy capacity in paragraph 42 of the WEECM Rules, namely as the duty to maintain the generating equipment which is owned by a supplying organization or belongs to it on some other legal grounds in a state of readiness for production of resources, including by a way of necessary repairs of the generating equipment, and the right of a consumer corresponding to the mentioned duty of a supplying organization to demand its due performance in accordance with the terms and conditions of concluded contracts.

Thus, in accordance with the legislation currently in force capacity in the STCN contracts is a characteristic of a subject of only two types of these contracts — for

supply with electrical and thermal energy. At the same time, the term used in the legislation in the sphere of electrical energy industry, and as it was shown above, even its wordings can be also extended to the relations arising in the process of supply through connected network of other resources — oil, petroleum products and cold water. So, the term "capacity of technical devices" or any other similar term could be respectively used with regard to juridical objects of all component parts of obligations under the STCN contracts.

It should be noted that the term "energy capacity" is applicable to the material object of energy supply contracts as well, but in this case as a quantitative and qualitative indicator of energy consumed by a recipient. The concept of legal relations under the STCN allows to reconcile the supporters of the above mentioned contrary views of the notion of energy capacity, since at the first stage of energy supply contracts capacity is their juridical object and takes the form of the activity of a supplying organization aimed at securing readiness of the equipment to generate and transfer the resources in a quantity and of a quality agreed upon in a contract with a consumer, whereas at the second stage of the contracts capacity is a quantitative and qualitative indicator of their material object — the electrical and thermal energy transferred to a consumer.

ELECTRICITY SECTOR REFORM: LEGAL ASPECTS AND INTERNATIONAL PRACTICE

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Abstract
The article analyses global trends aimed at reforming the energy sector, with an in-depth analysis of legal practice in different countries in the world.

Keywords: power supply, energy sector, tariffs for energy services.

Global trends in the development of law, economics, and social relations in different countries are aimed at reforming the energy sector. It is safe to say that if any country over the past 20-30 years has had no new "package" of legislation relating to energy, then most likely the state has ceased to exist. Anyway, the reform of the energy sector is a global process and affects all countries in the world. New ways of energy production, renewable energy sources, and non-hydrocarbons as the main source of energy production are just a few features of reforming.

The article tries to analyze and consider the peculiarities of power supply in various countries (by the example of electricity supply).

In most countries of the world, energy was viewed as a natural monopoly until the years 80-90 of XX century[1].

Tariffs for energy services were established, regulated and controlled by the state[2].

However, in conditions of higher prices for energy, hydrocarbon fuel, etc., this system showed its inconsistency (the state simply did not have time to react to

[1] P. G. Lakhno, Energiia, energetika i pravo // Energeticheskoe pravo [Energy, Power and Law // Energy Law]. 2012. No. 1 (6), p. 5.

[2] Mekhanizmy postreformennogo vosstanovleniia otechestvennoj elektroenergetiki [Mechanisms of Post-Reform Restoration of the National Electric Power Industry]. 2012 / Ushakov E. P.

changes in the market for supply and demand for energy resources, inefficiently modernized and introduced new generating capacities, etc.)[3].

As a result, at the end of the last century, the majority of foreign countries developed concepts and took the first steps to implement the structural reform of the electricity sector. Let us consider a few examples of the electricity regulation in different countries.

Great Britain

The main legislative acts in the field of energy supply are: Electricity Act 1989 (Electricity Act), Utilities Act 2000, Energy Acts 2004, 2008, 2010, 2013, 2016 (Energy Act), Law on Amending Climate Change Act 2008, European Union electricity legislation.

In general, it is the Department for Business, Energy and Industrial Strategy that monitors the implementation of the provisions of laws, compliance with the rules and policies of the state in the field of energy supply in the country. The Department controls more than 40 agencies and other public bodies, including the UK Office of Gas and Electricity Markets, *Ofgem*. So, *Ofgem* regulates monopolies in the electricity sector (National grid), controls the electricity and capacity markets, licenses companies engaged in the production, transmission, distribution and sale of electricity. *Ofgem* is a member of the European Agency for the Cooperation of Energy Regulators (ACER).

Law prohibits combining electricity transmission activities with production and sales activities[4]. Reforming of this sector in the UK began in 1983, i.e. 20 years earlier than the Federal Law "On Electric Power Industry" in the Russian Federation was adopted.

Since 1947, the UK electricity industry has been completely nationalized. A special regulatory body — the Central Electricity Generating Board (CEGB) -controlled the production, transmission, dispatching and marketing of electrical energy[5].

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[3] Pollitt M., Electricity Reform in Chile: Lessons for Developing Countries/ M. Pollitt; Massachusetts Institute of Technology; Center for Energy and Environmental Policy Research; A Joint Center of Department of Economics; Laboratory for Energy and the Environment; Sloan School of Management. Massachusetts: MIT. 2004. 42 p. [electronic resource] / Access mode: https://ideas.repec.org/p/cam/camdae/0448.html

[4] Sabirzyanov A. Ya., Opyt upravleniia strukturnoj modernizatsiej elektroenergeticheskogo kompleksa SSHA i Velikobritanii // Sovremennye problem i tendentsii razvitiia ekonomiki i upravleniia v XXI veke [Experience of Management of Structural Modernization of the Electric Power Complex of the USA and Great Britain // Modern Problems and Tendencies of Development of Economy and Management in the XXI century]. 2015. No. 1, p. 12

[5] *See:* https://www.np-sr.ru/ru/market/cominfo/foreign/index.htm

The Law on Energy was adopted in 1983. According to this Law, private generating companies got access to the energy market and received an opportunity of free access to national electric networks of independent electricity producers.

In 1988, the White Paper Privatizing Electricity was published, which provided for the separation of the subjects of the electric power industry into separate companies by a type of their activity, the elimination of vertical integration, the liberalization of generation, and the liberalization of the regional electricity distribution structure and retail energy supply.

In 1989, a new version of the Law on the Electric Power Industry was adopted, in accordance with which the Central Electricity Generating Board was divided into four companies, three of which (*National Power*, *Powergen*, *Nuclear Electric*) became independent generating companies and became private property. Network management activities were transferred from CEGB to the *National Grid Company* plc.

The Energy Law of 2013 initiated the reform of the electricity market, within which the capacity market was created, and contracts for difference (CfD is a long-term agreement protecting generators working on renewable energy sources from sudden price fluctuations in the pool) were entered into, and additional restrictions on emissions of harmful gases and a tax on coal were introduced.

The principles for the organization of the capacity market are established by the Energy Act in the 2013 edition, the Electricity Capacity Regulations of 2014 and the Capacity Market Rules. There are wholesale and retail electricity markets in the UK. The main market participants are the system operator, network companies, generating and/or sales companies. The system operator — *National Grid Electricity Transmission* plc (NGET) — performs operational dispatch control, balancing the system, and transmission of electricity through the backbone networks of the National Electricity Transmission System (NETS). Since April 2019, the system and network operator functions will be completely separated because of the creation of a new legal entity in the group of companies *National Grid — National Grid Electricity System Operator* (NGESO)[6].

Network companies and network owners are NGET (England, Wales), *Scottish Power Transmission* Ltd (South of Scotland), and *Scottish Hydro Electric Transmission* plc (north of Scotland and the islands).

To join the backbone network, the owner of generating equipment with a capacity of more than 100 MW submits an application and enters into an agreement with one

[6] https://www.np-sr.ru/ru/market/cominfo/foreign/index.htm

of the three grid companies, observing the Network Code, the Connection and Use of System Code and the Security and Quality of Supply Standards.

Fourteen distribution network operators are responsible for the distribution of electricity in certain geographic regions. They control independent distribution network operators responsible for smaller areas.

Wholesale trade in electricity is carried out mainly through bilateral contracts, which often depend on the spot market price, as well as through energy exchanges operating in the UK — *EPEX* and *Nordpool*[7]. *Electricity prices for retail trade are set directly by sales companies.*

Canada

Basic regulations: the Constitutional Act of 1867 on the division of powers in the field of energy regulation between the federal government and the provinces, Electricity and Gas Inspection Act of 1985, bylaws of the National Energy Council. The power industry is governed primarily by provincial legislation, with significant differences from each other[8]. Specialized agencies include the National Energy Board, Natural Resources Canada and Environment and Climate Change Canada. The competence of the National Energy Board includes regulating energy trade between the provinces and import / export of electricity.

In 2016, the total generating capacity of Canada reached 143 GW and more than half of the generation has historically been hydropower.

By 2050, Canada has scheduled the decommissioning of all coal generation. In this regard, the share of gas-fired TPPs is increasing, and all new coal generation must meet greenhouse gas emission standards comparable to emissions of new-generation gas stations; such stations must be equipped with CO2 storage.

Canada began reorganizing its electricity industry in 1990s, also with the purpose to participate in the North American wholesale electricity market. For most provinces, the restructuring of the industry was limited by a separation of an independent network company from state-owned vertically integrated companies to ensure non-discriminatory access to networks.

[7] Lavrikova Yu. G., Sovremennye problemy elektroenergetiki i puti ikh resheniia // Ekonomicheskie i sotsial'nye problemy: fakty, tendetsii, prognoz [Modern Problems of the Electric Power Industry and Possible Solutions // Economic and Social Problems: Facts, Trends, Forecast]. 2015. No. 3, p. 34.

[8] Vishnyakova A. S., Zarubezhnyj opyt reformirovaniia elektroenergetiki [Foreign Experience of Reforming the Electric Power Industry]. Monograph. M., 2011, p. 187.

Only in two provinces (Alberta and Ontario), electricity markets were liberalized. Alberta has fully liberalized markets while Ontario has a hybrid operating system. Alberta was the first to accomplish the total electricity market liberalization.

The electricity trading pool between the three existing vertically integrated companies was launched in 1996 after the adoption of the law on electricity. In 2000, an auction was held for power purchase arrangements, which retained the ownership and control of the stations for the operating energy companies, but part of the energy produced was given to new market participants for sale. The Alberta Electric System Operator (AESO) performs operational dispatch control of the system and organizes trading. Starting from 2021, it is planned to launch the capacity market and gradually decommission coal-fired plants, which produce 39% of the province's electricity.

Electric energy markets

Canada does not have a single focal point responsible for a balanced development of the electric power industry. The organizational structure of the electricity market depends on the provinces.

Only the province of Alberta has an organized competitive electricity market[9]. The province of Ontario has is a hybrid model of electricity markets (the wholesale electricity market is competitive, while in the retail market most of the electricity is sold through bilateral contracts). In other provinces, there are imperfect competition markets, meanwhile structural changes occur to create competitive energy markets.

In all the provinces, except for Alberta and Ontario, government regulates wholesale electricity market prices. In most provinces, production, transmission and selling of energy are carried out by vertically integrated state-owned companies and in most cases those companies are divided by a type of activity.

Although the energy system of Canada has close ties with the US power grid, the retail electricity markets are not integrated between the two countries. Planning for the development of distribution networks is carried out at the provincial level, inter-state lines — at the level of the federal government.

Electricity prices are set based on economically justified costs ("cost plus"). Prices differ in provinces due to the type of generating equipment and the form of electricity market organization.

[9] Ten A. L., Nekotorye osobennosti regulirovaniia tsen v otrasliakh estestvennykh monopolij [Some Features of Price Regulation in the Branches of Natural Monopolies] // Vestnik of Tomsk State University. 2012. No. 3, p. 5.

Since provincial authorities have more authority than federal authorities to regulate electricity markets, this leads to price differentiation due to costs associated with the type of organization of the electricity market and differences in tax rates between the provinces. In general, electricity prices in Canada are among the lowest in the world due to a high share of electricity generation at hydropower plants.

USA

Basic regulations: Federal Power Act 1935, Energy Policy Act 1992, Energy Policy Act 2005[10].

The main agency: US Department of Energy is developing a common energy policy, supervises the electric power industry and is responsible for the maintenance of power systems reliability, their economic sustainability, and environmental security. The Department is funding 17 research centers — national laboratories.

Independent regulator: The Federal Energy Regulatory Commission (Federal Energy Regulatory Commission, FERC) oversees compliance with energy standards, regulation of electricity trade between the states and the electricity transmission services, the regulation of prices in the wholesale electricity market, ensuring non-discriminatory access to electricity transmission, the establishment of mandatory requirements for the reliability of the network, ensuring the disclosure of information on the electricity markets, etc.[11].

Regulation of the electricity at the state level: the Public Service Commission, the official name and a set of powers of which are different. The competence of regional authorities includes, as a rule, regulation of retail trade within the state and distribution of electricity.

The North American Reliability Corporation (North American Electric Reliability Corporation, NERC) is a self-regulating non-profit organization, which includes representatives from all areas of industry: energy companies, government agencies, and consumers. The main functions of NERC include the development, coordination and monitoring of compliance with the standards of reliability of the power system, monitoring and analysis of problems related to reliability. Reliability standards are mandatory for subjects of the industry, for their violation NERC can impose a fine of up to $ 1 million per day.

[10] https://www.np-sr.ru/ru/market/cominfo/foreign/index.htm

[11] Report of the Federal State Statistics Service "Planning of the Ministry of Energy of Russia for 2010-2012" / M.: Ministry of Energy of Russia. 2012, p. 32.

In the 1930-1980s, the power industry in the United States was a regulated monopoly. Vertically integrated utilities possess generating and network assets, and the production, transmission and distribution of electricity were combined into a single service — the supply of electricity to consumers at tariffs.

The large-scale construction by public utilities facilities, such as nuclear power plants, on the background of the economic downturn in the US economy and the reduction of electricity consumption in the 1970s led to an increase in electricity tariffs, which caused concern and consumer protests.

In order to improve energy efficiency, as well as to ensure energy security, the Law on the Regulation of Public Utility Companies (PURPA) was adopted in 1978, providing for the emergence of a new category of electricity producers — "qualified power plants" (power plants with an installed capacity of less than 50 MW) using cogeneration technologies and renewables. Utilities have obliged to purchase electricity from "qualified power plants" at a price equal to its own costs for the production of electricity. In 1992, the Law on Energy Policy was adopted, which introduced the division of activities into natural monopoly (electricity transmission and operational dispatch management) and potentially competitive (generation, electricity sales, repair and service) and non-discriminatory access to electricity transmission services[12].

Pursuant to the Law, in 1996, the NERC issued Order No. 888 on the development of competition among wholesalers of electricity by providing utility companies with non-discriminatory access to electricity transmission services and Order No. 889 on the creation of an electronic system for providing information on the available transmission capacity of the transmission system. NERC Order No. 888 established the possibility of transfer by utility energy companies through network management to independent system operators (Independent System Operator, ISO).

NERC Order No. 2000 established a possibility to create a Regional Energy Transmission Companies (Regional Transmission Organization, RTO) to manage the backbone networks of large regions in the United States and Canada and the 12 requirements that a company must meet in order to become an RTO.

The Energy Policy Act 2005 gave the NERC broad powers to adopt regulations to prevent manipulation on wholesale electricity markets, to determine the size of fines for violating electricity standards, to monitor compliance with reliability standards.

[12] Velyaminov G. M., International Law: Experiments // Statute. 2015, p. 145.

Electricity markets

At present, 3,302 energy companies (2,012 companies with state participation, 187 private companies, 876 cooperatives, 218 marketers, 9 federal energy companies) operate in the USA in the electric power industry.

The development of competition in the power industry has led to the displacement of pricing based on costs by market pricing, providing for the formation of the price of electricity based on supply and demand.

Spreading of market pricing developed 10 wholesale electricity markets in the USA: California (CAISO), Midwest (MISO), New England (ISO-NE), New York (NYISO), Northwest, PJM, Southeast, Southwest, SPP, Texas (ERCOT). These markets vary significantly in geography (several neighboring states or within the state), structure, standards and trading mechanisms, participants and other indicators[13].

It is possible to highlight the general trends and goals of reforming the power supply industry in different countries:

One of the primary goals is to increase the efficiency of the energy systems as a result of the separation of monopolies with the separation of competing companies (Scandinavian countries, Chile, etc.) and / or granting the right to admit new participants to the industry — independent power producers.

In the sphere of state regulation, it is possible to identify goals related to the development of antimonopoly legislation, ensuring non-discriminatory access of competing participants to the infrastructure of electricity markets. In addition, the tightening of the requirements of environmental legislation required accelerated modernization of energy facilities.

In the Russian Federation, the restructuring of the electric power industry is also underway. Recently, there has been an internationalization of national legislation based on several methods, namely, reception, harmonization and unification.

Today, the reception of foreign regulations by the Russian legislation takes an active place. However, the harmonization and unification of the law have so far played a less significant role in the internationalization of the national legal system. In our opinion, it happened due to the fact that Russia is not a party to international agreements in the electricity energy sector, which could have a sufficiently large impact on the development of Russian energy law.

