KEHITTYVÄ VENÄJÄN OIKEUS
DEVELOPING RUSSIAN LAW
НАПРАВЛЕНИЯ РАЗВИТИЯ РОССИЙСКОГО ПРАВА

LAPPEENRANNAN
TEKNILLINEN YLIOPISTO

LAPPEENRANTA
UNIVERSITY OF TECHNOLOGY

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KAUPPATIETEELLINEN TIEDEKUNTA

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Lappeenrannan teknillisen yliopiston Venäjän oikeus –projekti on EU-osarahoitteinen. Projektin muita rahoittajia ovat Lappeenrannan kaupunki, Joutsenon kaupunki sekä Viipurin taloudellinen korkeakouluseura.

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LUKIJALLE

Venäjän oikeutta tunnetaan Suomessa edelleen melko huonosti. Juridista asiantuntemuksen tarvetta ovat entisestään lisänneet maiden välisen perinteisen tavarakaupan rinnalle kehittyneet uudet yritystoiminnan muodot (esimerkiksi etablointi). Hyvää oikeudellista asiantuntemusta voidaan pitää tärkeänä kilpailutekijänä, ja yritystoiminnan kansainvälistyessä se on välttämätöntä. Sitä paitsi omat perinteiset toimintamallit saattavat osoittautua toisessa liikekulttuurissa vääriksi. Uuden toimintaympäristön oikeussäännöstön hyvä tuntemus merkitsee myös avainta yrityskulttuurin tuntemukselle. Oikeudellisissa normeissa ja käytännöissä heijastuu usein myös kyseisen maan yleisempikin kulttuuri.

Venäjän oikeusjärjestelmä elää nyt voimakasta muutosvaihetta. Erityisesti yritystoimintaa koskevaa oikeudellista normistoa on uudistettu seuraamalla kehittyneiden teollisuusmaiden malleja. Venäläinen toimintaympäristö on kuitenkin erilainen, eikä läheskään aina voida olettaa, että samanlainen termi tai sääntö saisi saman merkityssisällön Venäjän oikeudessa. Harvat Venäjän oikeusoppineet tuntevat perusteellisesti muiden maiden oikeusjärjestelmiä, ja keskivertojuristi on tottunut perinteiseen oikeusdogmaattiseen ajatteluun ja seuraa yhä sitä. Silti hyvin koulutettu, kielitaitoinen ja länsimaista oikeutta tunteva nuori lakimies ei ole Venäjällä enää harvinaisuus. Yliopistoissa tehdään kiinnostavia tutkimuksia, ja oikeusvertailu on suosiossa. Venäjällä on kehittymässä toimiva oikeusjärjestelmä, jolla on ja tulee olemaan monia yhtymäkohtia omaan oikeuteemme. Samalla se kuitenkin säilyttää erikoispiirteensä, jotka seuraavat paitsi geopoliittisista ja taloudellisista myös yhteiskunnallisista ja kulttuuritekijöistä.

Kesäkuussa 2007 järjestetty seminaari "Kehittyvä Venäjän oikeus" oli ensimmäinen ja hyvin onnistunut yritys kuvata Venäjän oikeuden kehitystä kokonaisvaltaisesti, tuoda esiin sitä koskevia metodologisia, historiallisia ja vertailevia näkökulmia. Painopiste oli yritystoiminnan kannalta keskeisimmissä instituutioissa, kuten sopimuksessa, osakeyhtiössä, riidanratkaisussa ja oikeudellisissa riskeissä. Käsillä oleva kirja koostuu seminaarissa pidetyistä esitelmistä.

Seminaarin onnistuminen olisi ollut mahdotonta ilman hyvää yhteistyötä Helsingin yliopiston Kansainvälisen talousoikeuden instituutin (KATTI) ja Lappeenrannan teknillisen yliopiston (LUT) Venäjän oikeus -projektin sekä Venäjän ulkomaankaupppa-akatemian, Pietarin valtiollisen yliopiston oikeustieteellisen tiedekunnan, Tomskin yliopiston oikeustieteellisen instituutin ja Pietarin Herzenin pedagogisen yliopiston oikeustieteellisen tiedekunnan välillä. Erityisen tärkeää oli Lappeenrannan kaupungin osallistuminen seminaarin järjestelyihin sekä rahoitukseen EU-osarahoitteisen Venäjän oikeus -projektin puitteissa; projektin rahoittajia ovat myös Joutsenon kaupunki ja Viipurin taloudellinen korkeakouluseura. Kiitämme niiden päättäjiä ja erityisesti kaupunginjohtaja Seppo Miettistä. Edellä mainittujen tahojen lisäksi kiitämme Suomen Venäjän suurlähetystön Pietarin-konsulaattia ja erityisesti konsuli Simo Pietiläistä.

Seuraava Venäjän oikeuden kehitystä käsittelevä seminaari on tarkoitus järjestää vuoden 2008 kesäkuussa.

Johtaja Pia Letto-Vanamo
Kansainvälisen talousoikeuden instituutti

Professori Matti Niemi
Venäjän oikeus -projektin johtaja
Lappeenrannan teknillinen yliopisto

Professori Vladimir Orlov
Venäjän oikeus
Lappeenrannan teknillinen yliopisto

К ЧИТАТЕЛЮ

Знание российского права продолжает быть весьма недостаточным в Финляндии. Потребность в юридических знаниях возросла в связи с тем, что наряду с традиционной международной торговлей товарами получили развитие новые формы предпринимательской деятельности, как, например, создание и деятельность предприятий за рубежом. Хорошие юридические знания можно отнести к важным факторам конкурентоспособности, а при интернационализации предпринимательской деятельности они, безусловно, необходимы. К тому же привычные в своей среде модели поведения могут оказаться совершенно неподходящими в другой предпринимательской культуре. Хорошее знание правовых норм новой среды предпринимательской деятельности может также оказаться ключом к пониманию ее предпринимательской культуры. В правовых нормах и практике соответствующей страны находит обычно отражение ее общая культура.

Российская правовая система находится сегодня в стадии больших изменений. В особенности правовое регулирование предпринимательской деятельности обновлено следуя моделям развитых промышленных стран. Российская предпринимательская среда, однако, продолжает отличаться, и вряд ли всегда можно предполагать, что на первый взгляд тот же самый термин или правило получит то же самое содержание в российском праве. Так редко кто из российских юристов знает основательно иностранные правовые системы, и обычный российский юрист привык к традиционной правовой догматике, и продолжает ей следовать. Однако высокообразованный, владеющий иностранными языками и с хорошим знанием западного права молодой юрист все же не является редкостью в России теперь. В университетах ведутся интересные исследования, и сравнительное право пользуется популярностью. Действительно функционирующая правовая система развивается в России, и у нее есть и будет много сходного с правом Финляндии. В то же время она сохраняет свои отличительные черты, что отражает не только геополитические и экономические, но также и общественно-политические и культурные особенности России.

Семинар на тему Развивающееся право России, организованный в июне 2007 года, был первой и удачной попыткой представить всесторонне развитие российского права, показать относящиеся к нему методологические, исторические и сравнительные аспекты. В центре внимания были такие важные с точки зрения предпринимательской деятельности институты, как контракт, акционерное общество, разрешение споров и правовые риски. Настоящая книга состоит из докладов, представленных на семинаре.

Успех семинара был бы невозможен без хорошего сотрудничества между Институтом международного экономического права Хельсинкского университета и Проектом «Российское право» Лаппеенрантского технологического университета, а также Всероссийской академией внешней торговли, юридическим факультетом Санкт-Петербургского государственного университета, юридическим институтом Томского университета и юридическим факультетом Герценского педагогического университета. Особенно важно было участие города Лаппеенранты в организации семинара и его финансировании в рамках частично финансируемого ЕС проекта «Российское право»; проект финансировался также городом Йоутсено и Выборгским обществом высшего экономического образования. Благодарим их руководителей и в особенности мэра Сеппо Миеттинена. Помимо вышеупомянутых выражаем свою благодарность также Петербургскому генеральному консульству посольства Финляндии в России и в особенности консулу Симо Пиетиляйнену.

Проведение следующего семинара на тему Развивающееся право России запланировано на июнь 2008 года.

Директор Пиа Летто-Ванамо
Институт международного экономического права Хельсинкского университета

Профессор Матти Ниеми
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Профессор Владимир Орлов
Российское право
Лаппеенрантский Технологический Университет

Arvoisa seminaariosallistuja,

Viime kesäkuussa järjestetty Kehittyvä Venäjän oikeus – seminaari tarjosi ensimmäistä kertaa suomalaisille Venäjä-osaajille kattavan paketin alan oikeudellisesta asiantuntemuksesta Helsingin ja Lappeenrannan yliopistojen välisenä yhteistyönä. Lappeenrannan kaupungilla oli kunnia olla mukana rahoittavana tahona seminaarijärjestelyissä sekä toimia ensimmäisenä päivänä isäntänä seminaarin iltatilaisuudessa.

Kaakkois-Suomen suurimmalla kaupungilla, 60 000 asukkaan Lappeenrannalla, on ainutlaatuinen asema Euroopan Unionissa. Lappeenrannasta on muodostunut vaiherikkaan historiansa, erinomaisen sijaintinsa ja kaupungin oman myötävaikutuksen johdosta vahva Venäjän liiketoimintakeskus maassamme. Lappeenrannan seudulla on satoja yrityksiä, organisaatioita ja asiantuntijoita, jotka tekevät monella eri tavalla yhteistyötä venäläisten kanssa. Venäjän läheisyys on kaupungillemme suuri mahdollisuus työllistävän vaikutuksensa ja turismin lisääntymisen johdosta. Vaikutus näkyy mm. tax-free myynnin volyymina nostaen sen maamme toiseksi korkeimmaksi.

EU:n ja Venäjän välisenä rajakaupunkina Lappeenranta on kehittänyt itseään Venäjä-yhteistyön erityiseksi ymmärtäjäksi ja osaajaksi. Kaupungissamme panostetaan venäjän kielen ja kulttuurin opiskeluun jo peruskoulusta lähtien. Tänä syksynä Lappeenrannan teknillinen yliopisto käynnisti kaksoistutkintoon johtavan maisteriohjelman, joka järjestetään yhdessä Pietarin yliopiston kanssa.

Venäjän kehittyvä oikeus on eurooppalaisia ja varsinkin suomalaisia kovasti kiinnostava aihe. Kesäkuinen seminaari on poikinut jälkeensä täällä Lappeenrannassa tilaisuuksien sarjan, jolla välitetään tietämystä sekä tuodaan esiin ajankohtaisia aiheita ja asioita Suomen ja Venäjän välisestä yhteistyöstä. Lappeenrannan teknillinen yliopisto toteuttaa sarjan osana EU-osarahoitteista Venäjän oikeus – projektia, jossa ovat Lappeenrannan kaupungin lisäksi rahoittajina myös Joutsenon kaupunki ja Viipurin taloudellinen korkeakouluseura.

Lappeenrannan kaupungin puolesta haluan vielä kiittää mielenkiinnostanne ja osallistumisestanne Kehittyvä Venäjän oikeus -seminaariin ja toivotan teidät lämpimästi mukaan myös kaikkiin tuleviin Venäjän oikeutta koskeviin seminaareihin ja luentosarjoihin. Kaupunkimme on loistava paikka järjestää alan seminaareja, koska Lappeenrantaan on keskittynyt verkosto, joka auttaa suomalaisia yrityksiä Venäjän liiketoiminnassa. Suhteellisesti tarkasteluna voidaankin sanoa, että Lappeenranta on Suomen venäläisin kaupunki.

Mielenkiintoisia lukuhetkiä seminaarijulkaisun parissa toivottaen,

Seppo Miettinen
kaupunginjohtaja
Lappeenrannan kaupunki

Уважаемые участники семинара,

В июне 2006 года в рамках сотрудничества между университетами городов Хельсинки и Лаппеенранта был проведен семинар под названием «Развивающееся российское право» (Kehittyvä Venäjän oikeus). Этот семинар впервые представил финским специалистам достаточно полный пакет правовых знаний о России. Город Лаппеенранта гордится честью финансировать проведение семинара и принимать уважаемых гостей на торжественном вечернем мероприятии.

Лаппеенранта, в которой проживает порядка 60 000 жителей, является крупнейшим городом Юго-Восточной Финляндии. Город занимает особое положение в Европейском Союзе. На протяжении истории своего развития, Лаппеенранта, благодаря удачному географическому положению и активной работе городских структур, стала одним из основных в Финляндии центров делового сотрудничества с Россией. В самой Лаппеенранте и в ее окрестностях работают сотни фирм, организаций и специалистов, деятельность которых так или иначе связана с Россией. Близость России дает городу большие возможности, улучшает ситуацию с занятостью населения, позитивно влияет на развитие туризма. Влияние России видно и в увеличении объемов продаж такс-фри. По этому показателю Лаппеенранта занимает второе место в Финляндии.

Лаппеенранта расположена на границе ЕС и России. Город развивается в направлении повышения профессионализма и компетентности в вопросах, связанных с Россией. В общеобразовательных школах и других учебных заведениях города уделяется особое внимание изучению русского языка и русской культуры. Осенью этого года совместно с Санкт-Петербургским государственным университетом Технологический университет Лаппеенранты начал программу обучения магистров, которая даст возможность студентам получать «двойной диплом».

Динамично развивающееся российское право представляет большой интерес для европейцев, особенно для финнов. Июньский семинар стал первым в серии прошедших в Лаппеенранте семинаров. В выступлениях специалистов освещались актуальные аспекты российско-финляндского сотрудничества. Серия проводимых Технологическим университетом Лаппеенранты семинаров является частью финансируемого ЕС проекта «Российское право» (Venäjän oikeus). В его финансировании, наряду с городом Лаппеенранта, принимают участие также город Йоутсено и Выборгская экономическая ассоциация высших школ (Viipurin taloudellinen korkeakouluseura).