[13] https://www.np-sr.ru/ru/market/cominfo/foreign/index.htm

UNIFICATION OF PROCEDURAL LAW IN RUSSIA

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Abstract
The article focuses on a new notion — a civilistic process as a combination of civil and arbitration proceedings. Mutual changes take place not only in court proceedings but also in the court structure. The author makes an analysis of trends leading to the unification of procedural law in Russia.

Keywords: arbitration proceedings, administrative proceedings, unification of procedural law.

In accordance with Article 118 (2) of the Constitution of the Russian Federation, "judicial power is exercised by means of constitutional, civil, administrative and criminal proceedings". Legal regulation of the four types (methods) of proceedings is different. Federal Constitutional Law (FCL) No. 1-FZ of July 21, 1994 "On the Constitutional Court of the Russian Federation" regulates both the creation and organization of the said court as well as proceedings. The Criminal Procedure Code of the Russian Federation regulates the activity of courts of general jurisdiction dealing with criminal cases as well as the activity of preliminary investigation organs. Civil proceedings are regulated by two procedural codes: the Civil Procedure Code and the Arbitration Procedure Code of the Russian Federation. The existence of arbitration proceedings not directly provided for by Article 118 of the RF Constitution has contributed to the development of a new notion — a civilistic process as a combination of civil and arbitration proceedings.

The process of settling administrative cases (administrative proceedings) is regulated by three codes:

— cases arising from public relations within the competence of arbitration courts are tried under the rules of the RF Arbitration Procedure Code. Also, such rules are applied in trying civil cases, cases subject to special proceedings, etc.;

— cases arising from public relations within the competence of courts of general jurisdiction are tried either under the rules determined by the RF Code of Administrative Court Procedure or under the rules of the RF Code of Administrative Offences in case of administrative liability.

It has taken much time for the Russian law to develop so many procedural branches of law. In the times of Peter the Great, there was no division into civil and criminal procedure. The great judicial reform of 1864 in Russia not only made the proceedings adversarial instead of inquisitorial[1], but also contributed to further division of the process into civil and criminal.

For many years, Russia used to have only two procedural branches of law: civil procedure and criminal procedure law. In 1992, when arbitration courts were first established, it led to the adoption of the Arbitration Procedure Code and, consequently, to the development of arbitration procedure law. Within 10 years, there were three arbitration procedure codes adopted. If its version of 1992 practically copied the content, the structure and concepts of the Civil Procedure Code, its later version of 2002 was a real breakthrough in the development of adversarial proceedings.

At the same time, both the Civil Procedure Code and Arbitration Procedure Code distinguished such a type as proceedings in cases arising from administrative and other public relations. As for the Arbitration Procedure Code, the situation has not changed so far. But in case of the Civil Procedure Code the situation changed in 2015 when the Code of Administrative Court Procedure was adopted, with different cases from public law relations — to be precise, most cases included into the Code of Administrative Court Procedure arose from administrative or other relations, except for cases with administrative liability. But not only. The Administrative Court Procedure also included cases on compensation for the violation of the right to trial, within reasonable time or the violation of the right to the writ execution within reasonable time, and also some cases which earlier were subject to special proceedings: compulsory hospitalization of a citizen into a psychiatric facility or extending the period of compulsory hospitalization of a citizen with mental disorder.

At the same time, starting with 2002, courts of general jurisdiction have been trying cases on administrative liability not under the rules of the Civil Procedure Code (let us remember that the said cases used to be tried as cases arising from

[1] *See:* Reshetnikova I. V., Dokazatel'stvennoe pravo Anglii i SSHA [Law of Evidence in England and US]. 2nd edition. M., Gorodets. 1999.

public law relations under the rules of the Civil Procedure Code of the RSFSR), but under the rules of the Code of Administrative Offenses.

We can say that by 2019 a relatively short period of differentiation of the procedural form and procedural branches of law has been over[2], though this period has also been characterized by latent unification. For example, such a type of a case review as a review due to newly discovered or new circumstances has been equally regulated both by the Civil Procedure Code and the Arbitration Procedure Code; now we have an exchange of pleadings, discovery of evidence; the Arbitration Procedure Code has introduced its private definition, etc. After the elimination of the Supreme Arbitration Court of the Russian Federation (in August 2014), both Codes have been mutually complemented: the Arbitration Procedure Code has introduced writ proceedings, unmotivated decisions in summary proceedings, while the Civil Procedure Code has introduced summary proceedings, etc.

In the end of 2018, the RF Supreme Court presented a bill to the State Duma which was called 'procedural revolution' and which caused a mixed reaction (not always positive) among scholars. In almost a year, on November 28, 2018, Federal Law No. 451-FZ of November 28, 2018 "On Introducing Amendments to Separate Legislative Acts of the Russian Federation" was adopted. It signaled a new epoch of unification and approximation of three types of procedure: civil, administrative and arbitration.

Unification of procedural branches of law is possible on its objective ground: all procedural branches of law are homogeneous. This feature is accounted for by the fact that they all have the same subject of legal regulation, i.e. a relevant type of procedure (civil, arbitration or administrative), the same method of legal regulation (an imperative and dispositive method) and also a huge number of inter-branch principles of justice (justice administered only by courts, independence of judges and their subordination to law, transparency of court proceedings, etc.). Therefore, the civil procedure law, administrative procedure and arbitration procedure law have so many inter-branch legal institutions in their general and specific parts. It is easier to name specific rather than inter-branch institutions. Specific branch institutions can include special features of considering separate categories of cases.

Unification of procedural law at present has two major trends:

[2] *See:* Gromoshina N. A., Differentsiatsiia, unifikatsiia i uproschenie v grazhdanskom sudoproizvodstve [Differentiation, Unification and Simplification in Civil Proceedings], M., Prospekt, 2010.

The first trend is **the process of mutual exchange** — a successful legal regulation accepted by other procedural branches of law. In 2002, an attempt to introduce professional representation in the Arbitration Procedure Code and the Civil Procedure Code failed[3]. In 13 years, the attempt was repeated in the Code of Administrative Court Procedure, but this time it was successful. Some time later, relevant changes were made in the Arbitration Procedure Code and the Civil Procedure Code (Federal Law No. 451-FZ). Similar changes included, for example, the expansion of prejudicial effect of judicial acts in criminal cases, etc. After the decision to establish appellate and cassation courts of general jurisdiction was made, a new procedure for cassation review of judicial acts was developed based on the experience of arbitration courts. Before cassation courts of general jurisdiction began performing their work, the functions of cassation review were exercised by presidiums of courts of general jurisdiction in the subjects of the Russian Federation. After their creation, cassation courts will follow the procedure similar to cassation in district arbitration courts. First, cassation will have a comprehensive character — all claims will have to be considered and that will significantly increase the total overload of seven cassation courts. Second, appeal in cassation is acceptable if complied with the consistent procedure of appeal (the rule deeply rooted in arbitration proceedings). Third, review of judicial acts in cassation will be conducted within the scope of argumentation of claims. Fourth, it is obvious that judicial chambers of the RF Supreme Court will perform functions of second cassation, as, for example, now the Judicial Chamber for Economic Disputes.

The Arbitration Procedure Code has borrowed from the Civil Procedure Code such rules which concern the disqualification of a judge solely trying the case; the necessity to prepare the declaratory part of the judicial decision when making an appeal against the unmotivated court decision, etc. These are just a few examples of mutual exchange of provisions between the Codes. Besides, the very possibility to draw an analogy in procedural law makes it possible to further develop law enforcement activity.

Such mutual changes take place not only in court proceedings but also in the court structure. Thus, the establishment of appellate and cassation courts of general jurisdiction is based on the experience of establishing similar arbitration courts.

[3] Federal Law No. 25-FZ of March 31, 2005 declared these provisions ineffective.

The second trend of unification and its higher level is connected with the **creation of new legal mechanisms** which, for example, may include the refusal to admit cases stipulated in Federal Law No. 451-FZ. You can also see changes in the grounds for refusal to admit claims, some changes in the termination of proceedings in case, there is a possibility to commit a case to another court based on its competence.

Traditionally, jurisdiction of a court over certain cases makes it necessary to allocate cases between different courts. So, civil cases with involvement of citizens were as usual tried by courts of general jurisdiction. If a case involved entrepreneurs or legal entities, such cases were tried by arbitration courts. The legislator provided for some exceptions from general principles of allocating cases. The elimination of the RF Supreme Arbitration Court and marriage of arbitration courts and courts of general jurisdiction under the guidance of the Supreme Court of the Russian Federation became objective grounds to refuse to admit cases.

Since there is no jurisdiction over cases, then it becomes possible to transfer a case from one type of courts to another, thus intensifying the proceedings and providing better access to justice[4].

Making a change in procedural legislation is like throwing a stone into water: however small, it will still make ripples on water. The same is with procedural legislation: if there is no jurisdiction over cases, then we should reconsider many interconnected procedural norms and even institutions.

Traditionally, jurisdiction over cases was considered as a prerequisite for the right to claim, the lack of which made the judicial protection of rights impossible. Inadmissibility to hear a case was an insurmountable barrier to the access to justice. There were also some conditions for bringing an action the violation of which would lead to irreversible consequences: after their elimination, the case is tried by court. For example, a condition for bringing an action is jurisdiction of a court over a specific type of cases. If a case is not within the jurisdiction of this court, then you should go to such a court, which tries such cases.

As a rule, when accepting a claim, the court established lack of jurisdiction over such claims, it had to refuse to admit such a claim; if such a claim was admitted, but the court had no jurisdiction over such claims, the proceedings had to be terminated.

[4] In 2002, Federal Law No. 96-FZ of July 24, 2002 "On Enforcement of the RF Arbitration Procedure Code" contained a temporary provision concerning the transfer of cases in which law changed their jurisdiction: corporate disputes tried at that time by district courts were transferred from courts of general jurisdiction to arbitration courts.

Refusal from jurisdiction (Federal Law No. 451-FZ) changed the ground to refuse to admit a claim: "If a claim or an application are to be tried in constitutional or criminal proceedings or are not to be tried by courts", an arbitration court or a court of general jurisdiction refuses to admit such an application for proceedings (Article 127-1 (1) (1) of the Arbitration Procedure Code, Article 134 (1) (1) of the Civil Procedure Code). At present, the legislator uses the term 'court' encompassing courts of general jurisdiction and arbitration courts. As for courts of general jurisdiction, there is an additional clarification: "An application shall be tried in constitutional or criminal proceedings, *proceedings on administrative offences* or is not subject to be tried by a court".

In the said cases, there is no prerequisite to the right to claim, therefore an arbitration court or a court of general jurisdiction refuses to accept the claim for proceedings.

An important consequence of the refusal to admit cases was a rule on committing cases from one type of courts into another type similar to the principle of jurisdiction of cases. If during the proceedings in an arbitration court it becomes clear that it is to be tried by a court of general jurisdiction, the arbitration court shall transfer the case to the court of general jurisdiction. Since the system of arbitration courts is different from the system of courts of general jurisdiction (in first instance), the arbitration court shall direct the case to a relevant stage in the system of courts of general jurisdiction: the Supreme Court of a Republic, a krai court, a regional court, a court of a city of federal significance, a court of an autonomous oblast or a court of autonomous okrug of the same subject of the Russian Federation. The relevant court of general jurisdiction sends a case to a court of general jurisdiction to which competence the case refers (Article 39 (4) of the Arbitration Procedure Code).

It should be noted that the application concerning lack of jurisdiction (but not the competence of the court) must be made in the court of first instance. An arbitration court registers the transfer of the case under competence by its ruling, which can be appealed against in an arbitration court of appellate instance within 10 days after passing this ruling.

Legislatively, the transfer of a case under competence is regulated by the rule of indisputability of jurisdiction. A case transferred from one arbitration court to another arbitration court or from an arbitration court to a court of general jurisdiction shall be admitted by the court where it was directed. Disputes on jurisdiction over

cases by courts in the Russian Federation are not allowed (Article 39 (6) of the Arbitration Procedure Code).

If at the stage of appeal or cassation there are doubts whether the case can be tried by an arbitration court, the court shall apply Article 150 (1) (1) of the Arbitration Procedure Code terminating the proceedings in case: the claim or the application shall be tried in constitutional or criminal proceedings or shall not be tried by courts, i.e. by courts of general jurisdiction and by arbitration courts.

It is difficult to say whether such unification of procedural law will lead to the adoption of the unified Civil Procedure Code or all the procedural codes will be retained, however, it is clear that the process of unification is gaining momentum.

OVERVIEW OF THE RUSSIAN COURTS AWARDS CONCERNING PROTECTION OF LEGAL ENTITIES' BUSINESS REPUTATION

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Abstract
The author of the paper proves that business entities' reputational damages as a result of the dissemination of false and defamatory information influence company's contractors and consumers in a negative way and entail losses from the injured party. The article examines the connection of defamation committed against a member of a board of directors or an employee of a legal entity with business reputation of the organization. It is argued that a corporation shall prove that there is a link between the director or an employee with itself in order to claim damages from the person who damages the director's or employee's reputation.

Keywords: business reputation, defamation, legal entity, commercial name, non-pecuniary damage.

Damage of business reputation of a legal entity leads to a situation when a company can face with decreasing of its gains and problems with its contractors. Consequently, a violation of the corporation's goodwill leads to loses. In Russian law it is very difficult to accurately calculate the amount of compensation for reputation damages, moreover it is still unclear how to determine reasons for accepting a claim and making a decision.

Today Russian courts mostly support a position of the Supreme Arbitration Court[1], which constitutes that the recovery of damage to the business reputation of an organization is limited by the amount of damages proved. The Eighteenth Arbitration Court of Appeal[2] noted: to confirm the damages caused by defamation of

[1] Award of the Russian Federation Supreme Arbitration Court Presidium of July 17, 2012 No. 17528/11 URL: http://arbitr.ru/bras.net/f.aspx?id_casedoc=1_1_d43eb84b-ff5a-40f9-b6ff-919606297723

[2] Award of the Eighteenth Arbitration Court of Appeal of June 15, 2015 No. 18AP-5676/2015. Case No. A76-20440/2014

business reputation, the claimant shall prove the fact that the company has a business reputation, its business reputation has a value, there is reduction in the number contractors and clients of the company and there is a loss of their trust to the company. Identifying a link between the respondent's actions and the occurrence of adverse consequences on the claimant's side, the court took into account the real possibility of the influence of the respondent's actions on the contractor's opinion about the claimant. Such influence can be proved, for example, by raising a number of the counterparties' claim letters or by the termination of the contract when contractors link their unwell to cooperate directly with the fact of negative information.[3] In our view, all the obstacles named above are difficult to prove.

One of the conditions for satisfying a claim on the protection of business reputation of any person is the proof of the defamatory nature of the information and the fact of its dissemination. This raises a question whether damaging of the reputation of a person who is connected with an organization affects its reputation.

According to Article 64 (1) of Federal Law No.208-FZ "On Joint-Stock Companies" of December 26, 1995, the board of directors of a company performs general management of the company's activities, except for resolving matters that fall within the competence of the general meeting of shareholders under this Federal Law. So, in Russia the board of directors of a joint stock company should be considered as a joint stock company's collegial, elective, body, which is forming and at the same time expressing the will of the company. It includes only individuals who perform managerial and control functions. All these individuals have an equivalent number of votes, rights and duties. Thus, every member of the board of directors directly affects the decisions taken by the company and is associated with it. For example, the Sixth Arbitration Court of Appeal[4] decided that information relating to the company's management might be considered as information about the whole enterprise, even if the persons mentioned in the information remain unnamed, while their involvement in the company operations is clearly indicated. In this regard, we can conclude that the business reputation of a board of directors' member is closely related to the business reputation of the organization and its infringement is a violation of the

[3] Award of the Nineteenth Arbitration Court of Appeal of April 21, 2016 No. 19AP-1296/2016. Case No. A08-7996/2015

[4] Award of the Sixth Arbitration Court of Appeal of January 28, 2016 No. 06A-3385/2015. Case No. A73-14368/2014

organization's rights. The same we can say about reputation of the company's manager.[5]

The next question is whether the damage of a company employee's reputation affects the reputation of the business entity. It is clear that employees are not official representatives of a company. Moreover, they do not have and cannot have their own business reputation due to the fact that they work in the interests of the company and all their actions are coordinated by the owner of the company and the labor agreement concluded in accordance with the Russian Labor Code.