От имени города Лаппеенранта я хотел бы еще раз поблагодарить Вас за проявленный интерес и активное участие в работе семинара «Развивающееся российское право» и пригласить Вас к участию во всех предстоящих семинарах и циклах лекций по российскому праву. Наш город – замечательное место для проведения подобного рода мероприятий, так как в Лаппеенранте уже сформировалась сеть специалистов, помогающих финским компаниям вести бизнес в России. Можно даже сказать, что Лаппеенранта – самый русский город Финляндии.

Надеюсь, что знакомство с материалами семинара будет Вам интересно.

Сеппо Миеттинен
Мэр города Лаппеенранта

Vladimir Orlov: Russian Law Studies´ Discourse

Lappeenranta University of Technology

1. Problematisation of the Issue

The basic question regarding Russian law can be: are we seeing a tendency towards convergence between the western and Russian law, or is something new forming in Russia, derived from its own traditional legal culture?
It is impossible to give simple answer to the question. But in any case it is unrealistic to believe that the same legal rules shall work the same way in different legal system (particularly in real practice). And Russian law is still differs from the western law. We must avoid forgetting the basic rule of the comparative law that every legal system is unique. On the other hand, the Russian law has been developed under the influence of the western legal tradition based on the Roman law and particularly traditional legal problems of private law have usually the same solutions. But then there are the areas concerning the basic societal and cultural values that can give surprises. My further presentation is an attempt to detail the given answers.

2. International Transactions Level

As regards the international trade level, it is unnecessary to expect that the solutions provided under the Russian law are different compared with the western law. International practice has been followed even in the Soviet Union law. Especially it concerns international sale of goods contracts and particularly questions under the scope of application of the Vienna Convention (1980, CISG), in which the country is participating. Also the legal institutions adopted (in the Russian Civil Code) from the western business law, e.g. leasing, factoring, franchise and agency, cause no particular problems, they are not at least problematized in the context of the Russian law.
But there are Russian *ordre public* rules as well as directly applicable norms or so called "strong" imperative norms, the application of which can not be avoided under the Russian private law rules in case of litigation in a Russian court. Also it is important to remember, that construction work contract is usually regulated by the law were such works are exercised and thus considering building a plant in Russia attention must be paid to the Russian legal norms regulating the subject. Many of these rules are of compulsory nature.

3. Internal (domestic) Legal Relations

As regards the internal (domestic) legal relations (transactions) in Russia, the only applicable law is Russian law. It is particularly important to know in establishing business activities in Russia. An enterprise established by a foreigner in Russia is the subject of the Russian law. It is a Russian legal person and its contracts with other Russian legal persons are domestic and regulated only by the Russian legal norms.

4. The Basic features of the Russian Business Law

In characterizing Russian business law, it is important not to forget, that the Russian legal order is still shaping from the Soviet (socialist) law to the market economy law. As to the legislation, it has been succeeding. Also the results of privatisation process are impressive although not much positive for the whole society.

It is important to note then that continental and particularly German law, in which the primary legal source is a written law and the legislation is mainly codified now, have influenced the Russian law to a great extent. It means that the Russian law is based on concepts and general rules. On the other hand, the present Russian law has also some similarities to common law (e.g. trust modified into entrusted administration of property). As to the legal thinking (theory), in Russian law the legal-positivistic approach has been dominant, to be more exact, the statute-positivistic approach to law in legal doctrine and practice has always dominated.

Attention must be paid also to that the Russian state is still above the society although trying to get along with the market forces. And it is still the task of the state to set the legal norms and it expects strict obedience of the law by citizens. Customs and other means of quasi-legal regulation (in positive meaning) or what we call soft law is not properly rooted into legal business culture and the Russian business culture is quite different to the western one.

Let us go then to the great legislative work done in the codification of Russian law and its impact on problems of the Russian legal system. This modern codification of course deserves recognition but it has not solved fundamental problems of law in Russia. This concerns particularly the Civil Code, which is purported to contain the basic legal rules regulating business in Russia. It is still set of the ideal general rules, often ignoring practice, to be applied only in the case of litigation in a court. In practice the gap between, on the one hand, the nominal values of behaviour fixed in law and other normative acts and, on the other hand, the real patterns of social and economic behaviour, on which the activities of the living enterprises are based, is deep. It means that law-based practice has not yet

become rooted and the real functioning rules of the game for entrepreneurship are not created by legislation in Russia. Thus the legislation has not transformed into the law (legal norms) in the sense that this institution is understood in western countries, which means that the goals imposed for the legislation have not been realised in this. And in any case Russia is still on the road to achieve the standards of the western model of the state governed by law, if it is even really eager to it now.

5. Concept of Contract in Russian Law: Comparative Aspects

The results of the civil law codification in Russia with the aim to reduce the differences between Russian and western private (civil) law regulating business activities can be illustrated by introducing the Russian concept of contract through comparative aspects presented further.
In comparison of the Scandinavian and Russian law, attention must be paid to the similarities in contract-law terms and institutions. It owes to the fact that both the Russian and Scandinavian law has developed under the influence (although in different ways) of the German law. Such terms, concepts and institutions in Russian law as freedom and binding force of contract as well as the basic concept of contract have analogues in the Scandinavian law. But if we go into comparison in detail, there is also an essential difference in the meaning of a contract in the Russian law.
A contract used in enterprise activities that arises (is concluded) in Russia must be done according to the Civil Code (art. 161) in written form, and must in general meet the requirements of the law (the written norms). As to the foreign trade transaction the written form requirements are very strict (under a nullity of it). This means that the legal control on it, i.e. the control of public authorities, is accentuated directly in the norms of the law functioning as a certain pre-control of the conclusion and conditions of contract. By comparison, e.g. in Finland, a contract is regarded as a flexible organisation due to the rules prioritising the intention of the parties in interpretation of contract. And it can be subject to not just pre- but also after-control in case of its unfairness. In the meaning of a flexible organisation, a contract is understood in Scandinavian law as a developing system of legal relations (between its parties), which is in force for a definite time and also dependent on the views and activities of the parties, and which is aimed to achieve a certain result. So due to the form requirements the flexibility of the contract in Russia is very limited, and its static nature is even emphasised by the interpretation rules on contract prioritising the expression of will, as well as by favouring the statute-positivistic approach to law in legal doctrine and practice. So the rules on form and interpretation of contract in Russian law directly strengthen the stability of the contract and to some extent also its independence from the will of the contracting parties.

Thus, regarding the legal regulation of contract in Russian law, the objective interpretation and written-form requirements concerning particularly foreign trade contracts, together with the obvious domination of the positivistic approach in Russian law, could be seen as obstacles to its development to the modern western model.

6. The Present State of the Russian Legal Studies and Research

The key problems of the Russian legal system can be seen in the Present State of the legal studies and research in the country. It is proper to characterize them as postsoviet. Teaching (in high schools) and research work (in organisations of the Academy of Sciences) were separated from each other in the Soviet Union, and there has not been yet dramatic changes in the situation. Furthermore, legal education is still traditional and based on the model of classical academic education. It is totally under the control of the Ministry of Education, does not radically except teaching of law in the Soviet period. Lectures and book reading take the most part of the studies in high schools and students must study mainly the texts of law. Legal dogmatics is still predominating in legal studies and research. Foreign languages' learning is still the privilege of the fortunate students. The legal literature consists mainly of the textbooks repeating and sometimes explaining the content of the (codified) legal norms. Postgraduate thesis (dissertations) are usually dealing with the legal novelties containing almost always some statement *de lege ferenda*, including proposals for changes in law (standard requirement set by High Attestation Commission).

7. New Trends in Legal Science

However, legal studies and research work is undergoing changes in Russia. And what is important, Russian students are becoming more interested in serious legal studies, comparative and historical aspects as well as modern legal theories. Particularly the works of the post-graduates particularly in some provincial universities attract attention. It is not exceptional to find a good comparative study with regard to the western law institutions, particularly (German) pandect and (American) law & economics doctrine. Historical studies are also among the favourites of the post-graduates, and particularly the revival of the Russian legal theories and concepts of the late of the nineteenth and the early twentieth centuries is brought to light in them. Notable is the growing interest in the western legal theories and concepts in Russia. It indicates extending the boundaries of the studies in the Russian legal science. It is directly expressed that Russian legal science is currently searching for a new concept of state and law.

Also the necessity to go beyond the limit of the classical conceptions of the scientific rationality is expressed. The dominance of the logical rationality in legal sciences is challenged and turning to irrational understanding is seen necessary. Thus the relative nature of the legal knowledge is quite acceptable. Also legal hermeneutics concentrated on the interpretation and understanding of texts is getting acceptance in Russia. There are also clear footsteps of the sociocultural paradigm of legal thinking in Russia. It means that legal thinking is regarded not only as a cognitive activity of an individual but also as an expression of the concrete legal culture. Particularly the significance of the ethnocultural factors in the development of the state as well as law is seen important in some Russian articles. Interesting is the observation about the sociocentric (compared to the western egocentric) way of understanding and acting of Russians.

Also the postmodern idea of pluralization of the concepts of law does not seem as heresy in Russia. Accepting the postmodern concept of law, the idea of the multiplicity of culture and values and consequently of law, clearly means abandoning the vulgar Marxist concept of the state and law, dominated in the Soviet legal science. On the other hand, the concept of integrative jurisprudence (Berman) aimed at integration between legal positivism, natural-law theory, and the historical school or politics, morality and history, does seem attractive for the Russian legal scholars.

8. Historicocultural Factors in the Development of Russian State and Law

It is obvious that the modernisation process in Russia aimed towards convergence with the western model of the state and law is not going in the intended way. Among the answers to why it has happened are historical factors. The historical background of the development of Russian society includes such factors as that the ordinary thinking of Russians is not deeply and even less than totally based on rationality. And it was almost a Russian tradition to separate a theory from a practice, knowledge from act. Then the fragmentary way of life is quite common in Russia, and it could be explained by geographical and historical as well as social life factors. Particularly a peculiar nature of the country due to its big territory and exceptional natural conditions as well as the fact that its population is multinational and scattered deserves attention. Due to these factors, a very deep contradiction has prevailed from time to time between the centre and provinces as well as between the traditional country and ”civilised” town life. And the political development of Russia has been almost always swinging between the power of totally independent aristocrats and the state’s attempts of centralization, and consequently the role of law is still seen as to keep order for avoiding chaos. Owing to this, the principle of legality, regarded as an ideal and expressed often as

the dictatorship of law in Russia, is understandable. And the idea, that law is produced by the state and must serve as a means of carrying out its goals, seems to be still quite influential in Russia. The historical factors though often officially not recognized has played important role in the shaping of Russian law and they are hardly to be ignored in the present development of Russian law.

9. Conclusive Remark

Thus the Russian law studies face new challenges. It is becoming clear also in Russia, that traditional legal-dogmatic approach is not sufficient for knowing and particularly properly understanding the content of the Russian law. The development of Russian law and particularly new trends in the Russian legal science deserves attention in the studies of Russian law. Understanding it requires that sociocultural factors are paid attention to. It means also being sympathetic towards Russian legal culture, however without assuming an acritical attitude towards it.

Anton D. Rudokvas: Russian civil law in the European context: Past and Future

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1. Formation of methodological discourse.

There is no doubt, that every national legal system is a fruit of historical development. As such it represents a national legal tradition. The last one can absorb more or less intensively foreign influences and legal transplants, but it always conserves its own type of legal discourse, manner of thinking and decision making, which are different with other national legal systems. But on the other hand, the fact is, that national legal traditions can be born and die. So if we want to speak about actual law of any country, first of all we should understand when was born the legal tradition, which is embodied in the actual law of the country.

If we try to find a starting point to discuss the civilian tradition of Russia, we have to begin from the XIX-th century and more concretely from 1832 when the X-th volume of the Statute Book of the Russian Laws was promulgated. This volume contained civil laws. It was proclaimed officially an incorporation of the old Russian laws. But the statement was a misrepresentation. Many parts of the Statute Book were mere translations from the French civil code and from treatises of French jurists. Indications of historical sources of the articles of the Statute book had only formal character. In many cases these sources had nothing common with content of an article commented. So the connection between the Russian Statute books text and its so called historical roots was only formal and inconvenient. But the same text was too imperfect from the point of view of the juridical technique to be a closed interpretative space *per se*.[1]

Due to this fact Russian civilians began to form a doctrinal background of the Russian civil law on the base of German Pandectic law, as it was called the systematized and modernized Roman law applied in the Modern Germany up to 1900. Those German jurists who elaborated this system of Modern Roman law were called pandectists. Their Russian pupils also were not looking for perfect solutions of doctrinal problems in the native legal material. They tried to solve their problems by deep analysis of the sources of Roman law with help of German books and manuals. So little by little it was born in the late XIX-th century Russia a civil law dogmatic, which was closely connected with German Pandectic doctrine and studied Roman private law in such a

[1] For details see, e.g. *Rudokvas A. D.* The Alien. Acquisitive Prescription in the Judicial Practice of Imperial Russia in the XIX-th Century // Rechtsgeschichte. 2006. № 8. P. 59 – 69.

manner, if it was applied in Russia as a subsidiary source of Russian civil law. But the essence of Pandectism doesn't consist in the application of Roman law. It consists in its methodology.

References to the German dogma of Roman law were formulated as references to the legal science. Legal scholarship seemed to the Russian representatives of this type of law discourse as "science" in the meaning of "natural science". As a German historian of law Hans Hattenhauer wrote, the concept of law as a science (*Rechtswissenschaft*) is rather complicated and German one. It is better to make a full citation of him, because his description of the main features of pandectic legal method is relevant to the Russian civil law studies up today. "To make his theory work in practical life, Savigny obliged the legal profession on the truth-finding power of logic, on a logically structured system of law. This system appeared to him as a great and complicated building, in which the concepts of law (*Begriffe*) served as bricks. The main task of a jurist…therefore was clear definition of legal concepts, that is *persona*, *res*, *dominium*, *actio*, *contractus etc*. He believed that these concepts already existed before man started to think. To him they were living creatures. And there mutual relation was that of hierarchy, a firm and solid, logically founded static order, similar to a triangle resting on its base. In its top stood the highest-ranking concept, from which by descending downwards one could discover all existing concepts of the world of law. In this scheme law appeared as a tightly closed up world of its own, steered by the power of a logically founded theory. The adherents of this view were convinced, that the correct knowledge of these concepts and their correct treatment must bring about true law. Logic was a source of law, and logic alone – a source which evidently is non-political. The science of law thus was nothing else but "counting with concepts", in other words, a sort of mathematics"[2].