It is clear that the information that the organization's employees do not have necessary skills or experience and the work, which they do, is of a poor quality, can repel potential contractors and consumers and reduce the amount of profit. Therefore, information about actions of employees is deemed as information about the company only when there is a strong link between the claimant and the facts described in media concerning its work.[6] As the Russian Intellectual Property Court notes, if the offender distributes false and defamatory information on the issue how employees of the organization perform their labor duties, then it affects the business reputation of the legal entity, if this information proves a link between the actions of employees and the corporation. Otherwise, the claim shall be rejected.

It should be noted that if individuals take a position in the board of directors in different companies or work as employee in several legal entities, and if it is not possible to understand from the nature of the false information with which company such a person is connected, it seems that Russian courts will unable to confirm damage to the company's reputation. However, if we are talking about a person who controls several legal entities, and all the organizations are under his control, these companies will have all chances to bring their claims successfully.

Corporations own trademarks that are highly associated with them, therefore whether the defamation concerning a trademark affects the business reputation of an organization should be analyzed.

According to Article 1477 of the Civil Code of the Russian Federation, a trademark serves to individualize goods of legal entities, and a service mark serves to individualize their work performed and services rendered by legal entities. The trademark has a

[5] Award of the Ural District Federal Arbitration Court of June 22, 2011 No. F09-3347/11-C6. Case No. A60-32756/2010-C7.

[6] Award of the Intellectual Property Court of July 22, 2016 No. C01-377/2016. Case No. A40-128923/2015

great importance for consumers, while information about the organization that possesses it is sometimes unknown.

Therefore, dissemination of discrediting information about a trademark (service mark), goods (services and works) produced with its use creates a negative attitude of contractors and consumers to the trademark (service mark). This, such a situation can lead to losses of the owner of the trademark (service mark).

Paragraph 14 of the Russian Supreme Court Review of the courts practice[7] points out that the dissemination of false information about the trademark under which the claimant's products are made detracts from the claimant's business reputation, although the claimant was not named in the publication. At the same time, the Supreme Court of the Russian Federation disregarded the possibility of damage to business reputation through the dissemination of negative information about the commercial name. Therefore, it seems important to consider this issue.

According to Article 1538 (1) of the RF Civil Code, legal entities conducting business activity (including noncommercial organizations to which the right to conduct the activity concerned has been granted in accordance with provisions of their charter documents) and also individual entrepreneurs for individualization of trade, industrial and other enterprises belonging to them have the right to use commercial names that do not constitute trade names and are subject to obligatory inclusion neither in the charter documents nor in the Single State Register of Legal Entities. Therefore, a legal entity has an inextricable link with its commercial name and it is obvious that consumers, having negative information about the enterprise (in particular, a café or a shop), will not use the services that are provided on its territory. Such a situation would entail losses.

Meanwhile, there is a question how to prove that a claimant possess a commercial name. The Arbitration Court of the Moscow District[8] in one of the cases says that the claimant's possession of the commercial name is proved by the lease agreement and an extract from the *Rospotrebnadzor* Registry of Notifications. Consequently, a commercial name belongs to a legal entity, if the enterprise that uses it in its activities is owned by the corporation.

[7] Review of the courts' practice of hearing cases on the protection of honor, dignity and business reputation. URL:http://www.supcourt.ru/Show_pdf.php?Id=10733

[8] Award of the Moscow District Arbitration Court of May 10, 2016 No. F05-4518/2016. Case No. A40-41652/2015

Thus, false information about a legal entity is considered to be disseminated when it concerns its employees, members of its governing bodies or a trademark and the content of this information should demonstrate a link between the organization and the person mentioned in media.

It is important to answer a question: how to determine the amount of compensation for defamation? Russian courts point out the following criteria: the nature and content of the publication, the degree of false information dissemination, proportionality of the amount of compensation to non-pecuniary damage, the inadmissibility of infringement of media freedom.[9] Moreover, the court shall take into consideration a balance of interests between the claimant and the respondent, the behavior of the aggrieved party, and the property status of the respondent. It is obvious that all named criteria are not clear enough and the court may adopt a very controversial decision. It is interesting to note that the courts do not take into account the number of phrases containing damaging information, indicating that the number of false and defamatory statements does not matter because it is impossible to establish which of the statements will cause more harm to the reputation. Such an approach conflicts with the principle of justice specified in Article 1101 of the RF Civil Code and shows the need to develop more definite criteria that would correspond to the essence of reputational damages. One more controversial moment is that while determining the amount of compensation for defamation damages Russian courts apply Article 1099 (3) of the RF Civil Code. This means that the amount of compensation does not depend on the company's real loses,[10] and the court decides by itself on the amount the respondent shall pay.

Thus, Russian courts use rules, which are applied to the compensation for moral harm of individuals while determining the amount of compensation for reputational damage. Therefore, the criteria they apply do not take into account that the business reputation of an organization has, above all, monetary value.

[9] Award of the Eighteenth Arbitration Court of Appeal of November 10, 2014 No. 18AP-11959/2014. Case No. A07-801/2014

[10] Award of the Federal Arbitral Court of the Volga-Vyatka District of June 11, 2008. Case No. A79-5084/2007

APPLICABLE ENGLISH LAW IN THE JURISDICTION OF RUSSIAN ARBITRATION COURTS

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Abstract
The article examines several controversial issues concerning application of English law by Russian arbitration courts. The article focuses on the institutions of the limitation period and undue influence. Besides, the author gives examples of cases when parties enter into contracts, the provisions of which are aimed at limiting or exempting the debtor from liability if the debtor fails to comply with contractual obligations.

Keywords: English law, contractual provisions on its appliance, cases of applying English law in the jurisdiction of arbitration courts.

The practice of arbitration courts knows rare cases when the parties to a contract choose English law to be applied to their rights and obligations under this contract. We would like to refer to some illustrative examples:

1. Jurisdiction of which country concerning the limitation period shall a Russian court apply when dealing with a claim based on English contract law? Will the outcome be different if the Russian court establishes that rules on the limitation period of England are procedural rules?

Considering the claims of the Royal Bank of Scotland to some Russian debtor companies on recovery of debts against a loan or an English law indemnity contract, the arbitration court of the first instance satisfied its claims. In their appeals the respondents stated that the court should have applied the Russian term of the limitation period (but not the English one), because the limitation period in England is an institute of procedural law.

Under Article 1210 (1) of the Civil Code of the Russian Federation (further the RF Civil Code), when entering into a contract or at a later date, parties to a contract are

free to agree upon the law to be applied to their rights and obligations under the contract. Article 1215 of the RF Civil Code contains a non-exhaustive list of issues to be regulated by the contract statute. Under Article 1208 of the RF Civil Code, the limitation period also refers to the sphere of law application; the limitation period is determined under the law of a country to be applied to the corresponding relation.[1] This conflict of laws rule determines the rules of establishing the limitation period, its beginning, interruption, suspension, restoration.

Thus, considering a claim based on an English law contract, the Russian court shall apply the English law provisions concerning the limitation period. Such an approach of the Russian legislator stipulated by Article 1208 of the RF Civil Code fully complies with the world trend taking into account practical considerations and the fact that issues concerning the limitation period do arise in particular civil relations.

For example, under Article 12 (1)(d) of Regulation No. 593/2008 of the European Parliament and EU Council "On the Law Applied to Contractual Obligations" (adopted in Strasbourg on June 17, 2008), the law applied to a contract shall regulate different issues, including the limitation period and loss of the right due to the expiration of the time period[2].

The answer to the question shall not change if the Russian court determines that English provisions concerning the limitation period are procedural rules (though under the general rule, Russian courts do not apply rules of foreign proceedings). However, it is important to underline that historically English common law does not have a typical division into public and private law. Neither does it have any division into branches of law due to two factors. The **first factor** is that all courts have general jurisdiction and can try different categories of cases concerning both public and private law. The **second factor** is that England does not have any branch codes, making the English lawyer think that law is homogeneous. Any rule of conduct contained in legislation, judicial precedents and customs is a legal norm[3].

[1] A prevailing opinion in the Russian doctrine is that due to the imperative character of Article 1208 of the RF Civil Code the parties to a contract cannot choose law to be applied to the limitation period separately from the law to be applied to the essence of the contract (for example, Commentaries to the Civil Code of the Russian Federation: in 3rd v. / under the editorship of T. E. Abova, M. M. Boguslavsky, A.G. Svetlanova. V.3. Commentaries to the Civil Code of the Russian Federation, part 3, p. 388).

[2] Legal Reference System *ConsultantPlus*.

[3] Belykh V. S., Dogovornoe pravo Anglii: sravnitel'no-pravovoe issledovanie: monografiia [Contract Law of England: a Law Comparative Research: Monograph] M., 2018, p. 12, p.15.

The national legal doctrine has long established the opinion that "…foreign qualification of the limitation period as an institution of procedural law does not prevent our court or arbitration from applying the limitation period under the relevant foreign legislation"[4], "norms on the limitation period are to be applied regardless of the fact whether such norms are considered norms of procedural or substantive law in the relevant state"[5]. Moreover, the Russian legislator is of the same opinion.

Clear provisions of Article 1208 of the RF Civil Code concerning the law of a state to be applied to a certain relation are designed to overcome a possible conflict connected with the fact whether the limitation period is related to procedural or substantive law in different legal systems. **Consequently**, under the provisions of Article 1208 of the RF Civil Code, the procedural or substantive character of foreign law norms concerning the limitation period does not matter for the Russian court since such norms shall be applied any way.

Besides, Article 1208 of the RF Civil Code is interconnected with Article 1187 (1) of the RF Civil Code; under the latter, in determining the law to be applied the Russian court interprets legal concepts in accordance with the Russian law if not stated otherwise by law. It means that the concept of the "limitation period" shall be interpreted by the Russian court as a substantive law notion because it is most often understood as such in the Russian law[6]. From the viewpoint of substantive law, the limitation period is an institution of civil law, i.e. a separate body (group) of legal norms designed to regulate relatively independent public relations within a certain branch of law[7]. In accordance with Article 195 of the RF Civil Code, the limitation period is a period of time within which a person whose rights have been violated can protect their rights. Indeed, the institution of the limitation period has not only

[4] Lunts L. A., Kurs mezhdunarodnogo chastnogo prava. Obschaia chast'. [A Course of International Private Law. General Part]. M., 1973. P. 303.

[5] Boguslavsky M. M., Mezhdunarodnoe chastnoe pravo: praktikum [International Private Law: Manual]. M., 1999, p. 29.

[6] *See,* for example, Novitskij I. B., Lunts L. A., Obschee uchenie ob obiazatel'stve [General Theory on Obligation] M., Gosurizdat, 1950, p. 70; Novitskij I. B., Sdelki. Iskovaia davnost' [Transactions. Limitation Period] M., Gosurizdat, 1959, pp. 223 — 231; Cherepakhin B. B., Spornye voprosy poniatiia i dejstviia iskovoj davnosti // Sovetskoe gosudarstvo i pravo [Controversial Issues of the Concept and Application of the Limitation Period // Soviet State and Law] 1957. No. 7, p. 67; Kirillova M. Ya., Iskovaiia davnost' [Limitation Period] M., 1966, p. 26.

[7] Yakushev V. S., O poniatii pravovogo instituta [On the Concept of a Legal Institution] // Pravovedenie. 1970. No.6, p. 67.

substantive but also procedural importance. However, we agree with the opinion that there is no point in continuing long discussions concerning the right to sue substantively or procedurally. "An action is a category of civil procedural law. Thus, a substantive law institution does not need any other term referring it another branch of law"[8]. The link between the limitation period and the action is obvious but not absolute.

Another example for comparison: a remedy and an action. A remedy is a category of substantive (civil) law. We should distinguish a remedy and a procedural form. For example, a popular remedy is a restoration of a situation existing before the violation of the right (vindication). On the other hand, such a procedural form as a vindicatory action is often used in both literature and practice. Therefore, we cannot equal such notions as "a vindicatory action" and "vindication as a means of protecting civil rights"[9].

Finally, it should be noted that applicable norms of international agreements entered into by the Russian Federation concerning the limitation period prevail over the norms of Article 1208 of the RF Civil Code. An example of such norms is Article 11 (i) of the Kiev Agreement of March 20, 1992 "On the Procedure of Settling Disputes Connected with Economic Activity" and Article 43 of the Minsk Convention of January 22, 1993 "On the Remedy and Legal Relations in Civil, Family and Criminal Cases" (though in fact they are practically identical in their meaning with Article 128 of the RF Civil Code) — controversial issues concerning the limitation period are to be settled in accordance with the legislation of a state to be applied to a certain type of relations. It is logical!

A few words about the Limitation Act 1980. The Law establishes different periods of limitation depending on the nature of a violation and the subject of the action. The longest period is 12 years (in particular, it is established in claims to restore the right to land) and the minimum period is one year. And only in one case the Law (Article 21) does not limit the right to bring an action by any period of time. It is a fraudulent violation of trust.

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[8] Schennikova L. V., O material'no-pravovom institute iskovoj (pogasitel'noj) davnosti i grazhdansko-protsessual'nom prave na isk [On the Substantive Law Institution of the Limitation (Negative Prescription) and the Right to Sue in Civil Procedure] // Legal Reference System *ConsultantPlus*.

[9] Belykh V. S., Pravovoe regulirovanie predprinimatel'skoj deiatel'nosti v Rossii: monografiia [Legal Regulation of Entrepreneurial Activity in Russia: Monograph] M., 2005. P. 380.

In English law and theory, the construction of an unenforceable contract is significantly different from that in the Russian doctrine. Such a contract is of a substantive nature; however, it is impossible to bring an action on its ground. Cheshire and Fifoot state, "Undoubtedly, an unenforceable contract is more of a procedural rather than substantive law nature"[10]. In their opinion, the source of such a discrepancy is in the adoption of the Statute of Frauds 1677, therefore they had to analyze the legal history of the Statute and judicial practice.

Taking into account the said peculiarities of the unenforceable contract, the English doctrine and judicial practice allow for a possibility to apply non-judicial remedies by the aggrieved party. Thus, if a claim under which the limitation period expired is secured by a pledge or lien, the creditor is entitled to satisfy their claim from the pledged property or goods regardless of the expiration of the limitation period[11]. Noteworthy is the recognition of a substantive claim after the expiration of the limitation period, especially in cases of inherited property. The executor can satisfy any liability of the property owner from their inherited property under which the limitation period expired. Moreover, it is possible even in those cases when the amount of inherited property is not enough to cover all the liabilities of the property owner.

Thus, an unenforceable contract does not cease upon the expiration of the limitation period as well as in other cases when a claim form is not applicable. Moreover, such a contract cannot be recognized *unenforceable*. A person whose subjective (substantive) right is violated is deprived of the procedural right to a legal remedy. Unlike the continental legal system, the English law does not have an institution to restore the missed limitation period. So, under Article 5 of the Limitation Act, an action arising from a simple contract cannot be brought if six years after such a right to sue occurred has expired[12]. Another example: under Article 2 of the Law, there is a similar rule concerning a claim arising from damages.

2. Arbitration practice has faced a problem of differentiating the English concept "undue influence" and the Russian concept "abuse of right". Sometimes these terms are treated as identical, though there is a significant difference between them which we will consider below.

[10] *See:* Cheshire, Fifoot & Furmston's. Op. cit. P. 206.
[11] More detailed in: Khalfin R. O. Ibid. Pp. 112–121.
[12] *See:* Core Statute on Company Law/ by Cowan Ervine. New York, 2008, pp. 83–98.

In short, undue influence is cases of moral duress, inexperience or lack of knowledge of a counterparty, superstition or helpless state. Very often cases of fraud and direct blackmail are also considered as undue influence. For example, in *Williams v. Bayley* 1866, the bank owners compelled the head of the family to give them their mortgage on property threatening the father to initiate criminal proceedings against his son. As a result, the contract was considered unenforceable because of undue influence[13].

As we see, undue influence is a rather broad and vague concept, therefore in practice, while making a decision courts often take into account factual circumstances of a case. Thus, the presumption of undue influence is challenged if the party benefitting from the deal proves free expression of the will. The best way to prove it is to demonstrate that the party received independent advice (recommendation) before concluding the deal. The advice should be competent and based on relevant facts. An independent advisor was to approve the deal, and therefore the party followed his advice[14]. A similar rule is applied even when the solicitor buys something from the client or sells something from the client. The solicitor should prove that the client has been informed of all the circumstances of the deal and that the deal was fair. The solicitor is expected to provide full information.

Law books and judicial practice underline that undue influence does occur especially in case of fiduciary relations. Thus, Samond and Williams distinguish two types of such relations: 1) relations recognized as such (i.e. fiduciary) by virtue of law; 2) relations in which a fiduciary element is not presumed by law but its existence has to be proved in each particular case. The first type of such fiduciary relations includes, for example, relations between trustees and beneficiaries, agents and principals, solicitors and clients, doctors and patients, clergymen and people, parents and children[15]. In this case, *fiduciary relations* are such relations under which both sides shall in good faith inform each other of all either known or significant facts affecting the terms of the contract existing between them. However, in our view, the principle of utmost trust (*uberrimae fidei*) of the parties to any contract has nothing to do with personal trust-based (fiduciary) obligations. But it is a separate topic for further research.