As Franz Wieacker wrote[3], the underlying Pandectic conception was that of law as a positive science in which the rules of law and how to apply them were drawn exclusively from the system, concepts, and doctrinal principles. Extralegal values or aims were denied any title to create or alter the law. This fact has some important implications. The first of these is the conclusion that a legal system is necessarily a closed system of institutions and rules, independent of the social reality of the relationships subject to those rules and institutions. On this assumption all that is needed to make a correct decision in any case is the logical operation of subsuming the case under the hypothetical judgment contained in a general doctrinal principle and implicitly also in the concepts of legal science. This is very different from the recent view that the application of a norm involves a constant reciprocal interaction between the facts calling for decision and the general rule

[2] *Hattenhauer H.* On Savigny's Political Concept // Den historiska skolan och Lund. Rattshistoriskt symposium i Lund 6-7 maj 1980 / Skrifter utgivna av Juridiska Foreningen i Lund. Nr.49. Acta Societatis Juridicae Lundensis. P.17.
[3] *Wieacker F. P.* History of Private Law in Europe / English transl. by Tony Weir. New York. 1995. P. 341 – 343.

contained in the norm. However, another assumption is required to take the decision so resulting to be just. The assumption is not simply that legal concepts such as individual right, real right, the accessory nature of pledge, the elasticity of ownership are useful for purposes of systematization, education or explanation. They are not simply capable of being used as "counters" or mathematical operators in professional discourse, teaching or expounding the reasons for decisions. The principle assumption is that legal concepts should have a direct reality such as is accorded in present-day physics to a few "constants of nature" given the structures of reality as for example "speed of light". They must represent instantiations of permanently valid propositions of legal justice. Their logical application, like that of a rule of mechanics or an accurate formula in physics, necessarily leads to a decision which is correct and as such just. The premiss of this method is that if a scientific rule is conceptually logical and fits into the system, then it must be right. The assumption in its turn leads to a conclusion unwarranted by its premises, namely a serious belief that rights and legal situations really exist and are real things subject to the laws of physical nature. So, the rights and legal situations are described as impervious (for example – if A is there, B cannot be there at the same time, so if A is in possession, B cannot be in possession of the same thing too). They are described also as bound by time or space (For example, the right of ownership cannot exist in A and B at the same time, but must be either in A or B. So if A has the right of ownership, B cannot be an owner of the same property if we don't mean coownership; another example: a right once destroyed cannot be destroyed again, so a transaction which is null *ab initio* for instance on the ground of incapacity cann't be nullified by rescission; the last example – ownership is described as elastic, therefore been freed of its burdens, it springs back to its own shape)[4].

So if we speak about methods of Russian civil law, it is worth noting, that up today they are almost the same and that Russian civil law studies represent jurisprudence of concepts (*Begriffsjurisprudenz*) in their essence. Surely one can find in the Russian civil law literature some other arguments of the politics of law and sociology of law, but in comparison with the study of dogmatic concepts they don't seem too valuable. The legal discourse of modern Russian civilians is still full of appeals to the "juridical nature of institution", to the "nature of a concept of transaction" and so far and so on. This type of argumentation plays a very important or may be a key role also in courts. So one can say, that jurisprudence of concepts formed in the XIX-th century Russia is a nucleus of its civilian tradition just now, and other types of argumentation play only an auxiliary role. It is not occasional, that even today legal studies are represented in Russia as a "science of law" (*nauka prava*), and almost nobody says them "scholarship" (*uscenie*), as they say in the Modern Western jurisprudence. So the main task of our legal literature is to explore the "legal

[4] Ibidem. P. 344.

nature" of concepts and institutions of civil law in their application to the real life cases. In this sense Russia is an island of pandectism in Europe, and it is this attitude to the law discourse which prevails at the university faculties of law. It's impossible to appreciate it definitely positively or negatively. One should bear in mind, that jurisprudence of concepts was so popular in the XIX-th century Europe because it corresponded to the German variant of the "state of law" conception (*Rechtsstaat*), that is to the conception of the state, where clear and definite law rules and discretionary unexpected decisions of courts and of other powers are impossible[5]. Russian courts always tend to use their discretion instead of the rules of written law. It was so in the past, and it is so now. That's why the instinctive devotion as of Russian academics as of the barristers to the jurisprudences of concepts arguments becomes understandable and it isn't deprived of rationality. When judges aren't faithful, the "juridical mathematics of concepts" can implant objectivism to the legal discourse.

The corner-stone of pandectic legal thinking is an axiomatical supposition of the real being of an objective and therefore free from gaps system of law, which is reflected more or less successfully in the positive law. So the last one requires its correct logical interpretation through the prism of this system. Such type of interpretation often differs much in its results from a literal interpretation of the legal text. But judges, if they really want to find a solution, unknown to them from the start, are always inclined to literal reading of the text . So scholastic and literal methods of interpretation are always competitive in the legal discourse of Russian civil law. The scholastic method is supported by the academic circles. The structure of the Russian Civil Code also plays on its side, because general concepts have a key role in it as the General part of the Code. Besides, the formulas of the Code are often obscure and contradictory. Its text is incomplete to look it from the angle of juridical technique. This textual imperfection gives also additional arguments in favor of its "scientific" interpretation (as it is called in Russia). In addition to that a partisan of legalism cann't appeal to the will of the legislator reflected in the Motives of the Code because they are left unpublished. In summation the scholastic (or scientific) type of legal discourse prevails in the end due to the causes above mentioned. Its really unique serious enemy is a relatively low qualification of the court staff and of other actors at the scene of the civil law processes who are rarely capable to operate with arguments of a high level of abstraction. As a result, the Russian legal discourse is a mix of refined dogmatic and of its profanation.

The practical results of this state of methodology can be illustrated on example of the right of ownership. It is apparent that the legislator consciously avoided a direct definition of thing as the

[5] *Wieacker F. P*. History of Private Law in Europe / English transl. by Tony Weir. New York. 1995. P. 347-348.

only possible object of this right. Besides, the concept of thing doesn't exist in the Civil Code. More of that, the legislator always speaks about ownership of property *(imushestvo*), and not of thing. The legal definition of property in the art.128 of the Civil Code includes not only things, but also property rights, that is immaterial objects, which aren't things. In addition, there are many rules in the Russian legislation, which suppose ownership of objects which aren't things. For example, art.34 of the Family Code speaks about ownership of participatory shares, deposits in credit institutions, shares in capital of commercial organizations. So from the point of view of strict legalism one should acknowledge, that in Russian law exists the construction "right to right", in the framework of which it is possible to have one subjective right as an object of another subjective right including the right of ownership. This is an English concept of intangible property or choses in action. But a conclusion that this conception is adopted in Russian civil law would be contrary to the real state of the legal order in Russia.

The Russian civilian doctrine ignores the above mentioned legal definitions regarding them as euphemism or inaccuracy in formulation. The absolute majority of our civilians defend the position that the only possible object of the right of ownership as of any other real right can be only a thing in the sense of paragraph 90 of the German Civil Code, which says: "Things in the sense of law are only physical objects". Isolated attempts to undermine this position are unsuccessful despite of the fact, that the European Court of human rights, whose jurisdiction Russian Federation have acknowledged, stands on a very different point of view and its legal positions are obligatory for Russia. The argumentation proposed in favor of rejection of the intangible property concept are very typical for the actual Russian civil law discourse, and can characterize its methodological bases fully enough: "Firstly, the right of ownership gives domination of a thing to a person. Possession of the thing is an expression of the domination of it. But a creditor can't possess his claim. Consequently ownership of a claim is impossible. Secondly, in case of admission of such type of individual right the obliged person would be at the same time in two civil law relationships with the holder of the right. The absolute legal relationship of ownership would accompany the relative legal relationship of obligation. So the obligor would be obliged to make something in the framework of the relationship of obligation. But on the other hand he would be obliged to abstain from intervention in the sphere of ownership of the claim and above all from an action which could lead to its elimination. So there would be a logical paradox: if the obligor makes execution of the obligation, he eliminates the claim and so intervenes in the sphere of ownership of the claim. If he abstain from intervention in the sphere of ownership of the claim, he violates his duty in the relative relationship of obligation. So as the owner of the claim would be obliged in two duties

which exclude each other, the conception is inappropriate"[6]. The words cited were written in 2005. It is worth noting that their author – a famous Russian civilian – have paid no attention to the considerations of legal politics, economic adequateness and harmonization of Russian civil law with foreign legal orders. 'Considerations of ethics, politics or political economy are not the business of the jurist as such" – so said Bernhard Windsheid - one of the mainstream pandectists in 1884. As we have to notice, his Russian successors can say just the same.

The situation is rather similar with the institution of trust. Proposals to include it in the Russian civil law system were rejected, because it is connected with the concept of divided or shared ownership[7], which is alien to Pandectism. As a result, now we have only an institution of entrusted management of property, which is a surrogative device of the classical trust. Incorporation of the institution in the framework of the traditional doctrine meets also some difficulties, because Russian civilian doctrine cann't find it a proper place in the classical system of the real rights.

2. History of the civil law legislation and other sources of law[8].

As we have discussed the genesis of the juridical method in Russia and its current conditions, let's return to the history of the Russian civil law legislation. In the 1882 it was organized a special governmental commission for drafting a Civil Code for Russian Empire. It published a draft of 2640 articles with extensive commentary in the early years of the XX-th century. It was based in its most part upon the civil law ideas, embodied in West European legislation and doctrines, which in turn stemmed from concepts and rules of Roman private law. War and Revolution prevented this draft from becoming law, but the drafters of the first Soviet civil law codification in 1922 drew on it in a very high degree. It was due to the fact, that they wanted to provide a legislative basis for the emerging free market, created by the Bolshevik New Economic Policy in 1920-s. The soviet legislators had to hasten, and as they had a pre-revolutionary legal education, they implemented the first Soviet civil code with ides and concepts of western jurisprudence of that time. The Russian Civil Code of 1922 was copied almost *verbatim* in other Soviet republics. In 1936 the Stalin Constitution included a provision for replacing the separate republic codes with a Civil Code for entire USSR. But later in 1957 the Constitution was amended. Now it provided existence of "Fundamental Principles of Civil Legislation" at the USSR level and

[6] *Crusheninnikov E.A.* To the problem of the "ownership of claim" // Outlines of commercial law. Issue 12. / ed. *Crusheninnikov E.A.* Jaroslavl. 2005. P. 31 – 32. (In Russian).
[7] See, e.g.: *Sukhanov Y.A.* The Concept of Ownership in Current Russian Law // Juridica international. Law Review University of Tartu. 2001. VI. P. 106.
[8] For details see: *Joffe O.S.* Soviet Civil Law. Dordrecht. 1988.

civil codes based on these Principles on the republic levels. The USSR Fundamental Principles of Civil Legislation were adopted in 1961. New republic codes then followed, including the Civil Code of the Russian Soviet Federated Socialist Republic in 1964. This new codification left intact more than a half of the rules of the former code of 1922. So, it was also a representation of the civilian tradition, based upon the pre-revolutionary draft.

But the area of social relations, reserved for regulation by the Civil Code in the Soviet Law was reduced in a very high degree. Almost all property relations, connected with the economic activity of state, cooperative and social organizations, and of foreign trade were reserved for all-union legislation and were not the subject of republican regulation. So, for example, the Maritime Code and the Air Code were unified for entire USSR. Furthermore, even in cases where some kinds of civil law regulation of economic activity fell within republican jurisdiction (as, for example, relations between automobile transport organizations and their clients) all-union legislation might provide for general rules, which must be observed by all union republics. All the fifteen republican civil codes repeated verbatim the USSR Fundamental Principles of Civil Legislation and were revealing only insignificant distinctions in details.

As steps were taken toward a free market economy by Gorbatshev at the end of 1980-s, new USSR Fundamental Principles of Civil Legislation were formally adopted in the Soviet Union in the summer of 1991, to take effect in 1992. Despite of the fact, that the Soviet Union was dissolved in December 1991, the Russian Federation put these Principles into effect temporarily, pending passage of a new Civil Code, because in any case they were more progressive than the obsolete Civil Code of 1964. The new Civil Code of Russia has been adopted in three separate parts. The cause of that lied in practical and political considerations. Drafting of code is a difficult process for many decades. But creation of free market economy in Russia required a legal regulation adequate to it *hic et nunc*. So the draft was prepared in several parts promulgated in different years. Its First Part was adopted by Russian Parliament in 1994. It covered general principles of civil law, property, business organizations, and general principles of the law of obligations. The Second Part of the draft became law in 1995. It covered specific types of contracts, liability for causing harm, and unjust enrichment. The Third Part of the Code was adopted in 2001 and took effect in 2002. It contained rules of hereditary law and private international law. Fourth Part of the Code was promulgated only at the end of 2006, and is to take effect only in 2008. As each part was took effect, the corresponding parts of the 1964 Civil Code and the 1991 USSR Fundamental Principles of Civil Legislation were repealed. Each part was governed by a transition law that dealt with the complex problems of movement from the old law to the new.

It is well known, that the legal development of continental Europe has resulted in the establishment of two principal systems of civil law: institutional and pandectic. The institutional system stems from Ancient Rome, where legal textbooks (*institutiones*) had been divided into three parts – *personae*, *res*, *actiones*. It was used later by the compilers of the French civil code (*Code Napoleone*) of 1804. The pandectic system was a creation of German jurists, who dealt with the adjustment of Roman private law to its application in the new circumstances of the modern Germany. In the variant used by the compilers of the German civil code of 1896 (*BGB*) the pandectic system consisted of a general part, law of obligations, law of things, family law and inheritance law. In the general part were accumulated all the rules relevant to any civil law issue. Thus the general part frees the special parts from the necessity of repeating the same rules or of replacing repetitions by cross-references between different chapters of the same code.

The structure of the Russian Civil Code followed a pattern common to German Civil Code. It involves a "General part" of the Code, stating general principles, applicable throughout the Code. The presence of the general part in the code is a mark of the fact that Russian civil law belongs to German group of the continental legal system. The general part contains general provisions about civil legislation, the origin of civil-law rights and duties, the exercise and protection of civil-law rights, persons, objects of civil-law rights, transactions and representation, time periods and limitation of actions. It is worth noting, that every part of the Code contains in its very beginning general provisions, relevant to any issue of the Part, and the Part of the Law of Obligation has also it's own general part. The parts are divided to divisions and subdivisions, which in their turn are divided in chapters. The divisions, subdivisions and chapters have their own general provisions, relevant to any issue of this section of the Code. So in cases involving contracts governed by the Code, one must look firstly at the specific Code articles, dealing with the specific type of contract. Then if the necessary solution isn't found, one might look at the general principles of the law of obligations in the Code, then and finally - at the very general principles at the start of the Code.

So in the Russian Civil Code we have a hierarchy of rules and notions, which are logically structured, depend of each other and permit to find a solution provided by the legislator for a concrete case by ascending step by step to the higher level of abstraction if a special rule for our case doesn't exist in the Code. This technics of decision making by court supposes that the last one is restricted by positive law. A judge only applies law, but can't create it. Gaps are impossible in the Code from the theoretical point of view because every solution could be found in its text on the level of abstraction correspondent to it.

This feature of the Russian civil code isn't a new one. A general part took place also in the pre-Revolutionary draft of the Civil Code, and then in the soviet civil codes of 1922 and 1964. So

every codification of the Russian law always relied upon the pandectic system. But it was modified in some important aspects.

First of all, family law, which has been a permanent component of the classical pandectic system of civil law, is not included in the pandectic system of the Russian code. Russian jurisprudence considers family law to be a separate branch of legal regulation functioning independently from civil law. Therefore family law has its own code (1995) and has no place in the system of civil law. So, in Russia civil law is only subsidiary law for regulation of family relations.

Besides this, in the civil code of Russia are included some components unknown to the classical pandectic system because the legislative development of these parts of civil law attained a sufficiently high level only in the XX-th century. The rules about copyright, patent law, know-how, rights to designations individualizing the enterprise, its products, works and services (firm names, trademarks, service marks) are concentrated in the last IV-th part of the Code, which was promulgated only at the end of 2006.

Lastly, at the III-d Part of the code are embodied rules of Private international law, which are absent in the classical pandect system.

The Civil Code is accompanied with hundreds of special laws, which deal with different subjects of the civil law relations. So, there are special laws which regulate in details the order of creation and existence of every type of juridical persons existing in the Russian legal order. Besides, there are special laws which have complex legal nature containing rules of public as of private law. These are regulating some particular spheres of life, such as Housing Code, Land Code, Water Code, Forest Code etc. Despite of the fact that in the Civil Code is proclaimed that other laws ought to correspond with its provisions, sometimes their rules really contradict to those of the last one. In such cases courts act according to the ancient principle *lex specialis derogat lege generali*.

Speaking about the Civil Code and the civil law legislation in the whole, it would be misleading to ignore judicial practice of its application on the grounds that the last one isn't acknowledged officially as a source of civil law in Russia. It is true, that in Russian Federation there is nothing similar to the *stare decisis* doctrine of the common law. But it's without sense to ignore that interpreting rules of the written law courts sometimes really create new rules or block the application of those included in the text of law. Moreover, courts of the first instance are always inclined to use the precedents and recommendations of the supreme courts to avoid revision of their decisions in cassation and appellate instances. They have source of knowledge about positions of the supreme courts in the form of deliberations of the Plenums (that is of full sessions) of the Supreme Court of Russian Federation and of the Supreme Court of Arbitration of Russian Federation. The last one has nothing common with arbitration tribunals in the very sense of the

word. The arbitration tribunals as *ad hoc* as perpetual are also functioning in Russia. But the courts of arbitration are an another case. These are state courts, which form the branch of Federal judicial power dealing with economic litigations. On the other hand all those litigations, which aren't of economic character are reserved for courts of general jurisdiction. Both branches of the state judicial system regard deliberations of their Supreme instances Plenums as some kind of normative acts, because such documents include generalization of the judicial practice on dubious subjects when the rules of the written law are obscure. The special role, which the published legal positions of the supreme judicial instances play in the civil law system of Russia, is also traditional for the country. In connection with the subject one should remember the extraordinary role of the Cassation Department of the Governing Senate in the Russian Empire, whose precedents played a key role in the formation of the civilian tradition in pre-revolutionary Russia.

A great influence in the Russian civil law system has also the Constitutional Court. The Constitutional Court in Russia was created for the first time in July of 1991 by the law of the Russian Soviet Federative Socialist Republic. By this law, the Constitutional Court was regarded as an organ of the independent constitutional control in Russia. Such attitude to this institution presupposed a direct impact of verdicts of the Constitutional Court and in this way a direct impact of the rules of the Constitution. But, the Constitutional Court had to deal with the old soviet Constitution, expanded in the last years of existence of the USSR by nearly than 300 corrections and amendments. As a result, the revised soviet Constitution was contradictious in its basic elements, created in different social and ideological conditions, and so it was rather difficult to apply it really.

The situation has changed after the adoption on the referendum in 12 December 1993 of the new Constitution of the Russian Federation. In the Art.15 of the Constitution is fixed the principle of its direct impact and supreme validity. Laws and other legal acts in Russian Federation should not be contradictory to the Constitution. The direct impact of human rights and freedoms is acknowledged in the Art.18 of the Constitution, and the judicial protection of rights and freedoms is guaranteed to everybody by its Art.46. This block of rules granted for the first time in the history of Russian law the formal possibility of the direct impact of Constitution on the legislation and on the legal practices in Russia. Now the Constitution has become a real legal base for eventual invalidation and abrogation of normative acts, contradictory to it, and for putting a stop to activities, based on those invalid normative acts.

More of that, the Constitutional Court, presenting in its verdicts and definitions their motives, gives a correct interpretation of the norms of Constitution in their application to concrete problems of the real social and economic life. In this way the legal positions of the Constitutional

court should be a nucleus of the positive law doctrine, and so have a fundamental character for its development.

In the Russian Constitution of 1993 the Constitutional Court is mentioned in the Art.125, specially delivered to it, and in the Art. 118 it is also mentioned about the execution of the judicial power by means of the constitutional legal procedure and of the other types of legal procedure. Despite of that, it's impossible to find in the Constitution a strict definition of the concept of the Constitutional Court, because the drafters of the Constitution had different views of its possible status. The gap was filled up by adopting in July of 1994 of the Federal constitutional law entitled "About the Constitutional Court of the Russian Federation".

Applying the special process form of the constitutional legal procedure, the Constitutional Court is executing a special type of justice, that is the constitutional justice. The peculiarity of the latter consists in fact, that the Constitutional Court doesn't apply rules of positive law to concrete cases as do other courts. A concrete case can be only a pretext for the Constitutional Court to deal with some concrete rules of the positive law and to form a correct estimate of them from the point of view of their correspondence or contradiction to the Constitution. In practice this signifies, firstly, that verdict of the Constitutional Court doesn't have an immediate effect for the complainant. The latter can only insist on revision of the other courts decision concerning him, if this decision was made in contradiction to the sense of the Constitution, reflected in the verdict of the Constitutional Court. As a result, if it came to light *postfactum*, that in a case, presented to the attention of the Constitutional Court by initiative of a complainant, there were false facts or *corpus delicti* was really incomplete, it doesn't signify that the verdict of the Constitutional Court becomes unjust and needs to be revised. More of that, from this point of view it has no importance, if the case which was in discussion in the Constitutional Court took place really, or not. The verdict of constitutional justice really deals with an abstract situation, described by the complainant, and ought to give a model of decision making in such situation for all other state organs, courts and officials, who have to apply positive law in similar situations. As a result, the verdicts of the Constitutional Court have a character of normative act and are really addressed to unlimited circle of persons.

This position was openly declared for many times in the Constitutional Courts own verdicts. For example, in its Decision of 16 June 1998 on the case of interpretation of some rules of the articles 125, 126, 127 of the Federal Constitution the Constitutional Court declared that: "The decisions of the Constitutional Court of the Russian Federation, as a result of which normative acts, contradictory to the Constitution become invalid, have the same sphere of effect in time, area and for circle of persons, as decisions of an organ, creating new law, and, as a result, the same general significance as normative acts, which is not proper to the acts of the courts of general jurisdiction

and of the courts of arbitration, which by their nature are only applying law." In addition one can make a citation of an abstract from the Judicial Definition of the Constitutional Court of 7 October 1997 N 88-O there is written, that: "The legal positions, containing an interpretation of constitutional rules, or bringing to light the constitutional essence of law, on which are based the conclusions of the Constitutional Court of the Russian Federation in the resolutions of its decisions, are obligatory for all state organs and officials (on the grounds of the Art. 6 of the Federal constitutional law "About the Constitutional Court of the Russian Federation".)"

It is attributed to the competence of the Constitutional Court the constitutional control of the:

1) Federal Laws, normative acts of the President, of the both Chambers of Parliament (Federal Assembly) - Council of Federation and State Duma, of the Government of the Federation.
2) Of the constitutions, and laws and other normative acts of the subjects of Federation, which are adopted on the subjects, related to the conduct of the Federal power or to the common conduct of the state power organs of the Russian Federation and of the subjects of the Federation.
3) Of the agreements between the organs of the state power of the Russian Federation and of its subjects, and also between the organs of the state power of the subjects of Russian Federation.
4) Of the international agreements of Russian Federation, which are still not in effect.

It is attributed also to the competence of the Constitutional Court the constitutional control of those Soviet laws, which are still in effect in Russia.

On these cases the Constitutional Court executes only abstract control of rules, that is, without any connection with application of the acts in concrete situations. The Constitution gives the right of appeal to the Constitutional Court for the constitutional control of the normative acts and agreements above mentioned to the President of the Russian Federation, to the both Chambers of Parliament (Federal Assembly), to the one fifth part of the deputes of the Council of Federation (that is 36 deputes), or to the one fifth part of the deputes of the State Duma (that is 90 deputes), to the Federal Government, to the Supreme Court and to the Court of Arbitration, to the legislatures and organs of executive power of the subjects of the Federation.

Considering the inquiries of courts and the private complaints the Constitutional Court can execute the constitutional control of law, which is applied or should be applied in a concrete case, if such application could be regarded as infringing constitutional rights and freedoms of citizens, guaranteed by the Constitution. By the federal constitutional laws

"About the Procurator General's Office of the Russian Federation" and "About the Ombudsman in the Russian Federation" the right for appeal with inquiries to the Constitutional Court in the concrete cases of infringing of the constitutional rights and freedoms of citizens by application of a law is granted also to the Procurator General and to the Ombudsman of Russian Federation, but the Procurator General has never used this right up today, and the Ombudsman has used it for several times only.

The right for appealing with complaint to the Constitutional Court have not only russian citizens, but also foreign citizens and individuals without any citizenship (*apatrids*). The right for such appeal is granted also to the organizations of people. This rule is interpreted by the Constitutional Court in such way, that it has acknowledged as possible subjects of complaint also commercial organizations (that is joint-stock companies etc.) and municipal boroughs, thus extending proper competence.

It is hard to overestimate the value of the Constitutional Court practices for the development of Russian civil law. Its influence on the one hand and the influence of the precedents of the European Court of human rights on the other can really stimulate modernization of civil law in Russia.

3. Future transformations.

The head of the working group for preparation of the Civil Code of Russian Federation in 1993 – 2000 A.L. Makovskij confessed in 2004 a need for modernization of the Code[9]. There are quite a few reasons for amendments of the Code from his point of view. Let us describe them briefly.

1) The first parts of the Civil Code of Russia were created in 1993-1995 when a lot of economical and social reforms were only at the very beginning. They required a radical modernization of different branches of law, connected with civil law. Some of the reforms aren't completed up today (for example, the reform of housing law and land law, which are in course of transition).

2) After the years have passed, it became apparent, that the drafters of the Code didn't expect many of the processes which really took place in the economy and the social life of the

[9] See: *Makovskij A.L.* Code Civil of France and the Codification of Civil Law in Russia // Bulletin of the Supreme Court of Arbitration of Russian Federation. 2005..№ 2. P. 137 ff. (in Russian).

Modern Russia. So they confess some of the rules included in the Code to be mistakes, which are to be corrected.

3) The judicial practice of the Codes application have filled many gapes in it, operating with analogical extension of it's concrete rules and basic principles. It would be useful to include in the Code the most important of these interpretations, elaborated in practice, to make them indubitable.

4) There are many references in the Code to special laws, which should be adopted in addition to the Code for more detailed regulation of some areas of civil law relations. Now almost all of these laws really exist, but in almost every of them are present rules contradictory to the Civil Code. Surely these contradictions should be eliminated by amendment of the Code or of these other laws. There are proposals to abandon some of the special laws. It is proposed to regulate in some areas only by the Civil Code those relations, which now are regulated by the special laws. For example, there is an idea to codify in an additional part of the Civil Code all the rules relating to the legal persons, each type of which lives now according to it's own special law, because the Civil Code contain only general provisions about them. But it is apparent already now, that the Civil Code became too voluminous. It contains 1551 enough detailed articles. So, if the idea of expanding of the Code be turned to life, the last one can become comparable with the Roman *Corpus Iuris* of Justinian.