[13] Khalfin. Ibid. P. 255.

[14] Treitel G. H., The Law of Contract/ by Edwin Pell. 12th ed. London: Sweet & Maxweel, 2007. P. 314.

[15] Samond and Williams. Contract Law Basics. M., 1955. P. 347.

For the first time the legal definition of this principle was given in *Carter v. Boehm*, England, 1766: "Special information on which basis a possible chance is evaluated can be derived from the knowledge of the insuring party: the insurer trusts the statement made by the insuring party relying on the fact that the insuring party does not conceal any circumstances which could mislead the insurer and make the insurer believe that such circumstances do not exist. The concealment of such circumstances is considered fraud, and consequently, the insurance contract is void… The principle of utmost trust prohibits one of the parties to conceal knowledge known only by that party, thus involving the other party into the deal, taking advantage of the lack of knowledge with the other party which considers that circumstances are completely different…"[16] The principle of utmost trust in insurance is a private case of applying the fundamental civil law principle — good faith of participants of contractual obligations.[17] Therefore, this principle should be stipulated by a special law on insurance, but not in the RF Civil Code. However, it concerns Russian, not English, law.

A regular remedy in case of undue influence is *cancellation of a deal*. The party which rights have been violated is entitled to go to court with the claim to rescind the contract. The right to rescind the contract may be lost if third-party rights are concerned. Damages as such are not applicable in case of undue influence. If termination of the contract is impossible, the court may grant the aggrieved party whose rights have been violated a difference in the amount that the party expected from the deal and the cost at present[18]. In case of undue influence remedies can be available even if the person which received a present or a promise does not get any benefit from such a present (or a promise). For example, a priest receives a present to be used for the benefit of his religious community.

To compare: the RF Civil Code (Article 10) interprets *abuse of right* as the exercise of civil rights with the aim to inflict harm to another person, to perform law-skirting actions pursuing illegal purposes, and any other deliberate unscrupulous exercise of civil rights. It is prohibited to exercise rights with the purpose to restrict competition

[16] *See:* Shinkarenko I. E., Strakhovanie otvetstvennosti: Spravochnik [Liability Insurance: Reference Book] M., 1999, pp. 80–81.

[17] *See:* Belykh V. S., Krivosheev I. V., Mitrichev I. A., Strakhovoe pravo Rossii: uchebnoe posobie [Insurance Law of Russia: a Coursebook] / edit. by V. S. Belykh. — 3rd edit., amend., M., 2009, pp. 142–143.

[18] Treitel G. H., Op. cit. pp. 446–463.

and also to abuse the dominant position in the market[19]. **Thus,** under the RF Civil Code, abuse of right is possible only when the holder of the right acting within the scope of their subjective right uses such forms of the right's realization which go beyond the limits established by law. Most often such limits of exercise of civil rights are determined by the exercise of rights in accordance with their aim. The Code distinguishes such forms of abuse as: **a)** deliberately inflicting harm to another person; **b)** law-skirting actions pursuing illegal purposes; **c)** deliberately unscrupulous exercise of civil rights; **d)** exercise of civil rights with the purpose to limit competition; **e)** abuse of the dominant position in the market. As we see, there is a significant difference between the Russian model of abuse of right and the English notion 'undue influence'.

3. English law does not prohibit the parties when entering into a contract to provide for terms and conditions aimed at limiting or releasing the debtor from liability in case of their failure to comply with contractual obligations. Based on this general rule, the parties began to include similar provisions into their contracts, especially in case of adhesion contracts. As a result of a wider use of liability release conditions, the interests of buyers were left unprotected. The reaction of English courts towards this widespread phenomenon was drafting of 'the fundamental term' concept. Breaching the fundamental term would lead to the situation when any term excluding liability was considered void. Later, this concept was transformed into the doctrine of 'fundamental breach' according to which any limitations and exclusions from liability are considered void if the court qualifies the breach of contract as fundamental[20]. In resolving disputes, the courts are guided by the rule that every

[19] *See:* Izbrekht P. A., Zloupotreblenie grazhdanskimi pravami v sfere predprinimatel'skoj deiatel'nosti. Avtoref. …kand. urid. nauk [Abuse of Civil Rights in the Sphere of Entrepreneurial Activity. Abstract from Cand. of Legal Scien. Diss.] Yekaterinburg, 2005; Belonozhkin A. Yu., Soderzhanie i formy zloupotrebleniia sub'ektivnym grazhdanskim pravom. Avtoref. …kand. urid. nauk [Content and Forms of Abuse of Subjective Civil Right. Abstract from Cand. of Legal Scien. Diss.] Volgograd, 2005; Zaitseva S. G., Zloupotreblenie pravom kak pravovaia kategoriia (voprosy teorii i praktiki). Avtoref. …kand. urid. nauk [Abuse of Right as a Legal Category (Issues of Theory and Practice). Abstract from Cand. of Legal Scien. Diss.] Volgograd, 2005; Belykh V.S., Kategoriia 'zloupotreblenie grazhdanskim pravom' v rossijskom zakonodatel'stve i sudebnoj praktike [Category of "Abuse of Civil Right" in the Russian Legislation and Judicial Practice].// Information Journal. Federal Arbitration Court of the Ural Okrug. Practice. Commentaries. Reviews. 2002. No. 1, pp. 102 — 103; Emelyanov V. I., Nedopustimost' zloupotrebleniia grazhdanskimi pravami po rossijskomu zakonodatel'stvu [Non-acceptability of Abuse of Civil Rights under the Russian Legislation. Avtoref. …kand. urid. nauk] Abstract from Cand. of Legal Scien. Diss., M., 2001 and others.

[20] *See:* Miller C. J., Lovell P. A., Product Liability. L., 1977, pp. 132 — 134; Mickelburgh J., Consumer Protection, pp. 326 — 329.

concluded contract has its fundamental term which is regarded as something which is more important than warranties and conditions. It forms "the core" of the contract, so the parties cannot provide for clauses releasing from liability for the breach of the fundamental term[21].

The Russian civil law, on the contrary, prohibits parties to agree upon a condition to release the debtor from liability. Under the general rule, the refusal of physical and legal entities to exercise their rights does not lead to the termination of these rights, except for cases provided for by law (Article 9 (2) of the RF Civil Code). Such terms and conditions are considered void as they violate the requirements of law (Article 168 of the RF Civil Code).

The list of cases of English contract law application in the jurisdiction of Russian arbitration courts can be continued. For example, English law permits the parties to a contract to include conditions concerning the payment of a certain sum of money in case of its breach. Courts consider this sum as a *liquidated damage* that can be caused by the breach or as a penalty. The term used by the parties for this sum of money, whether it is a liquidated damage or a penalty, has no legal significance for the court. The intent of the parties is more important than the content of the contract. For example, parties can define the agreed sum of money as "liquidated damage", but the court during the trial can conclude that it is a penalty. And, conversely, if the parties define the agreed sum of money as a penalty, but it is a liquidated damage, the court would consider it a liquidated damage[22]. **Thus,** English courts pay much attention to the definition of terms and conditions in the contract, increasing the court's discretion.

The Russian Civil Code does not have a similar provision on abstract damages. At the same time, the provisions of Article 524 of the RF Civil Code contain an analogue to abstract damages when calculating damages in case of the delivery contract termination. **First**, this rule is limited by the scope of calculated damages when terminating a contract due to its breach by the buyer (or the seller). **Second**, if under the English contract law (Articles 50, 51 of the Sales Law), abstract damages are calculated as the difference between the contract price and the market price, under Article 524 of the RF Civil Code they are understood as the difference between the contract price and the price of a later deal. Certainly, abstract damages can be

[21] *See:* Anson V. Ibid. P. 122.
[22] Anson V. Ibid. P. 359.

different from the viewpoint of the simplified method of their calculation. Therefore, we support the initiative to complement the RF Civil Code by provisions on abstract damages both in general terms and in terms concerning contracts[23].

In any case, the topic of application of foreign law (in our case — English law) in the jurisdiction of Russian courts causes a lot of controversies and ideas. First and foremost, we need analytical reviews of judicial practice and recommendations of cassation instances and the RF Supreme Court. A difficult issue often raised in legal literature concerns different methods of establishing the content of foreign law. Such methods, in particular, include: requests to the RF Ministry of Justice and other bodies; receiving information from persons involved in the case; opinions of foreign experts; initiative learning of foreign law rules; interrogation of foreign law experts as witnesses by lawyers and any other experts[24]. In short, much work needs to be done.

[23] *See:* Braginsky M. I., Vitryansky V. V., Dogovornoe pravo. Kniga pervaia: Obschie polozheniia [Contract Law. Book One: General Provisions] M., 2011, pp. 660 — 661.

[24] Timokhov Yu. A., Inostrannoe pravo v sudebnoj praktike [Foreign Law in Judicial Practice] M., Wolters Kluwer, 2004.

LAWFULNESS OF THE PERSONAL DATA PROCESSING: EUROPEAN UNION AND RUSSIAN FEDERATION. BRIEF OVERVIEW

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Abstract
Modern society faces more and more digitalization of our lives; rapid online flow of the information is not obstructed by the state borders; businesses are globalized and cross-border activities constitute our day-to-day life. Still and fortunately, the institute of the personal human rights and interests remains one of the most frequently overriding factors, imposing boundaries on online and offline flow of personal information.
These developments bring up new challenges to the local legislators particularly when it comes to finding a balance between protection of the persons against unlawful flow of their personal information and freedom of (cross-border) movement of the information.
The adoption of Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, more known as the General Data Protection Regulation or the GDPR, is said to be one of the biggest legal news in the area of the personal data protection for the last 20 years.
The impact of the GDPR increases in comparison with other similar regulations in the light of its extraterritorial application, which will be explained further in this article. The abovementioned globalization and digitalization make it impossible to live within the frames of the legislation of one country: flowing information, including personal data, are subject to the legal regulation in different jurisdictions, which shall be taken carefully into account.
In this light, the present article aims at providing legal framework and especially practical examples about the territorial application of the GDPR, with a short overview of the analogical legal rules of the Russian Federation, as well as about the lawfulness of the personal data processing according to the GDPR and the laws of the Russian Federation.

Keywords: GDPR, personal data protection, application of GDPR, lawfulness of personal data processing, international transfer of personal data.

What is the GDPR

It has been more than six months that anywhere we go (a shop, a beauty salon, a law firm and likewise), we are asked to sign a small piece of paper with a short explanation "*this is because of all the GDPR*". What the paper usually mentions is the name of the enterprise/entrepreneur intending to process your personal data in compliance with the GDPR and your name, surname and signature certifying that you do agree.

It seems obvious that our personal data constitutes our property and our basic constitutional right is to protect it; it seems obvious that collecting someone's personal data without his/her explicit agreement to it and awareness as to what, for how long and by whom will be done with the personal data is illegal (save as allowed by law in some very special cases), but the GDPR requires making it said loudly, explicitly by both parties and in this way brings the responsibility to both sides, the controller and the data subject, for understanding and compliance with the data protection rules.

The GDPR has brought important changes to the circulation of the personal data. More attention is brought to the fact that personal data is personal and cannot be "*put in circulation*" unless the data subject willingly agrees to it after being informed in a clear and unambiguous way that his/her personal data will be collected, by whom, for what purpose, for how long and about all his/her rights related to the processing of the respective personal data (unless there is another, specially defined by law, reason for collection and processing of the personal data). No one would agree that a stranger takes your car and drives away, as no one would be happy about taking his/her name and contact details and providing it to an indefinite number of the businesses to fill in their marketing strategies.

So, basically, the GDPR does not bring any new rules to our lives, but regulates more strictly than previous regulations our rights and obligations in respect of our personal data, obliges the controller to make sure that the data subject is well informed (the burden of proof lies on the controller) about the collection and following processing of his/her personal data, and creates the frames to protect the personal data from an uncontrolled flow in online and offline sources. In this light, the small papers that the data subjects (clients of the service providers and shops) are asked to sign "*because of the GDPR*" are, in fact, not compliant with the requirements of the GDPR and usually miss most of the information to be provided to the data subject in compliance with the GDPR.

Territorial application of the GDPR

The first and foremost question is: when does the GDPR apply? Contrary to the previous regulation of data protection in the European Union and to most of the worldwide national regulations of this issue, the GDPR has extraterritorial application: it aims at protection of the personal data where the processing activities are undertaken within the European Union (whether the activities are related to the offering of goods and services in the European Union or to the monitoring of the behavior of the data subject whose behavior takes place within the European Union). Just to point out, "processing" means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.

To put it simply, the activities undertaken within the European Union shall be legal, i.e. shall be undertaken with the full respect of, *inter alia*, personal data protection rules, regardless of who is undertaking the activities and whose data is used. For example, a Russian citizen travelling to the European Union and paying for the organization of his/her trip to a Russian travel agency will not be covered by the GDPR in respect of the personal data that he/she is providing to the Russian travel agency; at the same time, providing his/her personal data to a local European hotel or even to a Russian airlines bringing him/her to the European Union will for sure be covered by the GDPR.

Hence, any person in the world, regardless of his/her citizenship, residence and factual place of living at the moment of providing of his/her personal data to another person (a controller) will enjoy protection under the GDPR if the activity of the controller in the frame of which the personal data is collected (processed) is undertaken within the European Union. On the other hand, any entity/person collecting the personal data of any data subjects in relation to the activities in the European Union, including the mere fact of offering their products or services (including free of charge) in the territory of the European Union or monitoring the behavior of the data subjects that takes place in the European Union, shall comply with the GDPR.

Few practical examples will well illustrate this issue: a Russian on-line shop targeting the customers situated in the European Union shall comply with the GDPR,

even if the customer is situated outside the European Union but orders goods and services to be delivered to their European address; a Russian photographer attending a photo session in the European Union (whatever is the nationality of the bride and groom) or covering a sport event in the European Union shall comply with the GDPR; a European on-line shop targeting the customers in the Russian Federation shall comply with the GDPR, but a Russian subsidiary of the European company selling the goods in the territory of the Russian Federation shall not comply with the GDPR.

To be noted in this respect is that Federal Law of the Russian Federation No. 152-FZ of 27 July 2006 (in the version of 31 December 2017) "On Personal Data" (*the Russian Law On Personal Data*) does not outline its applicability frames; therefore, we may conclude that any entity processing the personal data in the territory of the Russian Federation or undertaking activities related to the respective processing in the territory of the Russian Federation will have to comply with the requirements of the Russian Law On Personal Data. The entities with cross-border activities will usually face the obligation to comply with both European and Russian legislation.

In this light, another important aspect is the cross-border flow of the personal data. Rules on international transfers apply when personal data is transferred from the European Union to controllers, processors or other recipients in third countries or to international organisations. Those rules are very important for companies (controllers or processors) which carry out their activities outside of the European Union, such as travel agencies. However, the question arises only with respect to the transfer of the data abroad, whereas purely providing access to a database, situated in the European Union, to a processor from outside the European Union for processing without transferring the data outside the European Union, will not constitute the cross-border transfer of the personal data.

In any event, transfers to third countries and international organisations may only be carried out if one of the further conditions applies.

First, the Commission may decide, with effect for the entire European Union, that a third country, a territory or specified sector within a third country or an international organisation, offers an adequate level of data protection, thus providing legal certainty and uniformity throughout the Union as regards the third country or international organisation which is considered to provide such a level of protection (Article 45 of the GDPR). In such cases, transfers of personal data to a third country or an international organisation may take place without obtaining any further authorisation.

The adoption of an adequate decision involves a proposal from the European Commission, an opinion of the European Data Protection Board, an approval from representatives of the EU countries, the adoption of the decision by the European Commissioners.

The European Commission has so far recognised Andorra, Argentina, Canada (commercial organisations), Faroe Islands, Guernsey, Israel, Isle of Man, Jersey, New Zealand, Switzerland, Uruguay and the United States of America (limited to the Privacy Shield framework) as providing adequate protection.

In the absence of an adequate decision of the Commission, according to Article 46 of the GDPR, a controller or processor may transfer personal data to a third country or an international organisation only if the controller or processor has provided appropriate safeguards and on the condition that enforceable data subject rights and effective legal remedies for data subjects are available. The appropriate safeguards may be provided for with or without requiring any specific authorisation from a supervisory authority.