5) There were adopted in Europe in the last years Principles of European Contract Law, Principles of European Law of Trust and some other collections of such Principles. These are private codifications, which are formally not more than *lex mercatoria*. But they are really the base for harmonization of the European Private law, and we knew that the draft of Civil Code for European Community is in process of preparation. As Russia is interested in deep convergence of its economy with that of Europe, we have to take into consideration transformations of the European law in order to facilitate creation of a common market. The process of economic convergence will surely cause transmutations of our civil law for its harmonization with European communitarian law.

But it is apparent, that all possible transformations of the written law will be effective only in the framework of the existing doctrine, based on the civilian tradition which in its basic features is common to that of Germany. It is because of this that Russian civilians are really interested in the fate of the German civil code, the law of obligations in which was modernized some time ago to be convenient to the EU directives[10]. We shall probably see in the near future some borrowings into

[10] For details see, e.g.: *Zimmermann R.* The New German Law of Obligations: Historical and Comparative Perspectives.2005.

Russian civil law from its modernized German neighbor, which constantly spirits our civilian authorities at their theoretical studies.

Konstantin V. Gnitsevich: Tradition and Passing of Property (with Regard to Sale) in Russian Civil Law

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The legal nature of the tradition (that is of the transfer of a thing in discharge of a contractual obligation) has become recently an object of energetic discussion in the Russian civil law literature. There exist radically different views on the subject. There are few once who regard the tradition as a bilateral transaction abstracted from the underlying contractual obligation of sale[11]. So they are interpreting the rules of Russian law in the spirit of German civil law doctrine. Moreover, these authors consider it necessary to separate the tradition into two acts — an agreement of transfer of ownership, which is a bilateral transaction with the real effect, and the act of the things delivery (*Realakt*), which is not a transaction *per se*.

The second view consists in recognition of tradition as a bilateral transaction, but without its abstraction from the underlying contractual obligation[12]. That means the tradition to be a transaction dependent on its *causa contrahendi*. At last there are many jurists, who see in the tradition a combination of unilateral transactions of the parties discharging their contractual obligations of sale and purchase[13]. It is necessary to say, that general point of this position focuses on the renunciation of the requirement about concurrent participation of both parts in the tradition that is the renunciation of the bilateral transaction's nature of the tradition.

[11] *Grachev V.V.* Pravovaya priroda traditsii, in: Sbornik statey k 55-letiyu E.A. Krasheninnikova. Ed. by P.A. Varul. Yaroslavl 2006. P. 16 — 35; *Krasheninnikov E.A.* Fakticheskiy sostav sdelki, in: Ocherki po torgovomu pravu. Yaroslavl 2004. Nr. 11. P. 8; *Berdnikov V.V.* Rasporyaditelnaya sdelka kak sposob izmeneniya imushchestvenno-pravovogo polozheniya litsa, in: Zakonodatel'stvo 2002. Nr.Nr. 2, 3 (See: Nr. 3. P. 32); *Belov V.A.* Grazhdanskoe pravo: obshchaya i osobennaya chasti. Moscow 2003. P. 495.

[12] *Khaskelberg B.L.* Ob osnovanii i momente perehoda prava sobstvennosti na dvizhimie veshchi po dogovoru, in: Pravovedenie 2000. Nr. 3; *Idem.* K voprosu o pravovoy prirode traditsii, in: Sbornik statey k 55-letiyu E.A. Krasheninnikova. Ed. by P.A. Varul. Yaroslavl 2006. P. 120 — 136; *Idem.* Osnovaniya i sposobi priobreteniya prava sobstvennosti (obshchie voprosi), in: Tsivilisticheskie issledovaniya: Ezhegodnik grazhdanskogo prava. 2005. Nr. 2, Ed. by B.L. Khaskelberg, D.O. Tuzov. Moscow 2006. P. 369 — 376; *Khaskelberg B.L., Rovniy V.V.* Konsensualnie i realnie dogovori v grazhdanskom prave Moscow 2004. P. 84; *Tuzov D.O.* O pravovoy prirode traditsii, in: Sbornik statey k 55-letiyu E.A. Krasheninnikova. Ed. by P.A. Varul. Yaroslavl 2006. P. 57 — 84; *Idem.* Restitutsiya pri nedeystvitelnosti sdelok i zashchita dobrosovestnogo priobretatelya v rossiyskom grazhdanskom prave. Moscow 2007. P. 43 — 63. *Sklovskiy K.I.* Primeneniye grazhdanskogo zakonodatel'stva o sobstvennosti i vladenii. Prakticheskie voprosi. Moscow 2004. P. 144 — 145, 156 — 157; *Tuktarov A.E.* Abstraktnaya model' peredachi prava sobstvennosti na dvizhimie veshchi, in: Vestnik Visshego Arbitrazhnogo Suda Rossiyskoy Federatsii. 2006. Nr. 8. C. 19.

[13] Grazhdanskoe pravo, ed. by E.A. Suhanov. Edition 3. Moscow 2005. Volume 2. P. 50 (chapter's author — E.A. Suhanov); *Alekseev S.S.* Odnostoronnie sdelki v mehanizme grazhdansko-pravovogo regulirovaniya, in: Teoreticheskie problemi grazhdanskogo prava. Sverdlovsk 1970. P. 51; *Tolstoy V.S.* Ispolnenie obyazatel'stv. Moscow 1973. P. 24; *Slishchenkov V.A.* Peredacha (traditio) kak sposob priobreteniya prava sobstvennosti, in: Ezhegodnik sravnitel'nogo pravovedeniya. 2001. Moscow 2002. P. 166.

It is worth noting the impossibility of acknowledgement of the tradition a bilateral transaction on the base of literal reading of the text of law only.

The first point of the article 223 of Russian Civil Code proves only that in Russian civil law ownership passes to acquirer by transfer of a chose to him, and that it is not a contract of sale *per se* that transfers ownership. Meanwhile this model includes many variations, which are common only in requirement of delivering of possession in discharge of contractual obligation of alienation of thing for passing of its ownership[14].

The agreement of the transfer of ownership can be included in the contractual obligation of alienation (for example, in the contract of sale). It is so in the Austrian (§ 380 and 425 Civ. Code)[15] and Spanish (Art. 609 Cód. civ.)[16] law. However it can be also a bilateral transaction, autonomous of the contractual obligation, but dependent of the last one – like it is in Dutch (Art. 3:84 Abs. 1 Cod Civ.)[17] and Swiss[18] law. In both these cases we deal with the model of causal tradition. But the agreement of the transfer of ownership can constitute a separate bilateral transaction which has to be evaluated "abstractly" from the underlying contract of obligation. In the last case they say about the model of the abstract tradition. This variation applies to Germany[19], South Africa[20], Scotland[21] and Greece[22].

Therefore we can conclude, that in each legal system based on the model of the tradition exists an agreement of the transfer of ownership, but this agreement can be either implied in the contractual obligation or can take place as a separate transaction with the real affect at the moment of discharge of the obligation. But for all that the construction of the abstract tradition can exist only in case of separation of the agreement of the transfer of ownership from the obligatory contract. On the contrary, the idea of the causal tradition can have its place as in such separation as in case of unity of the obligation and the transfer of ownership agreement in one inseparable act. That's why perfect

[14] See: *Michaels R.* Sachzuordnung durch Kaufvertrag: Traditionsprinzip, Konsensprinzip, ius ad rem in Geschichte, Theorie und geltendem Recht. Berlin, 2002. S. 35-36. Gennadiy Vasilyev mistakenly believes the tradition's principle is identical with German property transfer's model, therefore he thinks the property transfer's model of the Russian Civil Code is neither tradition's nor consensual model. See: *Vasil'ev G.S.* Perehod prava sobstvennosti na dvizhimie veshchi po dogovoru. St. Petersburg 2006. P. 14 — 15.

[15] See: Kommentar zum Allgemeinen bürgerlichen Gesetzbuch. Hrsg. v. P. Rummel. Bd. 1. § 1 – 1174 ABGB. Wien, 2000. § 425. Rn. 2. Another point of view: *Koziol H., Welser R.* Grundniß des bürgerlichen Rechts. Bd. 1: Allgemeiner Teil, Sachenrecht, Erbrecht. 11. Aufl. Wien, 2000. S. 285 f.

[16] Art. 609 Cód. civ. See: *Vake A.* Priobretenie prava sobstvennosti pokupatelem v silu prostogo soglasheniya ili lish' vsledstvie peredachi veshchi? O rashozhdenii putey retseptsii i ego vozmozhnom preodolenii, in: Tsivilisticheskie issledovaniya Nr. 1, Ed. by B.L. Khaskelberg, D.O. Tuzov. Moscow 2004. P. 135 — 136.

[17] Nieuw Burgerlijk Wetboek, Art. 3:84 Abs. 1. См.: *Mijnssen F.H.J., de Haan P.* Zakenrecht. Bd. 1: Algemeen Goederenrecht. 13. Aufl. Zwolle, 1992. S. 161 — 187.

[18] Züricher Kommentar zum Schweizerischen Zivilgesetzbuch, Obligationenrecht. Bd. V/2a. 3. Aufl. Zürich, 1993. Art. 184. Rn. 24 — 35.

[19] *Jauering O.* Trennungsprinzip und Absttraktionsprinzip, in: JuS (Juristische Schulung). 1994. S. 721 — 727.

[20] *Kleyn D.G., Boranie A.* Silberberg and Schoeman's The Law of Property. Ed. 3. Durban, 1992 P. 78 — 84.

[21] *Gordon W.* Studies in the Transfer of Property by Traditio. Aberdeen, 1970. P. 210 — 236.

[22] *Michaels R.* Sachzuordnung durch Kaufvertrag. S. 36. Anm. 6.

understanding of the legal nature of the tradition in Russian civil law requires to explore, first of all, if it is causal or abstract, because its recognition as an abstract act will demonstrate *ipso facto* that it is a bilateral transaction. If it is a causal act it could be unilateral or bilateral transaction.

The question of the causal or abstract nature of the tradition is very intricate with reference to Roman law, because one can find many contradictory regulations in its texts. So the causal tradition is discussed in the next legal sources: Gai. 2.20[23], Ulp. 19.7[24], D. 41.1.31 pr.[25], Inst. Iust. 2.1.41[26]. As an argument in favour of the abstract tradition can be used D. 41.1.36[27], which unites the abstract characteristic of delivery with the irrelevance of the *error in causa traditionis*, and D. 12.1.18 pr.[28], which doesn't adopt such irrelevance. This non-coordination in the legal texts gave rise already from the beginning of the early Modern Times to the theoretical discussion about the *iusta causa traditionis*.

The XVI-th century doctrine of *titulus et modus acquirendi* produced by *Johann Apel* in his *"Methodica dialectices ratio ad iurisprudentiam accomodata"* (1535)[29] and accepted at the second half of the next century as *communis opinio doctorum* in Germany understood the requirement of a *iusta causa transferendi dominii* as a necessity of a valid obligation, due to which ownership must be transferred to the purchaser. This theory based on the rule of D. 41.1.31 pr. contradicted to the fragment D. 41.1.36, in which ownership passed to the purchaser in any case, when the alienator and the purchaser come to the agreement about the ownerships transfer. The way out from this collision was at first the permission of the acquirement of property, based on the *causa putativa*[30]. As a tradition based on the *iniusta causa* was considered those cases, which were enumerated as

[23] Gai. 2.20. Itaque si tibi vestem vel aurum vel argentum tradidero sive ex venditionis causa sive ex donationis sive quavis alia ex causa, statim tua fit ea res, si modo ego eius dominus sim.

[24] Ulp. 19.7. Traditio propria est alienatio rerum nec mancipi. Harum rerum dominium ipsa traditione adprehendimus, scilicet si ex iusta causa traditae sunt nobis.

[25] D. 41.1.31 pr. *Paulus libro trigensimo primo ad edictum.* Numquam nuda traditio transfert dominium, sed ita, si venditio aut aliqua iusta causa praecesserit, propter quam traditio sequeretur.

[26] Inst. Iust. 2.1.41. Sed si quidem ex causa donationis, aut dotis, aut qualibet alia ex causa tradentur, sine dubio transferuntur: venditae vero et traditae non aliter emptori adquiruntur, quam si is venditori pretium solverit vel alio modo ei satisfecerit, veluti ex promissore aut pignore dato…

[27] D. 41.1.36. *Iulianus libro tertio decimo digestorum.* Cum in corpus quidem quod traditur consentiamus, in causis vero dissentiamus, non animadverto, cur inefficax sit traditio, veluti si ego credam me ex testamento tibi obligatum esse, ut fundum tradam, tu existimes ex stipulatu tibi eum deberi. Nam et si pecuniam numeratam tibi tradam donandi gratia, tu eam quasi creditam accipias, constat proprietatem ad te transire nec impedimento esse, quod circa causam dandi atque accipiendi dissenserimus.

[28] D. 12.1.18 pr. *Idem [Ulpianus] libro septimo disputationum.* Cum ego pecuniam tibi quasi donaturus dedero, tu quasi mutuam accipias, Iulianus scribit donationem non esse: sed an mutua sit, videndum. Et puto nec mutuam esse magisque nummos accipientis non fieri, cum alia opinione acceperit. Quare si eos consumpserit, licet condictione teneatur, tamen doli exceptione uti poterit, quia secundum voluntatem dantis nummi sunt consumpti.

[29] *Hofmann F.* Die Lehre vom titulus und modus adquirendi, und von der iusta causa traditionis. Wien, 1873. S. 21; *Felgentraeger W.* Friedrich Carl v. Savignys Einfluß auf die Übereignungslehre. Leipzig, 1927. S. 3 — 7.

[30] *Hofmann F.* a.a.O. См. также: *Landsberg E.* Die Glosse des Accursius und ihre Lehre von Eigentum. Leipzig, 1883; *Stintzing J.A.R.v.* Geschichte der deutschen Rechtswissenschaft. Bd. 1. München, 1880. S. 296 ff.

such in the statute law (for example, it was recognized as such case a delivery based on the illicit donation between husband and wife[31]).

Another solution was produced by F.C. Savigny[32]. He presumed that there were cases of the valid tradition without an *obligatio civilis* before it. To his mind these are cases of dispensation of alms and of transfer of a loan without a civil contract before the transfer. Therefore Savigny believed that the *iusta causa transferendi* was in no way an *obligatio civilis.* He considered the *iusta causa transferendi* as an agreement between the alienator and the purchaser about the transfer of ownership. One can conclude about the real existence of this agreement from the externals of the delivery, but these externals are not a legal *causa* of the tradition[33].

Therefore the tradition of a thing is an abstract transaction in Savigny's doctrine. Its validity or non-validity don't depend from the validity of the obligation. This conclusion determines an actualization of the question about the *error in causa traditionis*, which is based on the contradiction of the rules of D. 12.1.18 and D. 41.1.36.

This problem was in the centre of attention of German pandectistics, which tried to adjust the contradictory views of Roman lawyers[34]. In the final analysis the pandectistics adopted opinion of Julianus. He thought that the tradition transfers ownership in any case, when the parts come to the agreement about passing of ownership, even if there was no obligation of alienation because of the *error in causa traditionis.* The dogma of the abstract tradition, which wasn't an element of the Classical Roman Law, came into the German legal system as a corner stone of the property law and entered into the German Civil Code as its § 929.

The idea of the abstract tradition was adopted almost unanimously in Russian pre-revolutionary civil law doctrine[35], inspired by the dogmatic influence of the German Pandectism. Works of this

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[31] See: D. 24.1.3.10: *Ulpianus libro trigesimo secundo ad Sabinum…* Sciendum autem est ita interdictam inter virum et uxorem donationem, ut ipso iure nihil valeat quod actum est: proinde si corpus sit quod donatur, nec traditio quicquam valet, et si stipulanti promissum sit vel accepto latum, nihil valet: ipso enim iure quae inter virum et uxorem donationis causa geruntur, nullius momenti sunt.

[32] *Savigny F.C.v.* Das Obligationenrecht als Teil des heutigen römischen Rechts. Bd. 2. Berlin, 1853. S. 256; *Felgentraeger W.* a.a.O. S. 33.

[33] *Savigny F.C.v.* Obligationenrecht. S. 256 — 259.

[34] *Windscheid B.* Lehrbuch des Pandektenrechts. Bd. 1. 9. Aufl. Bearbeitet von Th. Kipp. Frankfurt/M., 1906. S. 883 — 889; *Böcking E.* Pandekten des römischen Privatrechts aus dem Standpuncte unseres heutigen Rechtssystems oder Institutionen des gemeinen deutschen Civilrechts. Bonn , 1855. S. 162 — 164; *Schütze Th.R.* Eregetische Studien aus dem Civilrechte, in: Jahrbuch des gemeinen deutschen Rechts. Bd. 3. 1859. SS. 429 — 442; *Wetzel G.W.* Lex XII Tab. rer furtivarum usucapionem prohibet. Diss. iur. Marburg, 1840. P. 64 — 68; *Dernburg H.* Beitrag von der Lehre zur iusta causa, in: Archiv für civilistische Praxis. 1857. Bd. 40, S. 10 — 18; *Vangerow K.A.v.* Lehrbuch der Pandekten. 7. Aufl. Marburg, 1863. S. 573 — 574; *Puchta G.F.* Vorlesungen über das heutige römische Recht. 4. Aufl. Bd. 1. Leipzig, 1854. S. 492; *Strempel G.L.* Ueber die iusta causa bei der Tradition. Wismar, 1856; *Hofmann F.* a.a.O. S. 94 — 95, 80 — 89.

[35] *Muromtsev S.A.* Grazhdanskoe pravo Drevnego Rima. 1883. n.ed. Moscow 2003. P. 177, 548; *Grimm D.D.* Lektsii po dogme rimskogo prava. 1916. n.ed. Moscow 2003. P. 243; *Hvostov V.M.* Sistema rimskogo prava. 1908-1909. n.ed. Moscow 1996. P. 240. *Gambarov Yu.S.* [Grazhdanskoe pravo] Osobennaya chast': Veshchnoe pravo. St. Petersburg 1909. P. 198 — 209.

period are very popular among modern followers of the idea of the abstract tradition, because they try to demonstrate a historical continuity of their position.

The causal tradition's followers try to prove their view by references to the text of the second point of article 218 and the first point of article 223 of the Russian Civil Code, which state the acquisition of property *based on the contract* or *by virtue of a contract*[36]. The term "*contract*" here is a synonym of the word "*obligation*". The sticklers of the conception of the abstract tradition can't make a disproof for this argumentation. They insist that these articles don't reflect the causal nature of the tradition, but only mean that the delivery is usually based not on the court decision or unilateral transaction, but on the bilateral transaction, that is on the contract[37]. The reasoning is declarative and unscientific.

The adopters of the abstract tradition say, that their conception is confirmed by the rules of unjust enrichment[38]. Namely they say that the possibility of restitution of an individually–defined thing as unjust enrichment is based on the idea of the abstract tradition. It is worth noting that such a possibility is also provided in those legal systems which include causal tradition and therefore the unjust enrichment action intended for restitution of an individually–defined thing has another than abstract tradition premise. But in any case it is very important to make an analysis of the argumentation proposed in favor of the abstract tradition in Russian civil law.

Its partisans try to construe the rules of the article 1106 of Civil Code as a basis for the abstract tradition. Meanwhile according to this article a person who has transferred a right belonging to himself to another person by way of assignment of a claim or in another manner on the basis of a non-existent or invalid obligation can bring an action based on the unjust enrichment. Therefore each right discussing in this article may be transferred by each means named here, including assignment. Consequently there is no possibility to apply this article to the right of ownership as long as this right can't be transferred by means of the assignment. Certainly Russian Civil Code allows the transfer of the property right by means of the assignment of the *rei vindicatio* claim, yet this is without any doubts an equivalent for the delivery, but not a special case of the assignment of rights, because the plaintiff must be an owner or a rightful possessor of the thing to bring this action.

The attempts to prove an existence of the abstract tradition's principle in Russian civil law demonstrate an explicit influence of the German pandectic doctrine. Such aspirations for

[36] *Khaskelberg B.L.* K voprosu o pravovoy prirode traditsii. P. 134 — 135; *Idem.* Osnovaniya i sposobi priobreteniya prava sobstvennosti. P. 371 — 376; *Tuzov D.O.* O pravovoy prirode traditsii. P. 75 — 76; *Idem.* Restitutsiya pri nedeystvitelnosti sdelok. P. 59 (Fn. 3).
[37] *Grachev V.V.* Op. cit. P. 35.
[38] Ibid. P. 33.

Germanization of Russian civil law are evidences of the uncritical attitude to the pandectistics legacy without capacity for distinguish the national German institutions and general positions of the European civil law doctrine.

Of course, the idea of the abstract tradition has been adopted in some modern civil law systems, for example in Estonian law[39]. But it is an apparent consequence of political and historical motives, because the abstract tradition was peculiar to the law system of the Baltic provinces of Russian Empire[40].

It is worth noting another tendency. For example the Civil Code of Georgia, which belongs to the Germanic group of the continental law family, has adopted the idea of the causal tradition[41].

Similar tendency is typical for the modern civil law doctrine in Germany. It increases here an aspiration for renunciation of the abstract tradition. This tendency became stronger after Germany had been united, because the civil law of German Democratic Republic didn't know the abstract tradition[42].

The tendency for renunciation of the abstract tradition is an explicit line of development of European civil law. So the first point of the article 2:101 of the Civil Code's for EU draft says, that the transfer of ownership in a movable requires:

(a) the transferor's right or authority to transfer ownership in the movable and

(b) delivery or an equivalent to delivery or an agreement as to the time ownership is to pass [or registration] [based on]

(c) an obligation to transfer ownership[43].

This line of development of the European law should also be taken into consideration in the study of the legal nature of the tradition in the civil law of Russia[44].

So we can conclude that Russian civil law has adopted a causal tradition's model and there is no need to negate it.

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[39] *Tuzov D.O.* Restitutsiya pri nedeystvitelnosti sdelok. P. 88 (Fn. 4).

[40] Art. 801, 803 and 816 of the Code of Laws for the Baltic Provinces, see: Zakoni grazhdanskie, dopolnennie uzakoneniyami po 1890 god i soglasovannie s preobrazovaniem sudebnoy chasti i krest'yanskih prisutstvennih mest v pribaltiyskih guberniyah. St. Petersburg 1891. P. 160 — 162.

[41] First point of Art. 186 of the Georgian Civil Code (1997), see: Grazhdanskiy kodeks Gruzii. Translation from Georgian by I. Meridzhanashvili, I. Chikovani. St. Petersburg 2002. P. 169.

[42] *G'yaro T.* "Comparemus!". Romanistika kak faktor unifikatsii evropeyskih pravovih sistem, im: Drevnee pravo. Ius Antiquum. 2005. Nr. 1 (15). P. 189.; *Vake A.* Priobretenie prava sobstvennosti pokupatelem v silu prostogo soglasheniya ili lish' vsledstvie peredachi veshchi? P. 138.

[43] See: Transfer of Movables. 4th Draft, Berlin 2005 // http://www.sgecc.net/media/downloads/transfer_of_movablesjune_2005.pdf. p. 4.

[44] See: *Rudokvas A.D.* Neopandektistika i evropeyskoe pravo (opening address), in: Drevnee pravo. Ius Antiquum. 2005. Nr. 1 (15). P. 146 — 154; *Tsimmermann R.* Rimskoe pravo i garmonizatsiya chastnogo prava v Evrope, in: Drevnee pravo. Ius Antiquum. 2005. Nr. 1 (15). P. 156 — 175.

But what is the causal tradition in the Russian civil law in itself?

The opinion on the legal nature of the tradition which prevailed in the jurisprudence until the beginning of the XIX century was proceed from assumptions that the delivery of the thing presents the discharge of contract of alienation. This idea was based on the conception *titulus et modus acquirendi*, which placed high emphasis on the obligation's point in the relation between the persons[45]. Therefore the Austrian Civil Code, which was produced at the time of the dogmatic domination of this conception, doesn't know the tradition as a contract[46].

Another decision was produced by F.C. Savigny, which presumed that tradition is bilateral treaty about the transfer of ownership. Savigny especially noted to prove the idea, that the tradition as a bilateral transaction can be a conditional contract, if ownership passes to the purchaser after full payment for merchandise[47].

This point of view can be confirmed by many texts of Justinian's Digests (D. 18.1.53[48], D. 14.4.5.18[49], D. 19.1.11.2[50], D. 40.12.38.2[51], D. 49.14.5.1[52], D. 18.1.19[53]) and by the text of Inst. Iust. 2.1.41[54]. The question of the conditional tradition was expanded in the work of Robert Feenstra[55] and in the article of Tony Honoré[56] and now we shall not dwell on this problem concerning Roman law.

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[45] *Hofmann F.* Die Lehre vom titulus und modus adquirendi, und von der iusta causa traditionis. Wien, 1873. S. 21.

[46] Kommentar zum Allgemeinen bürgerlichen Gesetzbuch. Hrsg. v. P. Rummel. Bd. 1. § 1 – 1174 ABGB. Wien, 2000. § 425. Rn. 2. See also: *Suhanov E.A.* O vidah sdelok v germanskom i v rossiyskom grazhdanskom prave, in: Vestnik grazhdanskogo prava. Nr. 2. 2006. Vol. 6. P. 17 — 18.

[47] *Savigny F.C.v.* System des heutigen römischen Rechts. Bd. 3. Berlin, 1840. S. 312; *Felgentraeger W.* a.a.O. S. 36 — 37.

[48] D. 18.1.53. *Gaius libro vicensimo octavo ad edictum provinciale.* Ut res emptoris fiat, nihil interest, utrum solutum sit pretium an eo nomine fideiussor datus sit. Quod autem de fideiussore diximus, plenius acceptum est, qualibet ratione si venditori de pretio satisfactum est, veluti expromissore aut pignore dato, proinde sit, ac si pretium solutum esset.

[49] D. 14.4.5.18. *Ulpianus libro vicensimo nono ad edictum…* enimvero si non abiit, quia res venditae non alias desinunt esse meae, quamvis vendidero, nisi aere soluto vel fideiussore dato vel alias satisfacto, dicendum erit vindicare me posse.

[50] D. 19.1.11.2. *Idem [Ulpianus] libro trigensimo secundo ad edictum…* Et in primis ipsam rem praestare venditorem oportet, id est tradere: quae res, si quidem dominus fuit venditor, facit et emptorem dominum, si non fuit, tantum evictionis nomine venditorem obligat, si modo pretium est numeratum aut eo nomine satisfactum.

[51] D. 40.12.38.2. *Paulus libro quinto decimo responsorum…* Quaesitum est, an emptor servo recte libertatem dederit nondum pretio soluto. Paulus respondit servum, quem venditor emptori tradit, si ei pro pretio satisfactum est, et nondum pretio soluto in bonis emptoris esse coepisse.

[52] D. 49.14.5.1. *Idem [Ulpianus] libro sexto decimo ad edictum…* Si ab eo, cui ius distrahendi res fisci datum est, fuerit distractum quid fisci, statim fit emptoris, pretio tamen soluto.

[53] D. 18.1.19. *Idem [Pomponius] libro trigensimo primo ad Quintum Mucium.* Quod vendidi non aliter fit accipientis, quam si aut pretium nobis solutum sit aut satis eo nomine factum vel etiam fidem habuerimus emptori sine ulla satisfactione.

[54] Inst. Iust. 2.1.41. Sed si quidem ex causa donationis, aut dotis, aut qualibet alia ex causa tradentur, sine dubio transferuntur: venditae vero et traditae non aliter emptori adquiruntur, quam si is venditori pretium solverit vel alio modo ei satisfecerit, veluti expromissore aut pignore dato. Quod cavetur quidem etiam lege duodecim tabularum: tamen recte dicitur et iure gentium, id est iure naturali, id effici. Sed si is qui vendidit fidem emptoris secutus fuerit, dicendum est statim rem emptoris fieri.