Article 46 of the GDPR provides for an exhaustive list of such safeguards that do not require any specific authorization from a supervisory authority, including a legally binding and enforceable instrument between public authorities or bodies, binding corporate rules, standard data protection clauses adopted by the European Commission or by a local (European) supervisory authority and approved by the European Commission, even contractual clauses between the parties.

`In addition, in some particular cases (cf. Article 49 of the GDPR), the international transfer can take place where there is no adequate decision and no appropriate safeguards are ensured: this is about the situations when the data subject has explicitly consented to the proposed transfer, after having been informed of the possible risks of such transfers for the data subject due to the absence of an adequate decision and appropriate safeguards, when the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken at the data subject's request, when the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another natural or legal person, and in some cases when the reasons for the data transfer are so vital and of public interest, that they override the necessity to obtain any approval for the cross-border data transfer (for details, please refer to Article 49 of the GDPR).

It is to be particularly noted that the GDPR follows the specific chronology in describing the grounds for a lawful transfer of the personal data abroad: controllers have first to check whether there is an adequate decision on a third country adopted by the Commission; if not, they have to ensure that appropriate safeguards are in place and on the condition that enforceable data subject rights and effective legal remedies for data subjects are available (those include standard data protection clauses adopted by the Commission, even contractual clauses between the parties when subjected and approved by the competent supervisory authority); and only if none of these options are suitable, controllers can transfer data under special derogations, as mentioned in previous paragraph, in accordance with Article 49 of the GDPR.

At first glance, this looks clear. However, in practice many controllers were not in conformity with the described process of determining the lawful ground for international transfer of personal data, and we are mainly talking about the companies that in course of their activities transfer personal data both inside and outside the European Union and follow general rules on lawfulness of processing of the personal data within the European Union. However, the cross-border transfer of personal data triggers different regulation and requires different actions from the controllers: if in a general case of processing of personal data, conclusion of a contract with a data subject would be a lawful ground for processing, a cross-border transfer of personal data just on the basis of the respective contract would not be legal unless the controller has first checked for an adequacy decision, than for appropriate safeguards and only in absence of these options would use the contract as the "last resort".

Let us take a look at the change the GDPR has brought to travel agencies. They collect a wide range of personal data, not only a name and home address of a data subject but also the date and place of birth, their passport number, sometimes even copies of ID and eating "habits", for instance, if the data subject is a vegetarian, whether they have any allergies (let us not forget about the fact that this is health data which is seen as a special category of personal data for which more strict rules on processing are applied). They transfer all of this personal data to many different controllers and processors, depending on the travel arrangement the data subject has bought, such as airlines, hotels, entry permit or VISA authorization or decision making sections, even insurance companies. The necessity of the performance of the contract between the data subject and the travel agency does apply here, but it will not be the ground for international transfer of personal data by default. It would not

be wrong to conclude that there is an option for travel agencies to transfer personal data abroad under the condition that the transfer is necessary for the conclusion or performance of a contract concluded. However, according to the GDPR, this condition (and all the other conditions of Article 49) constitutes the last resort for the controllers to transfer the data ("*in the absence of an adequacy decision or of appropriate safeguards*").

Lawfulness of data usage

One of the main aspects of the GDPR is the lawfulness of data processing, i.e. the basis of the lawful processing. The processing of the personal data shall be considered lawful if the data subject agrees to it, but also in several other cases when the data subject did not provide his/her explicit consent to it.

In general, there are six independent grounds for lawful processing of the personal data under GDPR (Article 6 (1) of the GDPR): consent of the data subject, a contract (when processing is necessary for the performance of a contract to which the data subject is a party or in order to take steps at the request of the data subject prior to entering into a contract), legal obligation (when processing is necessary for compliance with a legal obligation to which the controller is subject), vital interests (when processing is necessary in order to protect the vital interests of the data subject or of another natural person), a public task (when processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller), a legitimate interest (if processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of the personal data, in particular where the data subject is a child).

Hence, you do not need the consent from the data subject for every processing of personal data that you perform: you might have another lawful ground to process the personal data. That also applies to the special categories of personal data, like, for example, data concerning health of a natural person: Article 9 of the GDPR provides for a list of grounds of the lawful processing of such data, including the consent of the data subject, but also when processing is necessary for a particular reason (execution of the obligation of the controller, protection of the vital interests of the data subject or another natural person etc.).

However, having other than a consent ground for processing of personal data does not mean that the processing may be undertaken without respect of the rules set up in the GDPR: the controller is still obliged to inform the data subject as soon as the personal data are obtained, of the following information: the identity and the contact details of the controller and, where applicable, of the controller's representative, the contact details of the data protection officer, where applicable, the purposes of the processing for which the personal data are intended as well as the legal basis for the processing, where the processing is based on Article 6 (1) (f), the legitimate interests pursued by the controller or by a third party, the recipients or categories of recipients of the personal data, if any, where applicable, the fact that the controller intends to transfer personal data to a third country or an international organisation and the existence or absence of an adequacy decision by the Commission, or in the case of transfers reference to the appropriate or suitable safeguards and the means by which to obtain a copy of them or where they have been made available. In addition, the controller shall, at the time when personal data is obtained, provide the data subject with the following further information necessary to ensure fair and transparent processing: the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period, the existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject or to object to processing as well as the right to data portability, where the processing is based on consent, the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal, the right to lodge a complaint with a supervisory authority, whether the provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract, as well as whether the data subject is obliged to provide the personal data and of the possible consequences of failure to provide such data, the existence of automated decision-making, including profiling, and at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

So, the information controllers / processors need to provide as soon as they obtain personal data is quite big and adapted to each and every individual situation. Controllers / processors cannot solve this with one fact sheet which is given to the data subject, no matter what is the basis for processing of his / her personal data —

they must apply it to each individual processing in order to suffice the transparency, lawfulness, fairness and other principles relating to processing of personal data (see Article 5 of the GDPR). It can be concluded based on only this Article of the GDPR that it brings an enormous impact on business operations of controllers/processors, as well as it brings some accountability to the data subjects.

While most of the grounds for the lawful processing of the personal data are rather straightforward, here worth mentioning is the legitimate interest of the controller as one of the grounds for processing of the personal data: according to Article 6 (1) (f) of the GDPR, processing shall be lawful if and to the extent that processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

So what is the legitimate interest of the controller which may justify the processing of the personal data without the consent of the data subject and in which cases is it overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data?

Article 6 of the GDPR states: "*processing shall be lawful only if and to the extent that at least one of the following applies: inter alia processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.*" Thus, the GDPR does not provide any definition thereof making it clear that this matter is flexible and no definition can be equally applicable to all life circumstances, except that it calls for a balancing test: the legitimate interests of the controller (or third parties) must be balanced against the interests or fundamental rights and freedoms of the data subject. The outcome of the balancing test largely determines whether Article 6 (f) may be relied upon as a legal ground for processing.

This ground gives you more flexibility, but also imposes more responsibility in proving that the legitimate interest existed for the justification of the data processing whereas the data subject's interests did not override your legitimate interest. In addition, it is not possible to use this ground as plan "B" for the case of the refusal by the data subject to provide his/her consent: if the consent is asked and not provided,

the data subject reasonably expects that his/her data will not be processed, hence further processing on the basis of the legitimate interests would constitute the deception of the data subject.

However, the GDPR outlines the understanding of the legitimate interests and provides for guidelines as to its interpretation and as to the situations when the legitimate interest of the controller is overridden by the interests and fundamental rights of the data subjects.

First of all, the respective sentence of point (f), as stated above, clearly makes children as a special and sensitive category of the data subjects, whose personal data protection will in most situations override any legitimate interest of the controller.

Then, the recitals of the GDPR give some guidelines for understanding the legitimate interest of the controller. According to recital 47 of the GDPR, the use of the legitimate interests ground for data processing may be justified when the data subject may reasonably expect his/her data processing based on their relationship with the controller (for example, where the data subject is the client or in the service of the controller). The respective recital gives an example of such a situation: the processing of the personal data for direct marketing purposes may be regarded as carried out for a legitimate interest (again, it "may be" regarded as such, but it is not by default, whereas the burden of proof that the direct marketing is the legitimate interest lies on the controller).

A practical example: if you attend a business meeting (a conference, a seminar, or any other business oriented event), you will naturally be interested in collection of the business cards from other guests in order to establish and pursue business relations with them. A business card normally contains personal data of the subject. A question arises, whether you can process this personal data (e.g., integrating it in your CRM system) and use it for your business purposes (direct marketing). Naturally, when a person attends a respective business event and voluntarily provides you with his/her business card, the person shall reasonably expect to be included into your CRM system and to be contacted by you: pursuing your business activity by collecting business cards and contacting the respective data subject for your business expansion constitutes your legitimate interest. However, when you contact a person for the first time, the GDPR requires that the data subject's right to object at any time to processing of personal data concerning him or her for such marketing (which includes profiling to the extent that it is related to such direct marketing) is explicitly

brought to the attention of the data subject and shall be presented clearly and separately from any other information (Article 21 (2), (4) of the GDPR). If the data subject informs the controller, after the first contact, that he/she does not wish to continue receiving any messages from the controller or even wishes to "be forgotten" (erasure his/her personal data from the data bases of the respective controller), the controller shall comply with it.

So, the legitimate interests as the ground for personal data processing may look a very flexible option, especially in the cases where the data is collected from publicly available sources like social networks (if a person made her personal information public, protection of his/her privacy rights obviously cannot override the legitimate interests of the controller), however it bears more risks for the controller than the data subject's consent or contract. In order to be relevant, the legitimate interest must be lawful (in accordance with applicable EU and national legislation), sufficiently clearly articulated to allow the balancing test to be carried out against the interests and fundamental rights of the data subject (sufficiently specific) and represent a real and present interest (not to be speculative). In accordance with Article 14 of the GDPR, the controller collecting the personal data, for example from the social networks, will still be obliged to inform the data subject about the controller's identity, the purposes of the processing and legal basis for processing, the categories of personal data concerned, possible recipients of the personal data, etc. In other words, even if the controller collects publicly available information from hundreds and thousands of personal accounts in the social networks, the controller is obliged to inform thereabout every data subject concerned and will face the rights of the data subjects to object to the processing (Article 21 of the GDPR) or to erasure his / her personal data (Article 17 of the GDPR). Thus, the GDPR is more protective of the fundamental human rights to privacy, even in the situation where a person makes his/her data publicly available, in order to ensure the adequate protection to the natural persons in the world where the rapid online flow of information is difficult to control.

It is interesting that, in accordance with the Russian Law on Personal Data, the grounds for the lawful processing of the personal data are almost the same as those listed in the GDPR; however, one of the additional grounds for the lawful processing of the personal data is when the processing concerns personal data made publicly available by the data subject (Article 6 (1) (10) of the Russian Law on Personal Data). In other words, if a person makes his/her personal information publicly available, he/

she shall have reasonable expectation that such data might be processed by anyone. Such a position, in our opinion, is more business oriented: the law does not impose on the controllers additional burdens with respect to the personal data that the data subject makes publicly available and accessible.

To conclude on the legitimate interest: it should not be seen as a legal ground that can only be used to fill in gaps for a rare and unforeseen situation as "a last resort" — or as a last chance if no other grounds may apply. Nor should it be seen as a preferred option and its use unduly extended because it would be considered as less constraining than other grounds. Rather, it is as valid as any other grounds for legitimizing the processing of personal data. Article 6 (f) presents complementary safeguards compared to the other pre-determined grounds. It should not be considered as "the weakest link" or an open door to legitimize all data processing activities, which do not fall under any of the other legal grounds.[1]

Conclusions

Whatever is the approach of a local legislator, it is undeniable that nowadays any diligent business shall seriously consider personal data protection while conducting its activities: an easier flow of the data brings more legal obligations for the controllers in respect of protection of the personal data and imposes the borders of privacy on natural persons that cannot be broken for commercial reasons. Hence, a data privacy specialist or even a department within a company becomes a must-have for every company, alongside with such traditional departments like Human Resources or Accountancy, especially bearing in mind the internationalization of businesses and an extraterritorial approach of legislators (referring to the GDPR).

On the other hand, data subjects are also required to be diligent in respect of protection of their privacy: do not leave your car open on the street if you do not want it to be stolen; do not make your personal information publicly available if you do not want it to be used in someone's (commercial) interests. Even in case of the GDPR which protects the personal data made publicly available by the data subjects themselves, we must understand that a lot of the processing of the publicly available information might be done without due notification to the data subjects who should be the first ones responsible for the protection of their data.

[1] Article 29. Working group on the protection of data. Opinion 06/2014 on the understanding of legitimate interests of the data operator in accordance with Article 7 of EU Directive 95/46, adopted on April 9, 2014.

KEY APPROACHES TO THE ORGANIZATION OF STATE REGULATION OF FINANCIAL MARKET IN FOREIGN COUNTRIES

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Abstract
The article analyzes the experience of developed countries in state regulation of their financial market in terms of its institutional organization. The authors try to reveal the most common approaches to regulating the financial market, which include institutional, functional, integrated, "twin peaks", and targeted approaches. The article focuses on positive and negative aspects of these regulatory scenarios, including the organization of interbank relations. The authors show advantages and disadvantages of the delegation of state regulation to the mega-regulator and come to the general conclusions about the perspectives of the optimal organization of regulation in the financial market.

Keywords*:* mega-regulator, financial market, state regulation, credit institution, bank.

At present, there are several approaches (methods and scenarios) worldwide for regulation of the financial market including the approach that denies the existence of a single regulator (mega-regulator). The most common and / or promising among them are functional and "twin peaks" approaches (including a targeted approach). Until recently, the most common was a functional approach, which is widely spread in Brazil, Italy, Spain, the USA and France, with a general trend towards a transition to regulation of the financial market based on a "twin peaks" approach, which finally won in such countries as Australia, Netherlands, Belgium, including its modifications, based on a targeted approach, which is met in Canada and the UK.

The most common models for the organization of financial regulation and supervision in the financial market are not found in a pure form in any national legal system. Developed countries, which have not chosen the model with the mega-regulator, usually apply one of the above-mentioned approaches (methods, scenarios) of regulation or have created their own version based on mixed features of such approaches. Apart from functional and "twin peaks" approaches (including a targeted approach), worldwide experience contains examples of institutional and integrated approaches[1].

The institutional approach is based on the concept that the choice of the supervisory authority is influenced by the legal status of a business entity in the financial market (a bank, a participant in the securities market, an insurance company)[2]. The supervisor oversees the activities of such entities, both in terms of prudential oversight and in terms of oversight of their conduct in the market.

The functional approach is based on the concept that the choice of the supervisory authority is determined by the type of entrepreneurial activity that the entities carry, regardless of their legal status. Moreover, an independent regulator can be created for each type of business in the financial market. The Central Bank, which is usually responsible for monetary policy, can serve an example of an independent regulator[3].

The functional approach can take place **with a strict delimitation of functions**. This approach will determine the choice of the supervisory authority based on two criteria: the type of business activity they conduct and the type of the legal status the entities have[4].

The functional approach is based on the existence of various bodies of financial supervision, depending on the type of business activity or depending on the type of activity carried out by the financial market entities and their legal status. At the same time, part of the functions of financial supervision may be concentrated in the hands of the structural units of the Central Bank. For example, in France, there is AMF (Agencies for Financial Markets), the Authority of Prudential Supervision and Regulation (ACPR), which operate separately within the framework of the Bank of

[1] Kellermann J., Haan J., Vries F., Financial Supervision in the 21st Century. Springer. 2013.

[2] Walsh, J. H., Institution-Based Financial Regulation: A Third Paradigm // Harvard International Law Journal. 2008. No. 2, pp. 381–412.

[3] Gerding E., Law, Bubbles, and Financial Regulation. Routledge. 2013; Spencer P., The Structure and Regulation of Financial Markets. Oxford. 2000.

[4] Carnell R. S., Macey J. R., Miller G. P., The Law of Financial Institutions (Aspen Casebook). Wolters Kluwer, p. 328.

France structure. The scenarios for completing the functions traditionally attributed to the competence of the regulator of financial market are not applicable with this approach, since the functions of financial supervision are completely distributed among various financial regulators without the involvement of independent associations or self-regulatory organizations. However, we cannot state that the presence or absence of a self-regulation organization (SRO) is due to a functional or any other approach to organizing financial supervision in the particular legal system. For example, the United States, which is deemed to have elements of a functional approach, has a highly developed institution of self-regulation, complementing functions traditionally attributed to the competence of financial market regulators (in particular, FINRA and NFA). Apart from it, in some countries, regardless of the chosen scenario of financial supervision, there is a system of financial ombudsmen (for example, the United Kingdom, Germany) and a system of banking mediators (France), which also play a certain role in the financial market in terms of ensuring the protection of the rights of bank customers and other financial organizations.

An integrated approach involves the creation of a single mega-regulator, which is responsible for supervision in all sectors of the financial market, combining the functions of prudential supervision and supervision of business, regardless of the subject or type of activity in the financial market[5].

The approach of twin peaks involves the separation of functions for the supervision of the financial market between two regulators, one of which carries out prudential supervision, and the other carries out regulation and supervision of business activities[6]. As part of prudential supervision, funds are used to ensure the stability of financial institutions and reduce systemic risks[7]. Within the framework of regulation and supervision of entrepreneurial activity, tools are used aimed at preventing non-competitive behavior of financial market participants and protecting the rights of consumers and investors due to "bad market behavior"[8]. The idea of transition to this scenario began to develop as a result of the international financial

[5] Pan, Eric J., Understanding Financial Regulation.// Utah Law Review. 2012, No. 4, pp. 1897–1948; Richard Scott Carnell, Jonathan R. Macey, Geoffrey P. Miller, The Law of Financial Institutions (Aspen Casebook) 6th ed. Wolters Kluwer.

[6] Taylor M., "Twin Peaks" Revisited...a Second Chance for Regulatory Reform. Centre for the Study of Financial Innovation. 2009.

[7] Driver D. G., Governance, Risk Management, Financial Regulation and Compliance: An Integrated Approach. Wiley. 2016.

[8] Rethinking the Role of the State in Finance// The World Bank. Global Financial Development Report. 2013.

crisis of 2008, when leading countries realized the mistakes made by supervisory authorities during the crisis, proved ineffective oversight and the need to organize financial supervision on new principles[9]. The priorities are the integrated approach and the approach of twin peaks[10]. Currently, the approach of the twin peaks is recognized as the most optimal for a number of reasons, including, since the internal conflict between oversight and regulation is resolved, it creates the basis for the development of competition in financial markets[11].

The peculiarity of financial supervision mechanisms under this approach is the implementation of various regulators (usually not including the Central Bank) prudential supervision and regulation of financial behavior of the financial market entities in order to ensure the integrity of the financial services market, maintain competition in such a market and protect consumer rights, help implement various regulatory approaches. The result is a synergistic effect of regulation of similar subjects, but by various means and methods. Scenarios for replenishing functions traditionally attributed to the competence of the financial market regulator are reduced to the use of the institution of self-regulation in which self-regulation organizations (for example, ASX in Australia) are controlled by the non-prudential regulatory body and are empowered to develop their own standards, supervise their implementation members.

The targeted approach is based on the distribution of powers between regulators on the objectives of supervision, regardless of the type of activity or the status of the entity performing it, and includes the allocation of supervision of payment systems, prudential supervision and supervision of business activities in the financial market. This approach is close to the one, which is described above, but provides for a greater number of regulators[12].

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[9] Ross Levine, The Governance of Financial Regulation: Reform Lessons from the Recent Crisis 3-8 (Bank for International Settlements, Working Paper No. 329, Nov. 2010); R Michael Gadbaw, Systematic Regulation of Global Trade and Finance: A Tale of Two Systems, 13 J. Int'l Econ. L. 551, 554-57 (2010).

[10] Michael W. Taylor, The Road from "Twin Peaks" — and the Way Back // Connecticut Insurance Law Journal Fall, 2009; Rosa M. Lastra & Geoffrey Wood, The Crisis of 2007-09: Nature, Causes, and Reactions, 13 J. INT'L ECON. L. 531, 537-45 (2010); Sheila C. Bair, The Case Against a Super Regulator, N.Y.TIMES (Sept. 1, 2009), http://www.nytimes.com/2009/09/01/opinion/01bair.html?_r=0

[11] Economics of Investment Funds: Monograph / A. E. Abramov, K. S. Akshentseva, M. I. Chernova, D. A. Loginova, D. V. Novikov, A. D. Radygin; under the general ed. HELL. Radygina. M., 2015. P. 298.

[12] Fanto J. A., Financial Regulation Reform: Maintaining the Status Quo // Brooklyn Journal of International Law. 2010. No. 3, pp. 635 — 664.

This approach can be considered as a variation of the "twin peaks" model, since it is based on the same regulatory principles, but only with many regulators. At the same time, the main coordinating body sets directions for the regulatory policy and oversees the financial market (for example, in Canada it is the Financial Institutions Supervision Commission (FISC)[13], which reports to the Ministry of Finance, in the UK it is PRA, a subsidiary of the Bank England, which under certain circumstances may impose a veto on the decision of the regulator of financial behavior). Scenarios for the completion of functions traditionally attributed to the competence of the regulator of the financial market are reduced to the use of the institution of self-regulation in which independent self-regulation organizations are created. Some peculiarities can be found, for example, in the equity investment market in Canada, the full regulator of which is Investment Regulation Organization (IIROC)[14]. Apart from it, there are other possible institutions which can compensate for the functions of financial regulatory and supervisory bodies, for example, in the UK there are the Financial Ombudsman's Service[15], the Anti-Fraud Agency[16] (which largely minimizes the risks of insolvency of financial institutions, which are often not the result of an unsuccessful financial oversight, and the result of fraud) and many others.

The institutional approach in modern financial systems is not used so often (examples are China, Hong Kong, Mexico[17]), where in most cases a gradual reform is carried out to move away from this regulatory scenario[18]. This model is considered outdated, previously used, for example, in France, Germany[19], Russia, but was replaced by more optimal regulatory models.

The functional approach was used until recently in world practice quite often (for example, France, Italy, Spain), but at present there is an obvious tendency towards a transition to the "twin peaks" model[20]. The most indicative in this sense is the "transitional" experience of France.

[13] Financial Institutions Supervisory Committee. https://www.fin.gc.ca/fin-eng.asp
[14] Investment Industry Regulatory Organization of Canada. www.bcsc.bc.ca
[15] Financial Ombudsman Service. http://www.fos.org.uk/
[16] Serious Fraud Office. https://www.sfo.gov.uk/
[17] The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace. p. 16.
[18] Calomiris, Charles W., Financial Innovation, Regulation, and Reform// Cato Journal. 2009. No. 1, pp. 65–92.
[19] Mads Andenas, Gudula Deipenbrock, Regulating and Supervising European Financial Markets: More Risks than Achievements. Springer. 2016.
[20] Whitehead, Charles K. Reframing Financial Regulation.// Boston University Law Review. 2010. No. 1, pp.1–50.

Some changes have taken place in terms of the integrated approach recently due to the criticism in relation to it[21]. The most significant examples of the use of this approach are Japan and Germany, which remain its adherents.

The "twin peaks" model in the most pure form can be met in Australia.

The targeted approach can be considered close to the "twin peaks" approach. It is used, for example, in Canada and the UK.

As an example of an approach that does not fall under this classification, we can cite the United States as a country with significant features (a functional approach with separate institutional elements and a trend towards transition to a "twin peaks" scenario)[22].

The other important issue is the analysis of interbank relations, which are mostly subject to financial regulation and supervision, and are mostly reduced to interbank settlements and interbank lending.

Interbank payments. Payment systems of central banks combine the main part of interbank payments, as well as a large amount of settlements carried out through other systemically important payment systems. All scenarios for the organization of regulation of the financial market without mega-regulators are constructed in the way that they have a payment system supervision body, whose functions in most cases are performed by the Central Bank. The need to have the Central Bank included is determined by the need to ensure uninterrupted payments in the financial market. Central banks in payment systems perform not only a regulatory function, but also participate in contractual relations with different entities on their own behalf, which makes them the subjects of the payment system. At the same time, central banks perform regulatory functions in other subsystems of the financial market. Integration is especially important in this area, since financial organizations become participants in various settlement and payment systems. Such integration can be created in different ways, which is clear from the analysis of the experience of Australia and Germany.

[21] Ahmed, Sanaa. The Politics of Financial Regulation// Socio-Legal Review 2015. No. 1, pp. 61 — 82.; Duff, Schan. The New Financial Stability Regulation//Stanford Journal of Law, Business & Finance. 2018. No. 1, pp. 46–111.

[22] For more information on different regulatory systems, see also: Foreign Banking Law (Banking Law of the European Union, France, Switzerland, Germany, USA, PRC, UK): Monograph / ed. L. G. Efimov. M .: Prospectus, 2016; Economic Analysis of the Development of Scenarios of Financial Supervision in Different Countries, see: Economics of Investment Funds: Monograph / A. E. Abramov, K. S. Akshentseva, M. I. Chernova, D. A. Loginova, D. V. Novikov, A. D. Radygin; under the general ed. HELL. Radygina. M., 2015.

However, in some countries, the function of regulating payment systems has been allocated from the Central Bank system. It is difficult to detect general patterns of interbank settlement scenarios for the redistribution of this functionality, including, depending on the scenarios of financial supervision without a mega-regulator. However, various models can be distinguished, including those that replenish the powers of central banks:

- payment system regulation, which is handled by the System Payment Regulator (for example, in the United Kingdom it is PSR, which is a subsidiary of FCA (financial behavior regulator) and an independent economic regulator for the payment system industry);
- regulation of payment systems by payment associations (along with the Central Bank), which coordinate payments by settlement participants (for example, the Canadian Payment Association);
- regulation of payment systems based on self-regulation in the market of payment systems (for example, the presumption of self-regulation of the payment market in Australia, along with oversight in this area by the Central Bank).

General remarks concerning the organization of interbank settlements equally apply to systems with different approaches to the organization of financial supervision and, accordingly, can be overcome in any scenario of the organization of financial supervision. The monopolization of the regulation of the payment system within a single regulatory authority has advantages in a crisis period, when such an authority can centrally offer alternative payment instruments. However, outside of the crisis period, it is more optimal to use market-based regulatory mechanisms, when participants in settlements themselves implement contractual regulation or these mechanisms are stimulated by special regulatory entities.

Interbank lending. Features of the legal regulation of relations arising in the field of interbank lending are influenced by the distribution of functions of financial supervision between different bodies. In particular, in the case of the most promising "twin peaks" approach, interbank relations are regulated by various means of prudential supervision and regulation of the financial conduct of entities in the financial market in order to ensure the integrity of the financial services market, maintain competition in such a market and protect consumer rights. In this case, specialized agencies can be involved (for example, the Council on Credit Standards (LSB) in the UK).

Based on the analysis of various regulatory scenarios we can reveal a number of advantages and disadvantages of the transfer of financial regulation and supervision functions to the regulator (mega-regulator).

1. Disadvantages:

1.1. the transfer of all regulatory functions to the mega-regulator leads to the unification of the regulation of financial organizations on the basis of the approaches applied to credit organizations, whose activities though are significantly different from other financial institutions;

1.2. combining the functions of financial regulation and supervision in the hands of a single regulator can not only reduce (in periods of crisis), but also contribute to an increase in systemic risks, especially if the integration of financial supervision is carried out not on the basis of the Central Bank, but of another regulatory body. The example of such effect is the development experience of UK financial supervision systems;

1.3. since banking supervision is usually taken as the standard of regulation, it is not surprising that during mega-regulation more attention is paid to the banking services market to the detriment of the development and sustainability of other segments of the financial market.

2. Advantages:

2.1. reducing the risk of superpowers of the Central Bank, since all or part of the functions of financial regulation and supervision are delegated to the institutions, which are not supervised by the Central Bank;

2.2. reducing the risk of errors and achieving a synergistic effect of regulating similar entities, but using various means and methods with the obligatory presence of a coordinating body with the provision of the right of veto or other similar powers;

2.3. reducing the risk of potential conflicts of interest when various regulators perform the functions of financial supervision and monetary policy, taking into account the specific legal nature of the Central Banks;

2.4. making it more transparent and understandable to market participants that it is possible to transfer part of the costs of regulatory agencies to market participants through their regular contributions (used, for example, in the United States, United Kingdom, Australia).

Summing all the information up, we come to the conclusion that the genesis of the formation of various models of the regulation in the financial market shows that

both new approaches, and namely the "twin-peak", including the targeted, approach with several regulators and the integrated approach with a single regulator are the responses of the governments to crisis phenomena. Therefore, this policy can be deemed as anti-crisis state regulation in the financial market going into the direction of a gradual departure from outdated models of institutional and functional approaches. Based on international experience, the most promising alternative model to these approaches is the "twin peaks" approach and its modification — the targeted approach, which are currently being considered by different counties. The "twin peaks" model ensures optimal regulation of the financial market in case of duplicating the functions of individual regulators or their possible conflict, thus serving the purpose of risks minimization.

The study of the experience of various countries in terms of their choices of models of the regulation in the financial market has revealed the latest general trend leaning towards the convergence of the polar approaches (integrated and functional), which have become available through the organization of financial supervision based on the "twin peaks" approach and its varieties. Thus, in countries with a "classical" integrated approach to the organization of financial regulation and supervision, there is a tendency to "split" the functions of the mega-regulator according to the "twin peaks" model (Germany, Japan). Apart from it, financial oversight bodies in countries with a functional approach are also based on the principles of the "twin peaks" approach: separation of prudential oversight and regulation is aimed at ensuring the stability of the financial market with the creation of a subject for coordinating these areas and fixing the main powers of the Central Bank in the area of monetary policy and supervision for payment systems.

However, no national legal system directly copies the scenario of organizing financial supervision, even if it is recognized as the most successful by the international community. Recently governments have moved from direct implementation of the most "popular" scenarios for organizing financial supervision towards creating their own system, introducing the most successful elements of various scenarios and at the same time taking into account a profound analysis of all factors of their national genesis. Countries have organized financial supervision in the best method required by their own national legal systems, but with the consideration of their roles in the international financial system and the influence caused by the global crisis phenomena.

COMPARATIVE ANALYSIS OF PROVING PROCEDURE WITHIN TAX DETERMINATION PROCEDURE

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Abstract
The authors discuss topical issues of proving as a central part of tax determination procedure which have proved problematic during long-term following of the (Slovenian) tax law (as part of European union tax law). Tax determination procedure in practice, does not function even after all the fundamental principles of tax procedure law. However, despite the clear legal regulation of the evidence procedure, in practice in some cases in the tax determination procedure some principles are not observed, although they ought to be. This presents the significant problem for the functioning of the principle of legality and the principle of material truth in tax law. The authors carried out a comparative analysis of individual tax determination procedure elements which are analysed on the basis of legal system with long and rich court and administrative case law.

Keywords*:* tax evidence procedure, legality principle, material truth, burden of proof, exclusive of burden of proof, standard of proof, fishing expeditions.

1. Introduction

The present contribution discusses the most topical issues of proving in (Slovenian) tax procedure in comparison with Germany, the Netherlands, Sweden and France. For comparison we have purposefully chosen tax systems differing a lot and with various emphases, and at the same time it is about systems or states, respectively, with a long tradition of taxes as well as a vivid jurisdiction from the fields of substantive and procedural tax law. At the same time, it is also the common characteristic of the chosen legal orders that they have a characteristic of the field of proving not being entirely legally regulated, but mainly being so-called case law.[1] It is the intension of

[1] DE: Richterrecht, NL: rechterrecht, SE: domarrätt.

this contribution to highlight certain open questions of proving in (Slovenian) tax law, what refers to tax procedure, as well as to (fiscal) administrative trial.

2.Principle of Tax Assessment Procedure and Individual Elements of Evidence

Every use of a legal rule departs from established facts. We find the facts in a way that from a concrete historic event we choose those facts that are legally relevant and can be therefore subsumed as a legal rule to be used.

In the framework of today's assessment procedure, the principle of material truth, the principle of hearing the parties and the principle of protection of the parties' rights and the public benefit are expressively coming to value (Tipke, 1993).[2]

From the aspect of the body deciding in a procedure, without (proper) facts not (proper) use of law can be realised. Naming and proving of facts, on the other hand, is the most important act for the parties in a procedure.

The characteristics of the tax procedure differing it from most of the civil, criminal and other administrative procedures shall be listed.

Tax procedures are mass procedures (German: *Massverfahre*) (Tipke, Kruse, 2010[3]) as the tax office has to decide on the rights and obligations of a large number of people every year and file proper administrative acts, where relevant facts may refer to numerous events in the sphere of the tax payer's property. There, the tax body deciding on relevant legal facts has to establish these *ex officio*, which is an expression of the principle of investigation.

As a rule, between the tax payer and the tax body there always is a contradiction of interests,[4] which means that on the side of the tax body, an information deficit is present, as the latter, differing from the tax payer, usually does not know all facts being important for the right assessment of taxes. Thus, legal orders demand additional duties from the tax payers, in order to a right and complete establishment of all legally relevant facts. It is about the duty of the tax payer to comply (*German: Mitwirkungspflicht, the Netherlands: meewerkplichten, Sweden: kooperationsprincipen*). The tax payer is obliged to actively comply with the tax procedure at establishing all legally relevant

[2] Tipke, K.: Die Steuerrechtsordnung, Band III: Verlag Dr. Otto Schmidt, Köln, 1993, p. 1186.