[55] See: *Luig K.* Übergabe und Übereignung der verkauften Sache nach römischem und gemeinem Recht, in: Satura Roberto Feenstra sexagesimum quintum annum aetatis complenti ab alumniscollegis amicis oblata, hrsg. v. J.A. Ankum, J.E. Spruit, F.B.J. Wubbe. Fribourg, 1985. S. 445 — 461.

It is only important to say here, that the condition about the full payment for merchandise applies to the tradition, which is in that way a conditional bilateral transaction, but doesn't apply to the sale contract, which is an unconditional obligation as it takes its legal effect since signing[57].

Savigny's idea about the contractual nature of the tradition was accepted by most of pandectists[58] and by majority of Russian civilians[59], who were under dogmatic influence of German jurisprudence. This opinion was adopted in the German Civil Code[60]. However some of legal scholars didn't recognize the tradition as a bilateral treaty – for example Siegmund Schlossmann[61], who tried to see in tradition a unilateral transaction, and Iosif Pokrovski[62], who called the tradition a special real act. But according to the prevailing ideas, based on the text D. 44.7.55[63], tradition was recognized as an agreement concerning transfer of ownership, that is as a contract.

A disproof of this opinion can be based on the assumption that according to Roman law and Roman sense of justice doesn't exist a possibility to transfer a property right, but this right must end on the side of seller and spring up on the side of purchaser. This opinion is protected by Ralf Michaels[64] without any arguments in its favour. Similar conception but concerning legal characteristic of the tradition in the Russian civil law is supported by some authors[65] who are under the influence of the ideas produced by a famous soviet civilian Veniamin Gribanov[66].

This opinion doesn't correspond to the systematic interpretation of the Russian Civil Code[67], although it is based on the texts of its articles 223 and 235. According to another rules of the Civil Code it is clear that the Russian Civil Law system has adopted the classical model of the transfer of ownership without this right ending on the side of seller and springing up on the side of purchaser.

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[56] *Honoré T.* Sale and the Transfer of Ownership: the Compiler's Point of View, in: Studies in Justinian's Institutes in Memory of J.A.C. Thomas, ed. P.G. Stein and A.D.E. Lewis. London, 1983, p. 56 — 72.

[57] *Grachev V.V.* Pravovaya priroda traditsii P. 18 — 19, 22 — 24; *Krasheninnikov E.A.* Fakticheskiy sostav sdelki. P. 8. Fn. 11.

[58] *Windscheid B.* Lehrbuch des Pandektenrechts. 6. Aufl. Bd. 1. Frankfurt a.M., 1887. S. 581; *Dernburg G.* Pandekti. Vol. 1. Part 2. Veshchoe pravo. St. Petersburg 1905. P. 113 (Fn. 2).

[59] See: *Muromtsev S.A.* Grazhdanskoe pravo Drevnego Rima. P. 177, 548; *Grimm D.D.* Lektsii po dogme rimskogo prava. P. 243; *Hvostov V.M.* Sistema rimskogo prava. P. 240. *Gambarov Yu.S.* Veshchnoe pravo. P. 198 — 209; *Trepitsin I.N.* Perehod prava sobstvennosti na dvizhimie imushchestva posredstvom peredachi i soglasheniya. Odessa 1903. P. 6, 172; *Shershenevich G.F.* Uchebnik russkogo grazhdanskogo prava. Moscow 1912. P. 502.

[60] *Flume W.* Allgemeiner Teil des bürgerlichen Rechts. Bd. 2: Das Rechtsgeschäft. 3. Aufl. Berlin u.a., 1979. S. 174 ff.

[61] Schlossmann S. Der Vertrag. Leipzig, 1876. S. 94.

[62] *Pokrovskiy I.A.* Istoriya rimskogo prava. Petrograd 1917. n.ed. Moscow 2004. P. 380.

[63] D. 44.7.55. *Iavolenus libro duodecimo epistolarum.* In omnibus rebus, quae dominium transferunt, concurrat oportet affectus ex utraque parte contrahentium: nam sive ea venditio sive donatio sive conductio sive quaelibet alia causa contrahendi fuit, nisi animus utrusque consentit, perduci ad effectum id quod inchoatur non potest.

[64] *Michaels R.* Sachzuordnung durch Kaufvertrag. S. 105.

[65] *Sklovskiy K.I.* Mehanizm vozniknoveniya sobstvennosti, in: Ekonomika i zhizn': Yurist. 2004. Nr. 18; *Belov V.A.* Singulyarnoe pravopreemstvo v obyazatelstve. Moscow 2000. P. 19.

[66] *Gribanov V.P.* Pravovie posledstviya perehoda imushchestva po dogovoru kupli-prodazhi v sovetskom grazhdanskom prave, in: Sovetskoe gosudarstvo i pravo. 1955. Nr. 8. Similar conception see: Sovetskoe grazhdanskoe pravo. Part 1, ed. by V.A. Ryasentsev. Moscow 1960. P. 254 — 255 (chapter's author — V.A. Ryasentsev).

[67] For more details, see: *Grachev V.V.* Pravovaya priroda traditsii. P. 25 — 28; *Khaskelberg B.L.* Osnovaniya i sposobi priobreteniya prava sobstvennosti. P. 356 — 363.

A hard ground for the conclusion about the tradition as a bilateral transaction in Russian civil law is the rule of the article 491, according to which the transfer of the property right can be made under condition about the full payment for merchandise by purchaser[68].

Therefore we can conclude that tradition in the modern Russian civil law is a bilateral transaction dependent from the obligation underlying it. In other words it is a causal contract dealing with the transfer of the real right.

[68] See: *Grachev V.V.* Pravovaya priroda traditsii. P. 18 — 19, 22 — 24; *Krasheninnikov E.A.* Fakticheskiy sostav sdelki. P. 8. Fn. 11. Another point of view on the Art. 491 of Russian Civil Code see: *Tuzov D.O.* O pravovoy prirode traditsii. P. 82 — 83; *Idem.* Restitutsiya pri nedeystvitelnosti sdelok. P. 62 — 63.

Vsevolod V. Baibak: Assignment of commercial contracts in Russia

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Assignment of rights under commercial contracts

1. According to Russian law the rights under commercial contracts can pass to the third party under transaction (assignment of rights). However, it is important to distinguish the contract between the assignor and assignee, according to which the assignor agrees to transfer the rights under commercial contract, from the transaction of assignment.

   First contract creates only an obligation of the assignor to transfer the rights, that is why it is often called in Russian arbitration practice “agreement on assignment”, and Russian scholars usually call it, following terminology of German law, “obligation transaction”. At the time of conclusion this agreement the right does not pass to the assignee.

   The second transaction (assignment transaction) is made in order to perform the obligation to assign under the agreement on assignment. It is the ground for transfer of contractual right to the assignee, that is why Russian scholars often call it acquisitive transaction, again after German terminology.

   Aforesaid distinction is supported by the arbitration courts in Russia.
2. Main substantial term of the assignment transaction is the subject matter – assigned right. The parties have to nominate it as precisely as possible. However, they are allowed to indicate only criteria, according to which the subject matter of the assignment can be determined by any interested party (f.i. “all rights arisen out of long term supply contract starting from the 1st January 2007 till 1st of may 2007).
3. Russian law allows to assign so called “future rights’, that are rights, which do not exist at the time of assignment, but will probably arise. However, such rights pass to the assignee only after they arise.
4. Russian arbitration practice is very ambiguous in respect of the assignment of rights under bilateral commercial contracts (f.i. supply of goods, supply of electricity etc.) without simultaneous assignment of debts under the contract to the same assignee. Although it is not provided by Russian law, the courts allow assignments of rights without assignment of debts, if such rights (a) already exist (se it. 3 above), (b) are not disputable, (c) are not conditioned by consideration from the part of the assignor.

5. Partial assignment is allowed if the object of contractual right is divisible (f.i. money, oil, grain).
6. Along with the main contractual right assignee acquires all supplementary rights, connected with the main right, that are: pledge (mortgage), surety, penalty, interest; except for the right under bank guarantee issue to secure the assigned right.

   However, Russian arbitration practice is ambiguous in respect of the rights under arbitration clause. Some courts state, that the assignee may apply to the commercial arbitration only if the assignment transaction directly provides for transfer of the rights under arbitration clause. Other courts consider, that the assignee becomes the party to the arbitration clause automatically, by virtue of assignment of either of the rights under the contract containing arbitration clause.
7. Russian law prohibits assignment of rights, which are inseparably connected with the personality of the creditor (the so called “highly personified rights”). As this criteria (inseparable connection) is not defined in the law, it is applied under discretion of the courts.
8. Assignment transaction is always concluded between two parties: assignor and assignee.

   The debtor never participates in this transaction, and usually his consent to the assignment is not necessary, except for the cases, when (a) it is provided for by the law, (b) it is provided for by the contract, from which the assigned right arisen or (c) the personality of the creditor is of high importance for the debtor. In the last case criteria of high importance is again not defined by law and left for the discretion of the court. However, it is presumed, that the personality of the creditor is not important for the debtor, and the debtor may disprove this presumption in the court.

   When the consent of the debtor to the assignment is required, it is considered as separate unilateral transaction of the debtor, and the right pass to the assignee, when both transactions (assignment and consent) are made. Consent may be given before the assignment, at the time of assignment and after assignment. Consent may be general (f.i. consent to the assignment of any right to any person) or particular (specified right, specified assignee). In the second case the assignee shall need to receive another consent of the debtor in case of consequential assignment.
9. Although legal significance of the causa of the assignment (the reason of transfer of contractual rights) is pretty unclear under Russian law, arbitration courts tend to consider assignment as causal transaction. It means, in particular, that if causa of assignment was invalid, the assignment is invalid as well, and the assigned right does not pass to the assignee.

10. Notification of the debtor on assignment can be made either by the assignor, or by the assignee. However, it should be done in writing. If the debtor was not notified and, therefore, fulfilled his obligation in favor of the assignor, i.e. improper person, the debtor is deemed to be released from the obligation, and the assignee bear all losses resulting there from. However, assigned right passes to the assignee regardless of notification of the debtor.
11. The debtor may raise against claim of the assignee all objections, which the debtor had against the assignor as of the moment of notification on the assignment. In particular, the debtor may set off against the claim of the assignee the claim, which the debtor had against the assignor at the time of notification on the assignment.
12. Assignment shall be executed in the same form, as the contract, which was the ground for the assigned right. In particular, if the contract was registered by the Federal Registration Service (Russian authority keeping records on transactions with real estate), assignment of right under such contract also shall be registered, even if the assigned right is not connected with real estate.

Assignment of debts under commercial contracts

1. Assignment of debts under commercial contracts is based on the agreement concluded by the assignor and the assignee. Assignment of debts usually requires consent of the creditor, which is also considered as the unilateral transaction. Thus, the assigned debt passes to the new debtor, when both transactions are made. They can follow each other in any consequence, i.e. consent of the creditor can be given before conclusion of the agreement on assignment, at the time of its conclusion or even after the agreement is made.

   However, such collaterals as surety and pledge granted by the third party (i.e. not by the debtor under assigned debt) shall survive the assignment of debts if the pledgor or surety gives consent to be responsible for the new debtor. Such consent is to be given before pass of the debt to the new debtor. Otherwise, pledge and surety terminate automatically, and the pledgor and surety can only conclude new pledge and surety agreements.
2. Russian law does not prohibit partial assignment of debts, if the object of assigned debts is divisible.
3. Assignment of debts is to be executed in the same form, as the contract, from which the assigned debt arose.

Assignment of entire contracts

1. Assignment of contracts is understood as assignment of both rights and debts under the contract. Therefore, the parties to such assignment agreement have to fulfill all requirements stipulated for the assignment of rights and assignment of debts.
2. As a result of the assignment of contract one party leaves the contract entirely, and the other party takes its place.

V.A. Musin: Reforms of the Civil Law Procedure in Russia in the Context of the European Law

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There are two court systems dealing with Civil law disputes resolution in Russia: 1) courts of general jurisdiction headed by the Supreme Court of the Russian Federation and 2) State arbitration courts (i.e. state commercial courts)[69] headed by the Supreme State Arbitration Court of the Russian Federation. Proceedings in courts of general jurisdiction are regulated by the RF Civil Procedure Code; proceedings in state arbitration courts are regulated by the RF Arbitration Procedure Code.

Courts of general jurisdiction are in charge of consideration of cases with involvement of private individuals who are not engaged in business activities. As for disputes arising out (or connected with) commercial operations (including those in the sphere of foreign trade), such disputes are within jurisdiction of state arbitration courts.

Both procedural Codes had been drafted during several years and incepted a few years ago: the RF Arbitration Procedure Code – as of 1st September 2002, the Civil Procedure Code – as of 1st February 2003. Those laws absorbed some basic rules well-known in western countries.

Let us take such a problem as evidence. In previous times it was not prohibited by our law to produce an evidence at the very last moment, by taking some document "out of one's sleeve" right in a court room, in which case an opposing party was certainly taken by surprise and had actually no time to prepare its defense properly.

Meanwhile, e.g., in the UK such a situation is legally excluded.

I recollect one case in English High Court (Admiralty Division) in 1994 where I gave my testimony as an expert witness in Russian law. The issue in dispute was whether it was permissible under Russian law for a shipowner to deliver the goods to the consignee upon producing a copy of a bill of lading (instead of the original).

I have made a statement along the lines that according to Article 152 of the USSR Merchant Shipping Code 1968 (which was effective that time) in order to receive the goods the consignee should produce the original bill of lading to the carrier. The barrister who cross-examined me indicated that Article 152 of the Code just mentions "producing of a bill of lading" and does not contain any reservation that it should be an original rather than a copy.

[69] One should not mistake state arbitration courts for voluntary arbitration court (in German – Shiedsgericht) which are also available in Russia.

I insisted that the wording in question means an original bill of lading, not a copy of it because a bill of lading is a kind of securities[70]. I supported my view with a reference to the Fundamentals of Civil Legislation of the USSR and Republics 1991[71] which define any kind of securities as a document evidencing a proprietary right and a precondition of execution of such a right is producing of the original documents (see: Article 31, Section 1).