[3] Tipke, K., Kruse, H. W.: Abgabenordnung/Finanzgerichtsordnung, Verlag Dr. Otto Schmidt, Köln, 2010, comment on Article 2, comment on Article 96 FGO.

[4] In administrative relations there is a confrontation of public and private interests, and so the body (if) wishing to work in line with the law must not favorise anybody.

facts, even those harmful to him or her. But, violation of the compliance rule on the side of the tax payer does not free the tax body from establishing the legally relevant facts *ex officio* (Deutsches Institut der Steuerberater, 2010[5]).

The procedural regulation of establishment and proving of facts demands for the existence of *elements of evidence* in all sorts of legal procedures, the co-effects of which defines the procedural balance, i.e. the object of proving or the production of evidence telling *what* shall be proven; the means of evidence telling *how* or *by what* shall be proven; prohibition of evidence telling *when* a certain piece of evidence must not be presented anymore; burden of proof telling *who* shall prove a fact (subjective or procedural burden of proof) or who carries the consequences of a failure of proving (material or objective burden of proof); the standard of proof telling by which degree of probability a fact has to be proven or *how* convincing a claimed fact has to be proven.

The establishment and proving of facts follows the fundamental principles of tax procedure, and their primary purpose is the limitation of power in the execution of acts by the authority and by this guarantee for the protection of the parties.

3. Individual Elements of Evidence of Tax Assessment Procedure

3.1 Production of Evidence

The theme of proving or the subject of proving (German: *Beweisgegenstand, Swe: bevistema*) is the fact in the tax procedure, to which the material or procedural provisions bind legal consequences. Without entering the judgement of the other elements of evidence, some production of evidence can be said to be *more problematic* in a tax procedure.

The common characteristic of more problematic productions of evidence lies within the frequent conflict of the legal relevance of a fact. As the establishment of a fact, as well as its legal qualification are problematic. The Swedish scholar Robert P°ahlsson differs between the simple application of law, where the element of subsumption (*subsumptionmoment*) is in the foreground, as well as the most

[5] Judgement by the Federal Financial Court, BFH, file no. I R 14/02 of November 7, 2001, where additional facts shall be proven with other evidence and the use of the burden of proof, if there are any reasons at all enabling the discovery of additional facts. Similar also Brockmeyer H.B., Klein F.: Abgabenordnung, Verlag C.H. Beck, München, 2002, p. 492 and Tipke K.: Die Steuerrechtsordnung, Band III: Verlag Dr. Otto Schmidt, Köln, Die Untersuchungspflicht — Pflicht zur Ermittlung von Amts wegen — endet nicht grundsätzlich schon dort, wo die Mitwirkungspflicht verletzt wird (The duty to investigate ex officio — does not end in principle already where there is a violation of compliance).

demanding application of law, where the element of interpretation (*tolkningsmoment*) prevails.[6] Each application of law moves between two extremes — the simple subsumption or such an abstraction that deciding already means creation of law and not only interpretation. Establishment of relevant facts is running in line with the search for the content of a legal norm. But, we must not forget that application of very abstract norms or legal standards brings unpredictable conclusions for the tax payer (SWE: *osäkrare slutsatser*). This should be respected by the tax body or the court of justice at running a procedure, determination of elements of evidence and by this the balance in the procedure and later the argumentation for the decision. *Thus, the production of evidence represents the starting-point for the procedure of proving.*

3.2 Standard of Proof

The standard of proof (Ger: *Beweismass, Neth: bewijsmaatstaf, SWE: beviskrav*) describes the quality of proving a certain fact. As a rule, in (Slovenian) administrative law the standard of proof demands for certainty (appr. 90% probability or absence of reasonable doubt) (Androjna, Kerševan, 2006;[7] Jerovšek, Trpin, 2004,[8] Grafenauer, Breznik, 2009[9]). As a rule, facts are proven by the standard of proof of certainty (Jerovšek, Simič, Škof, 2008[10]), but in the past time, another point of view appeared claiming that also lower standards of convincing should be sufficient.

Referring to the legal base regarding the standard of proof, we can assert only with certainty that the standard of proof of probability is only applied in legally defined cases (as exception). Besides, the standard has to be higher.

The methods of establishing facts may be very unusual — they may include even the purchase of sensitive data. Acquisition of data in this way, besides the parallel exchange of data between tax offices is gaining more and more meaning. In spite of many doubts in sense of constitutions, abroad such efforts of tax offices mainly prevailed judicial testing.

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[6] P°ahlsson R.: Skatterättspraxis i utveckling — principer för rättsfallanalys, revue Skattenytt, 2011, no. 3/2011, p. 113.

[7] Androjna V., Kerševan E.: Upravno procesno pravo, GV Založba, Ljubljana, 2006, p. 99.

[8] Jerovšek T., Trpin G. et al.: Zakon o splošnem upravnem postopku s komentarjem, Inštitut za javno upravo pri Pravni fakulteti Univerze v Ljubljani, 2004, p. 82.

[9] Grafenauer B., Breznik J.: Upravno pravo-procesni del, Upravni postopek in upravni spor, GV založba, Ljubljana, 2009, pp. 185-186.

[10] Jerovšek T., Simič I., Škof B.: Zakon o davčnem postopku s komentarjem, Davčno izobraževalni inštitut & Davčno finančni raziskovalni inštitut, Ljubljana, 2008.

As a rule, continental legislators do not set the application of the standard of proof. It is about the so-called case law. In Germany, they usually do not ask for the standard of certainty, but the standard of conviction of the probability of proof of a certain fact (*glaubhaft*) is sufficient. But, the tax payer may be also asked for a higher standard in case of violation of his or her duty to comply (Tipke, Kruse, 2010; Deutsches Institut der Steuerberater, 2010). It is similar in the Netherlands, where regularly they also depart from the standard of conviction (*aannemelijk maken*), except if the text of the provision (in case of violation of the duty to comply) demands for a higher standard of proof (*overtuigend aantonen, blijken*) (Pechler, 2009;[11] Happé, van Loon, Slijpen, Pauwels, 2010[12]). Of course, also in Germany and the Netherlands, it is (exceptionally) allowed to establish facts by a degree of probability (Ger: *Wahrscheinlichkeit, Neth: waarschenlijk*).

It is somehow different in Sweden. There, as a rule the standard of proof is not legally defined. Usually, the standard of proof of probability (*sannolikt*) is requested, but in case of a later inspection control (*eftertaxering*) normally a stricter standard of proof is requested (*styrkt bevisprövning*), where literature warns of the lack of unity of the national jurisdiction (Leidhammar, Lindkvist, 2010[13]).

As follows in continuation of this contribution, the standard of proof may be adapted (lowered) also in case of violation of compliance, when the tax body applies the classic direct method of establishing the tax base.

3.3 Burden of Proof

The burden of proof (Ger: *Beweislast, Neth: bewijslast, Swe: bevisbörda, FR: charge de la preuve*) may be procedural (subjective) or material (objective). From the aspect of procedural activities, the procedural (subjective) burden of proof is more important, telling that a party has to provide for evidence. The procedural burden of proof may also transfer during the procedure, which means that a party or a body proves a fact by a certain probability and then the opposite party of the body has to oppose this by opposite proof (Keresteš, 2011[14]).

The starting-point for the regulation of the material (objective) burden of proof, according to the position of German scholars, is depending on the benefit of the one,

[11] Pechler E.B.: Belastingprocessrecht, Second edition, Kluwer, 2009, p. 152.

[12] Happé, van Loon, Slijpen, Pauwels: Algemen Fiscaal Bestuursrecht, Third edition, Kluwer, 2010, pp. 391–395, 403.

[13] Leidhammar B., Lindkvist G.: Bevisprövning i mål om genomsyn, Nordstedts Juridik, 2010.

[14] Keresteš T.: Dokazno breme, Podjetje in delo, GV Založba, št. 6-7/2012, pp. 1419–1420.

for whom a certain legal norm is set (Ger: *Normenbegünstigungstheorie*). This theory derives from civil procedural law and is named after its founder the *Rosenberg theory*. Also, in most of the other continental legal orders, the objective burden of proof is mostly regulated regarding the content of a legal norm, under which the proven fact is subsumed (normative theory).

The mentioned starting-point does not exclude additional criteria for the regulation of the (subjective) burden of proof in the tax procedure (Dürrer, 2010[15]).

In the first line, the criterion of the "sphere of responsibility in the procedure" (Ger.: *Sphärenverantwortung der Beteiligten*) or "regulation of the (subjective) burden of proof according to the sphere" is applied. One could speak also about the so-called sphere theory. According this theory, the tax office and the tax payer are responsible for the facts in their sphere of influence. In spite of the exhaustive discussion in German procedural literature, from the argumentations within jurisdiction of the other states it derives that burden of proof and standard are similarly regulated also in other comparative regulations (Happé,van Loon, Slijpen, Pauwels, 2010[16]).

If knowledge of facts and evidence is in the *sphere of the tax payer*, it is suitable that the burden of proof shall be borne by him. If the evidence is *outside his or her sphere*, according to the principle of relativity, the application of the lower standard of proof of probability is more appropriate (Tipke, Kruse, 2010[17]).

One has to mention the newer legislation activity in the Netherlands. There, by July 1, 2011 a special Act on the Legal Protection in Controlling Procedures (*Wet rechtsbescherming bij controlhandelingen*) stepped into force, and in case of conflict about the violation of the duty to comply after Articles 41, 47, 47.a, 49 or 52 AWR, which has a consequence of a turned burden of proof, it provides that the tax body files a declaratory decision on the violation of compliance (*informatiebeschikking*) that may be challenged by the tax payer (De Blieck, van Amersfoort, de Blieck, van der Ouderaa, 2011[18]). The challenge has a consequence of interruption of the tax procedure. After the binding decision, the tax procedure continues. The mentioned

[15] Dürrer R.: Beweislastverteilung und Schätzung im Steuerstrafrecht, C.F. Müller Verlag, 2010, p. 36.

[16] Happé, van Loon, Slijpen, Pauwels: Algemen Fiscaal Bestuursrecht, Third edition, Kluwer, 2010, pp. 391–395, 403.

[17] Tipke K., Kruse H. W.: Abgabenordnung/Finanzgerichtsordnung, Verlag Dr. Otto Schmidt, Köln, 2010, comment on Article 2, comment on Article 96 FGO.

[18] De Blieck L.A., van Amersfoort P.J., van der Ouderaa E.A.G., de Blieck, J., Koopman R.J.: Algemene wet inzake rijksbelastingen, Kluwer Deventer, 2011, pp. 132,168.

institute just confirms the basic thesis that the use of burden of proof in tax procedures shall only be the ultima ratio.

Again, at this place, one has to mention that the decision-making by use of the burden of proof is the ultima ratio in the tax procedure. This means that the question of the standard of proof should have an essentially higher importance. By a strict use of a certain standard, the use of (material) burden of proof would become less. In the same way, by this a stricter standard of proof as a relative response to the tax payer's violation of compliance would be possible.

3.4 Means of Evidence

Principles of material or formal truth and free interpretation of evidence apply to the means of evidence (Ger: *Beweismittel, Neth: bewijsmiddelen, Swe: bevismedel)*. The principle of material truth means that the facts have to be totally and properly established and a fact is proven by any means of evidence (principle of free interpretation of evidence). Opposite, in proving the principle of formal truth is limited to a certain means of evidence.

Regarding the choice of means of evidence, the procedural theory recognises the tax body to decide after own discretion limited by the principle of appropriateness (evidence can prove a certain fact), relativity (relative burdening of the tax payer regarding the results of proving), enforceability and accountability (the production of proof cannot be allocated, if important legal goods would be harmed, e.g. discover of a business secret, if the same result may be achieved by other means).

Vigilant widening of formal truth is illegal. One cannot expect from a tax payer to provide documental evidence, if he or she does not have it and proves his or her claims by other means.[19] Insisting on documental evidence along with rejection of other means of evidence is problematic in practice. The tax body's right to choose evidence being most convincing among pieces of evidence is undisputed. This is also in line with the principle of procedural economy. But, it is different, if the tax payer presents evidence that is not even regarded by the tax body.

3.5 Limitations and Prohibitions of Proof

3.5.1 Limitations and Prohibitions for the Benefit of the Tax Payer

There are certain limitations to the application of individual means of evidence for the benefit of the tax payer. On the one hand, it may be about evidence referring

[19] If the legal expertise is necessary to find out or to clarify some crucial facts and the authority does not have the necessary expert knowledge, expert as evidence will be needed. Rijavec, V.: Dokazi z izvedenci, Podjetje in delo, GV Založba, št. 6-7/2012, p. 1395.

to the closest (intimate) sphere of an individual. It might also be about special protection of a professional secret of certain sensitive professions (religious person, lawyer, medical staff). In numerous states, this protection is widened to other professions representing parties in tax procedures, as well (*tax intermediaries*). Also, collection of data may be inappropriate and therefore illegal (*so-called Fishing expeditions*). On the other hand, there are also cases, where, due to a great violation of the law, the production of proof of already obtained evidence is not allowed (*so-called exclusion*).

a) Protected Personal Sphere and Professional Secret

The German Federal Financial Court (*Bundesfinanzhof, BFH*) ruled by judgement No. VIII R 78/05 of October 28, 2009 that a lawyer being subject to tax inspection control may not refuse the request for handing over documents in a "neutralised form". In the same way, he or she may not refer to the provision of §102 AO (*Abgabenordnung*), when requested documents (e.g. income and outcome invoices, bank transcripts) do not at all contain protected data or the tax office already found out the name of the client, due to representation in tax procedures. The tax office may therefore request the handing over of data in a neutralised form, and the way of neutralisation is left to the lawyer (e.g. by covering the names and addresses of clients). Even in the newest German professional literature (Buck, Klopfer, Betriebsprüfung, 2011[20]) the position is established that persons bound to professional secrets (*Berufsgeheimnisträger*) may be called to present documentation, but only in a neutralised form.

In the Dutch jurisdiction, there is a starting-point that in principle it is the lawyer to judge whether some writing is protected by the lawyer's professional secret or not, whilst this question was tested case by case.[21] The newer practice of the Dutch Supreme Court mainly follows the opinion by the attorney of the court (*procureur generaal*), who theoretically and comparatively legally founds his proposal, also by quoting rulings of foreign and supra-national courts in his opinions, to decide on this concrete case (*cassatie*). The Dutch jurisdiction is more inclined to respect eventual professional secrets later in a criminal procedure, and at the test of relativity they tend to respect also the interest of the fiscus, as it is within the somehow dogmatic German practice.

[20] Buck R., Klopfer M.: Betriebsprüfung, Spinger Gabler Verlag, 2011.

[21] E.g. the ruling Hoge Raad der Nederlanden, file No. 39105 of January 27, 2006 and the opinion (conclusie) of the attorney P.J. Wattela.

Slovenian tax procedural law does not know provisions similar to §102 AO, Art. L. 86 LPF or Art. 47 AWR respectively. In spite of this, one has to stress that the professional secret is regulated for the benefit of the client**.** Therefore, it is not allowed to a tax or other body finding out the name of the client to request from this client any confidential documentation that the body could not obtain from the lawyer. This position has long been established in the practice of the European Court of Justice[22] and comparative foreign jurisdiction.

b) Fishing Expeditions

The question of so-called fishing expeditions is very disputable. It is about a way of collecting information on an individual tax payer or a certain sort of information in a larger group of tax payers possibly leading the tax body to useful information and without a prior certainty by the tax body of the relevance of the collected data. There, it might be a "test" collecting of information from an individual tax payer, but also from third persons. In most states, this act is prohibited (Höglund, 2011[23]). But, on the other hand, for the past time in some states there are also opposite tendencies,[24] where these limitations are interpreted less exactly and more "pragmatic".

One cannot agree with this way of collecting data, without a parallel running of any kind of tax inspection control, or should at least oppose, in spite of the fact that such a way of data collection in the RS is legalised. Already a short overview of foreign jurisdiction is sufficient (contra).

In line with the position by French jurisdiction "*une demande gėnėralisėe de reinsegnment*" (a general request for mediation of information) is illegal, as derives from Ruling by Conseil d'Etat No. 54222 of 1987. In this case, l'administration fiscale sent a questionnaire to 300 clients of an attorney from Marseille. The court of justice found the measure illegal, information collected in such a way were not allowed to be used in the tax procedure (Michaud, 2010[25]).

[22] Ruling SES, file No. C-155/79 of May 18, 1982, case AM&S Europe Limited vs. the Commission.

[23] Höglund, M.: Tredjemanrevision grundad på bankontons slutsiffra, SkatteNytt, 2011, nr. 7-8/2011.

[24] Other rulings of the higher instance Kammrrätten i Stockholm No. 8243-08 of November 4, 2010 at the moment tested by the Highest Administrative Court (Högsta förvaltningsdomstolen, HFD), here, there is also the ruling of the German Federal Constitutional Court, according to which the use of bank details bought by the German Secret Service BND from a former employee of a bank in Liechtenstein is legal.

[25] Michaud P.: L'obligation de loyaute en droit fiscal, Etudes Fiscales Internationales, 2010.

Further, the taken position is also confirmed by the German ruling by the Bundesfinanzhof (BFH), file No. VII R 25/08 of January 16, 2009 (case *Deutsche Telekom*), when the tax body wished to obtain data from a certain company on 100,000 shareholders, who obtained additional "free of charge" shares, as there was a fear that some of them might not announce the reception of profit.

Of course, there are also opposite tendencies (pro). Jurisdiction has to decide, when the requests for sending of data are still enough specific. So, the second instance of the court of justice Kammrräten i Stockholm confirmed the tax office that requested data from the SEB bank based on data on the fiduciary account of an attorney containing a certain number. The bank opposed this, as it would mean forwarding of 280 from 900 accounts with approximate 18,000 transactions. The second instance court of justice confirmed Skatteverket, and the case is processed in front of the Supreme Administrative Court (HFD) at the time being.[26]

c) Exclusion of Evidence

Further, the question is open, what to do, when an illegal fishing expedition or other severe violations already happened. Here, two approaches are possible. In France, based on the provision by Article L16 Livre de procėdures fiscales (LPF), illegally obtained evidence is consequently excluded.

The German and Dutch approach is different. In Germany, exclusion is based on an expressive regulation by law, or in the case of especially founded reasons also in individual cases.[27] In each individual case, the interests of the tax payer on the one side and the ones of the fiscus on the other side are weighted. In the last time, the weight, even in criminal procedures frequently tends to be on the side of the latter, which is shown by the mentioned conclusion by the Federal Constitutional Court (Bundesverfassungsgericht) in connection with data bought by the federal secret service BND from a former employee of a bank in Liechtenstein.

Also, Dutch fiscal jurisdiction knows exclusion of evidence. For example, if the fiscus requests data on third persons, and there is a violation of procedural law, the

[26] Critical towards this ruling at higher instance Mats Höglund in the mentioned article, where it is interesting that he mentions Article 8 of the ECHR as constitutional base for the protection against requests of that kind.

[27] Conclusion 2 by the Senate of the Federal Constitutional Court (BVerfG), file No. 2 BvR 2101/09 of November 9, 2010, by which a complaint to the constitutional court was not handled (NJW 33/2011).

obtained data must not be respected in the tax procedure.[28] That in the past time also in the Netherlands the jurisdiction is becoming stricter, is shown by the decision by the Hoge Raad in the cases of KB Lux.[29] *In the last mentioned cases, it really is not only about tax proceedings, but these are shown in the relations of the public financing crisis as a trend of increased (unsanctioned) repression or use of disputable means from the side of the tax and other state bodies.*

3.5.2 Limitations of Evidence for the Benefit of the Tax Authorities

The preclusion of evidence on the first instance does not have such a meaning as in the later phases of the procedure. A later listing of new facts and evidence may be hindered due to the prohibition of new complaints and claims.

After the provision of Article 238 section 3 Act on general Administrative procedures, a party can list new facts and evidence in the complaint, but has to explain, why these were not mentioned in the procedure at the first level. New facts and evidence are respected as reasons for complaint only, if they existed in the time of decision-making at the first level and if the party could not present or mention them at the court for founded reasons.

Also, Article 20 section 3 Act on the Administrative Court-1 (ZUS-1), after which in an administrative procedure facts and evidence must not be mentioned and presented, if the possibility of mentioning or presenting was given in the procedure before the filing of the decision. It has to be added that in a Slovenian administrative trial, there is an additional imitation, when it is about an exercising of violations of procedure in the tax procedure. After Article 85 section 1 point 1 ZUS-1 a revision may be asked for due to essential violations of the provisions on procedures in administrative trial, but not for violations of procedure in tax procedures.

Conclusion

The mentioned presentation of domestic and foreign jurisdiction and theory regarding proving in tax procedure shows that in spite of quite large historic and

[28] Judgement of the Hoge Raada no. BNB 1990/240 of May 23, 1990, as well as the conclusion by Staatssecretaris van Financiën of April 1, 1998, No. AFZ98/1228, where it is about an illegal collecting of data from banks regarding their clients (De Blieck L.A., van Amersfoort P.J., van der Ouderaa E.A.G., de Blieck J., Koopman R.J.: Algemene wet inzake rijksbelastingen, Kluwer Deventer, 2011, pp. 132,168.

[29] Conclusion by the Dutch Supreme Court (Hoge Raad), file No. 02324/05, VN 2007/2.3 of November 14, 2006.

normative differences the problem remains the same or comparable essentially in all legal regulations. Therefore, the comparative method is useful for the legislator, the tax office, as well as for the taxpayer or his or her representative, as they might learn a lot from "experiences" of other legal regulations or they do not have to learn from own mistakes, which (as they say) is also the most expensive way, usually. At the same time it showed that actually the jurisdiction and tax practice in the compared states is the one that "gave" answers to questions asked till today in Slovenian tax practice, whilst we can only hope that Slovenian jurisdiction will "draw a line" under the newest scopes of problems of Slovenian tax assessment procedure. On the other hand, sometimes the mechanical use of national law leads to situations in opposition to the fundamental constitutional principles, without conscience of the interpreter of a legal norm. Therefore, at this point, one should remember a well-known Latin legal saying: iura vigilantibus scripta.

THE ROLE OF THE DOCUMENTARY LETTER OF CREDIT IN THE CONTRACT OF SUPPLY

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Abstract
The article examines the possibility of applying a Documentary Letter of Credit and its role in the Supply Contract, which provides its counterparties with a certain level of guarantee in obtaining payments. The use of this type of the Letter of Credit is possible not only for those counterparties who concluded contracts for the supply of goods in the domestic market, but also at the international level, especially when it comes to the import or export of goods. The principle of the Documentary Letter of Credit is that the buyer is guaranteed to be protected from the risks of not receiving the paid goods, since the nominated bank will pay only against those documents that will comply with the terms of the Letter of Credit. The seller, in their turn, timely meeting their obligations to the buyer and submitting to the bank the documents in full compliance with the terms of the Letter of Credit, is guaranteed to receive payment regardless of the buyer.

Keywords: Letter of Credit, Documentary Letter of Credit, settlements by Letters of Credit, execution of a Letter of Credit, monetary obligation of the bank, UCP-600, foreign trade transactions.

In recent times the issue of fulfilling obligations within the framework of concluded contracts is of high priority. In this situation, we are speaking not only about contractors who have concluded contracts for the delivery of goods in the domestic market, but also at the international level, especially when it comes to the import or export of goods.

In order to strengthen the guarantee for the fulfillment of obligations under contracts for the supply of goods, as well as to protect themselves against possible losses related to non-payment or non-delivery of goods, entrepreneurs have a possibility of applying such a legal mechanism as a Letter of Credit.

Letters of Credit are very important for business activities aimed at importing or exporting goods to foreign countries. Taking into account the recent situation in the world market, an important factor here is that foreign trade transactions always bear both economic and political risks. Primarily it is so because the supplier and the buyer are in different states with different laws, considering an unstable situation in domestic and foreign markets.

In such difficult conditions of doing business, it is simply necessary to have a legal instrument that would serve as a measure to ensure a guarantee of the fulfilment of obligations under concluded transactions.

The Letter of Credit can be considered one of such legal instruments, which is a sort of a compromise between the seller's interests to receive the payment, and the buyer to receive the goods. When goods are sent from country to country, Letters of Credit guarantee that sellers shall pay and buyers shall receive what they have paid for.

In the Russian Federation, the issues of application of a Letter of Credit are regulated by Part Two of the Civil Code, Chapter 46 paragraph 3[1], Chapter 6 of Regulation on the Rules for Conducting Money Transfer No. 383-P of 19 June 2012[2] and some other regulations.

In international law, the work with Letters of Credit is determined by the Uniform Customs and Practice for Documentary Credits (UCP), which came into effect on 1 July 2007 (current publication of ICC No. 600 (UCP 600)) [3], and also by other documents developed and published by the International Chamber of Commerce (ICC).

A Letter of Credit is a monetary obligation of a bank issued on the basis of an instruction of its client-importer to make payment to a third party (exporter) in accordance with the instructions of the importer and at their expense. A client-

[1] Civil Code of the Russian Federation. Part 2 / Federal Law of January 26, 1996 No. 14-FZ (as amended on July 29, 2018) // Collection of Legislation of the Russian Federation. 1996. No. 5. Art. 410.

[2] Polozhenie o pravilakh osushchestvleniia perevoda denezhnykh sredstv: Utv. Bankom Rossii 19.06.2012 № 383-P: [red. 05.07.2017] (Zaregistrirovano v Miniuste Rossii 22.06.2012 №24667) [Regulation on the Rules for the Transfer of Funds: approved by the Bank of Russia on June 19, 2012 No. 383-P: [as amended on July 5, 2017] (registered with the RF Ministry of Justice on June 22, 2012 No. 24667)] // Vestnik Banka Rossii [Bulletin of the Bank of Russia], 2012. No. 34.

[3] ICC Uniform Customs and Practice for Documentary Credits (UCP 600) (produced by the International Chamber of Commerce (ICC))] (came into force on 1 July 2007). Legal Reference System *ConsultantPlus*. Available at: http://www.consultant.ru (accessed on August 12, 2018).

company, on whose behalf a Letter of Credit is opened, is called the Payer under the Letter of Credit, or the Applicant. The recipient of payment under the Letter of Credit is called the Beneficiary. The bank that received an instruction from the client to open a Letter of Credit is called an Issuing Bank. It is obliged to arrange payment against the Letter of Credit by itself, or to ensure payment by another bank.

In practice, a Letter of Credit like a settlement transaction includes two transactions. The first transaction is concluded between the Payer and the Issuing Bank. For this purpose, the Payer (Accreditor) files to the Servicing bank an application for a Letter of Credit and "reserves" money on a special account, at the expense of which later settlements shall be conducted with the Recipient. Since the bank is connected with the Payer under the Contract, it is not entitled to refuse to execute this order, if its form and content do not contradict the requirements of the law and the terms of the bank account agreement[4].

The second transaction is made between the Issuing Bank and the Beneficiary. In accordance with it, the bank assumes the obligation to transfer the necessary amount from the special account of the Payer to the Beneficiary, provided that the Recipient submits the relevant documents proving the fulfillment of certain conditions (shipment of goods to the Payer, etc.)[5].

International practice shows that one of the most common forms of settlements under supply contracts is a Documentary Letter of Credit, which provides for the submission of relevant documents to the bank in which a Letter of Credit is opened. This type of Letter of Credit is called "documentary" due to the fact that its execution is based only on documents. Any condition under a Letter of Credit must have a documentary form. A Documentary Letter of Credit is used in payments for goods and services, with payment being made only upon presentation by the exporter to the bank of the relevant supporting documents specified in the Letter of Credit. Such documents concerning the dispatch of goods, as a rule, include: Invoice, Packing List, Bill of Lading and other transport documents, Quality Certificate, Certificate of Origin, etc.

[4] Zhukov V. N., Pravovye i uchetnye aspekty beznalichnykh raschetov po vneshnetorgovym finansovym obiazatel'stvam / Bukhgalterskij uchet v biudzhetnykh i nekommercheskikh organizatsiiakh (Problemy ucheta) [Legal and Accounting Aspects of Non-Cash Settlements for Foreign Trade Financial Liabilities / Accounting in Budget and Non-Profit Organizations (Accounting Problems)]. 2015. No. 12 (372). p. 16.

[5] Ibid.

In accordance with the legislation regulating the Letter of Credit, banks deal with documents, not with goods. Such a provision is contained in Article 5 of the Uniform Rules and Customs for Documentary Letters of Credit[6], according to which all interested parties deal only with documents, but not with goods, services and (or) other types of performance of obligations which the documents may relate to.

In contrast to the Russian legislation, the Uniform Customs and Practice for Documentary Letters of Credit define several types of documentary letters of credit, such as deposited, guaranteed, confirmed, non-confirmed, direct, negotiable, transferable, with immediate payment documents, payment documents by instalments, with the final settlement, revolving (revolver), not renewable, divisible, indivisible, direct debit (collection) and others.

The type of a Letter of Credit and the rules for its application are prescribed in the foreign trade contract concluded between contractors. In this case, stipulated are not only the payment amounts, but also the methods for the implementation of the Letter of Credit, the list of documents submitted by the exporter, their names and characteristics, the terms of submission, the terms of shipment of goods, the terms of insurance, etc.

The obligation of the Issuing Bank to execute the Letter of Credit before the Beneficiary (Exporter) arises since the moment of opening the Letter of Credit and only under the condition that the Recipient fulfils all the stipulated conditions. In turn, the Nominated Bank, if it is not confirming, does not have this obligation before the Beneficiary, since it is only the representative of the Issuing Bank, on whose behalf he is acting.

The transaction between the Beneficiary and the Nominated (Confirming) Bank is considered concluded if, during the validity period of the Letter of Credit, he submits to the Nominated Bank all documents confirming compliance with all the conditions of the Letter of Credit. Accordingly, from that moment on, the Nominated (Confirming) Bank has an obligation to execute the Letter of Credit, namely to pay for the shipped goods.

An important fact that should be taken into account by the parties to the transaction when applying for a Letter of Credit under supply contracts is that the

[6] ICC Uniform Customs and Practice for Documentary Credits (UCP 600) (produced by the International Chamber of Commerce (ICC))] (came into force on July 1, 2007). Legal Reference System *ConsultantPlus*. Available at: http://www.consultant.ru (accessed on August 12, 2018).

bank's employees are not the experts in any area which the category of goods defined in the contract refers to. Often, after the bank receives the documentation specified in the Letter of Credit, it transfers money. Thus, the question of when and against which documents it is necessary to transfer money depends entirely on the conditions agreed between the seller and the buyer. Accordingly, counterparties need to more clearly define for themselves the key terms on which to transfer funds. Such conditions include, for example, timely issuance of a Consignment Note or a Bill of Lading (on a clearly indicated date or before its occurrence); timely preliminary inspection of the goods to determine the quality and quantity before shipment, etc.

In this case, when applying the Letter of Credit method of payment, we have to consider shortcomings, which are connected with the fact that banks do not assume any obligations for the execution of payment, for example, if the buyer refuses to receive documents or goods. In their turn, banks are not responsible, for example, for the consequences of delay and/or loss in the transmission of any messages, letters or documents; for delay or any errors in the transmission of electronic messages; for mistakes in the translation or interpretation of technical terms; for attracting other banks to effect a Letter of Credit payment.

As one way to reduce risks to the seller it is recommended to transfer the original documents to the bank and never transfer them directly to the buyer; in addition, always to adhere to international rules for the implementation of such payments and establish in the contract their specific terms.

The practice of applying the Letter of Credit shows that Russian companies, when settling with foreign partners, use the payment in this way quite actively. First of all, it is so because the Letter of Credit, in comparison, for example, with a bank loan, has a certain advantage, showing that lower interest rates are applied to the Letter of Credit (by 4-5%). Thus, a Letter of Credit confirmed by a Western bank is a cheaper form of financing import purchases. At the same time, there is also a disadvantage that there are few Russian banks which open Letters of Credit, and which Western banks are ready to work with[7].

Thus, the above mechanism of the Letter of Credit, showing its ability to provide a guarantee of receipt of payments and goods, can definitely be of interest to the parties to the transaction under the supply contract. Since the Letter of Credit form

[7] Basilashvili T. P., Sposoby platezha pri importe tovarov iz Kitaia [Methods of Payment When Importing Goods from China] / T. P. Basilashvili . // Rossijskij vneshneekonomicheskij vestnik [Russian External Economic Bulletin]. 2017. No. 6. p. 82.

is used quite effectively in supply contracts in foreign economic activities, the exporter has the opportunity to obtain guarantees of unconditional payment by the importer after the shipment of goods. In its turn, the importer is guaranteed a refund, in case the goods are not delivered within the time specified in the Letter of Credit.

Based on the foregoing, it is likely that the Letter of Credit is one of the ways to ensure receipt of payment to counterparties and fulfilment of obligations under supply contracts. It is clear that the application of the Letter of Credit allows the buyer to have an additional level of security, forcing the supplier to perform pre-defined requirements before the funds are transferred.

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