As soon as I said that I was interrupted by the judge.

- Professor, wait a minute. You have just now mentioned the Fundamentals of Civil Legislation. I would like to know whether you in your correspondence with the opposing party ever made reference to this law.
- Yes, my Lord.
- Where was it?
- My Lord, when in the witness box, I am naturally nervous to some extent and, I am afraid, I can hardly instantly indicate the file and the page. With your permission I shall request our solicitor to help me.

The solicitor showed relevant material to the judge, then the latter invited me to proceed further with my testimony.

There is, however, no doubt that if I failed to prove that the law in question was mentioned in our correspondence with the opposing party, this proof would be rejected in spite of the fact that it had a vital importance for my legal opinion.

Such an approach was apparently taken into consideration in course of drafting the Arbitration Procedure Code 2002. Article 65 (Section 4) contains a mandatory stipulation that reads: “persons participating in the case are only entitled to refer to proofs which were beforehand made available to other persons participating in the case”.

As it appears both from the text and the meaning of this norm, proofs submitted to a state arbitration court “at the last moment” and without making them available to the opposing party beforehand, may well be rejected by court. I must, however, note that in practical terms so far our courts do not go as for as that but upon a relevant motion of the opposing party a judge will declare a break or adjourn the case so as to provide the opposing party with a real possibility to prepare its defense.

Therefore the RF Arbitration Procedure Code which is currently effective did absorb rules well-known to the civil procedural law of European countries.

[70] By the way, it makes sense to note that the Merchant Shipping Code 1999 (whish is currently effective) expressly provides that “goods carriage of which is performed on the basis of a bill of lading shall be delivered by the carrier [to the consignee] in the port of discharge upon producing of the original bill of lading” (Article 158, Section 1).
[71] This law was effective in Russia that time.

Here is one more illustration of this thesis. It concerns security measures in course of court proceedings. First of all it should be noted that the previous Arbitration Procedure Code 1995 admitted a possibility to request a court for security measures only provided a statement of claim has already been filed with the court. Meanwhile some situations are possible when application of security measures is necessary prior to submission of a statement of claim to a court.

Let us suppose that there was a collision of Russian and foreign seagoing vessels within territorial waters of the Russian Federation (e.g. inside St. Petersburg sea port). Let us further admit that the foreign vessel (whose crew was at fault) was actually not damaged and is about to leave the port. There is no doubt that after the vessel leaves Russian territorial waters it will be rather difficult to chase the vessel and to detain it.

The only way to prevent these difficulties would be to approach the court with a motion to apply security measures (such as arrest of the vessel) prior to filing a statement of claim since its preparation would require some time. However the previous Code did not provide for such a possibility, so a shipowner of a damaged vessel needed to wait until the vessel at fault calls a port of a foreign country (e.g. Finland) where a preliminary security measures are allowed by law and where the vessel in question could be arrested prior to filing a statement of claim with help of local lawyers.

After inception of the Arbitration Procedure Code 2002 this problem disappeared. According to this Code a state arbitration court is entitled upon a motion of a relevant person to take preliminary security measures aimed to secure the applicant's proprietary interests prior to filing a statement of claim (see: Article 99, Section 1).

Hence, now preliminary security measures are available in Russia (like in other European countries). There is, however, a reservation in the Code that the court ruling on application of preliminary security measures should, inter alia, indicate a time period (not exceeding 15 days) within which a statement of claim has to be filed (see: Article 99, Section 5). If a plaintiff fails to submit a statement of claim to a court within the abovementioned term, the preliminary security measures will be lifted (see: Article 99, Section 8).

Moreover, as it is expressly mentioned in the Code, a state arbitration court may take security measures (including preliminary ones) upon a motion of a party to a dispute to be resolved by a voluntary arbitration forum (see: Article 90, Section 2). This norm is very substantial. There is a Russian Law "On International Commercial Arbitration" 1993 which law is actually a replica of the UNCITRAL Model Law "On International Commercial Arbitration" 1985. This Law provides, inter alia, that "it is not incompatible with the arbitration agreement for a party to request, before or

during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure" (Article 9).

Until the Arbitration Procedure Code 2002 was incepted the quoted rule of the Law "On International Commercial Arbitration" was practically not applicable since the previous Code 1995 did not contain a norm similar to that of Article 90 (Section 2) of the Code 2002, so judges were reluctant to apply Article 9 of the Law "On International Commercial Arbitration" due to the fact that it was not supported by a relevant norm of the Code. Now the rules of Article 9 of the Law 1993, on the one hand, and of Article 90 (Section 2) of the Code 2002 are quite consistent with each other, and the norm of Article 9 of the Law 1993 is actively in practical use. This example also clearly shows that Russian procedural law assumed an approach which is quite typical for other European countries.

Development of Russian legislation in line with European law standards results, inter alia, from participation of our country in the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the European Convention"). As it is expressly stated in the Constitution of the Russian Federation, generally recognized principles and norms of international law and international treaties of the Russian Federation shall be deemed an integral part of its legal system (see: Article 15 (Section 4). Accordingly the rules of the European Convention are binding for Russia.

The European Convention not only declared human rights and freedoms to be protected by its participants but, in addition to that, created a legal mechanism whose aim is to ensure unified construction of the Convention's norms, i.e. the European Courts of Human Rights. It is expressly stipulated in Article 46 (Section 1) of the Convention that "the High Contracting Parties undertake to abide by the final judgement of the Court in any case to which they are parties". The Russian Federation strictly follows this approach.

It makes sense to draw attention to the Ordinance of the Plenum of the Supreme Court of the Russian Federation of 10th October 2003 No 5 "On application of generally recognized principles and norms of international law and international treaties of the Russian Federation by courts of general jurisdiction".

The Ordinance emphasizes that "the Russian Federation as a party to the Convention for the Protection of Human Rights and Fundamental Freedoms recognizes jurisdiction of the European Court of Human Rights as binding in issues of construction and application of the Convention and Protocols to it in case of alleged violation of these treaties by the Russian Federation when an alleged violation took place after inception thereof in relation to the Russian Federation. Therefore application of the abovementioned Convention by courts should be performed with due

consideration of practice of the European Court of Human Rights so as to avoid any violation of the Convention for the Protection of Human Rights and Fundamental Freedoms" (Section 10, paragraph 3).

The Ordinance further indicated that, given the contents of Article 46 (Section 1) of the European Convention (see above), a final judgement of the European Court on Human Rights in relation to our country shall be binding for all public agencies of the Russian Federation including courts who within their competence should act so as to ensure performance of obligation of the state resulting from participation of the Russian Federation in the Convention for the Protection of Human Rights and Fundamental Freedoms (Section 11).

As one can see, these rules of the Ordinance of 10th October 2003 mean judgements of the European Court of Human Rights in the cases where the Russian Federation was a party.

There is, however, one more Ordinance of the Supreme Court of the Russian Federation. It is the Ordinance of 19th December 2003 "On court judgement". This Ordinance instructs lower courts in course of preparation of judgements to take into consideration, inter alia, acts of the European Court of Human Rights containing "an interpretation of provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms which should be applied in the case" (Section 4 (b)).

It is worthwhile to stress that, unlike the Ordinance of 10th October 2002 No 5, the Ordinance of 19th December 2003 does not limit an indication to lower courts to bear in mind only European Court's acts in cases with involvement of Russia. It means that Russian courts should take into consideration any judgements of the European Court of Human Rights containing interpretation of the European Convention's norms to be applied in the concrete case, even if such European Court's acts relate to other countries than Russia.

This indication is very helpful to our courts who should bear in mind the case law of the European Court concerning other countries so as to avoid errors discovered by the European Court and in such a way to prevent relevant complaints to the European Court against Russia.

The European Court of Human Rights emphasizes the importance of the principle of legal certainty which principle is closely connected with a right to fair trial as provided for by Article 6 of the European Convention[72]. Due to this principle a court judgement, after it came into legal force

[72] This Article (Section 1) reads:
"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice".

and became effective, shall not be subject to review on its merits. Such review is only admissible in order to correct the court's errors[73].

Meanwhile both the RF Arbitration Procedure Code and the RF Civil Procedure Code provide a possibility to review a court judgement (which has already become effective) on its merits in course of court supervision. A question arises, whether such a possibility is consistent with the abovementioned position of the European Court of Hyman Rights.

It should be noted that the attitude of he Council of Europe to our court supervision system is definitely negative albeit at the same time – enough flexible. In this relation it makes sense to draw attention to the Interim Resolution of the Committee of Ministers dated 8th February 2006, where the Committee of Ministers expressed its certain understanding the approach of Russian authorities as well as a significant part of Russian legal community that court supervision system is so far needed as an effective way of rectification of numerous grave errors of court judgements being issued at local and regional levels.

Having noted that, the Committee of Ministers encouraged Russian authorities to further improve civil procedure legislation so as to put in full compliance with the principle of legal certainty emanating from the European Convention on Human rights and being construed by the European Court's case law.

It is worthwhile to recollect that until recently (when previous Civil Procedure Code 1964 and Arbitration Procedure Code 1995 were effective) a court supervision proceedings could only be initiated by certain top dignitaries of court system or the state attorney's office who were entitled to submit so-called "supervisional protest". Litigants could only request those dignitaries to file a protest but it was up to abovementioned dignitaries' discretion whether to come up with the protest or to refrain from it.

The European Court of Human Rights repeatedly noted in its judgements that dependence of court supervisional proceedings of some dignitaries' discretion excludes a possibility to treat such proceedings as effective way of court protection in the meaning of the European Convention[74].

The European Court is of opinion that since proceedings in supervisional instance may only be triggered by Chairman or Vice-Chairman of the Court where the case should be reviewed, it may affect the requirement of the European Convention concerning impartibility of the tribunal.

This approach of the European Court may be illustrated by the following quotation: "a protest of the Vice-Chairman of the Regional Court was submitted to the Presidium of the same Court.

[73] See, e.g., the European Court's judgement in the case "Ryabykh v. Russia" (24th July 2003).
[74] See: European Court judgements in the cases "Tumilovich v. Russia (22nd June 1999), "Sovtransavto v. Ukraine" (25th July 2002), "Nikitin v. Russia" (20th July 2004).

Vice-Chairman of the Regional Court of the Regional Court considered the protest submitted by him to the Presidium, where he was a member and a Vice-Chairman, together with his colleagues-members of the Presidium. Such a practice is inconsistent with impartiality of a judge who considers a concrete case since nobody can be both the plaintiff and the judge in his own case[75].

The abovementioned standpoint of the European Court produced substantial impact upon Russian civil procedure legislation in course of its reformation.

Supervisional protests of court officials or state attorneys are unknown to the Arbitration Procedure Code 2002 and the Civil Procedure Code 2002 which are currently effective. Now proceedings in supervisional instance may only be triggered by application by litigants and other persons who are convinced that their rights have been infringed by the court judgement which they request to review. The Committee of Ministers appreciated these rules in the abovementioned Resolution of 8th February 2006.

Still so far there is a significant difference concerning regulation of court supervision in the system of state arbitration courts, on the one hand, and in the system of courts of general jurisdiction, on the other. As for state arbitration courts, Arbitration Procedure Code 2002 (see: Article 293, Section 4) provides for the only one forum clothed with authority to act as a supervisional instance: the Presidium of the Supreme State Arbitration Court of the Russian Federation. It is also stipulated in a mandatory way that repeated supervisional application of the same person of the same grounds is not allowed (see: Article 299, Section 9).

Meanwhile according to the Civil Procedure Code 2002 (see: Article 377) supervisional complaint may be submitted in three consecutive venues, each acting as a supervisional instance:

1) the Presidium of the Court of a relevant subject of the Russian Federation (e.g. the Presidium of the St. Petersburg City Court, the Presidium of the Court of Leningrad Region etc);
2) the Civil Cases Collegium of the Supreme Court of the Russian Federation.
3) The Presidium of the Supreme Court of the Russian Federation.

Such a scheme in criticized by the European Court of Human Rights who is convinced that a situation where supervisional proceedings, being once triggered, may last during endless period, would create legal uncertainty and is inconsistent with the European Convention[76].

Given this position of the European Court, the Committee of Ministers of the Council of Europe recommended Russian authorities to limit, to the extent possible, a number of subsequent supervisional complaints concerning the same case (see: Interim Resolution of 8th February 2006).

[75] See; European Court judgement in the case" Naumenko v. Ukraine" (9th November 2004).
[76] See: European Court judgement in the case "Denisov v. Russia" (6th May 2004).

It should be noted that the approach of the European Court of Human Rights is completely shared by the Constitutional Court of the Russian Federation who specifically considered this problem in its Ruling of 5th March 2007 No 2-П in the case "On examination of constitutionality of provisions of Articles 16, 20, 112, 336, 376, 377, 380, 381, 382, 383, 388 and 389 of the Civil Procedure Code of the Russian Federation in connection with application of the Cabinet of Ministers of the Tatarstan Republic, complaints of open joint stock companies "Nijnekamskneftehim" and "Khakasenergo" as well as complaints of a number of citizens".

The Constitutional Court specifically mentioned that "the right to fair consideration of the case within reasonable time by an independent and impartial court implies also finality and stability of court acts once became effective, and enforcement thereof" (Section 3.2, paragraph 1).

According to the Constitutional Court's standpoint "supervisional review of court's acts which became effective is only possible as an additional guarantee of legality of such acts and envisages establishment of special grounds and procedures at this stage of proceedings which correspond to its legal nature and designation. A court act which became already effective may only be amended or overruled in exclusive circumstances, when as a result of an error as made in course of previous proceedings and preconditioned the outcome of the case, there were substantial violations of rights and lawful interests which are subject to court protection and which cannot be restored without quash or amendment of the erroneous court act" (Section 3.1, paragraph 2).

Quite in line with the abovementioned opinion of the European Court of Human Rights the Constitutional Court noted that "procedures admitting unlimited or substantially long in time challenges of court judgement, including uncertainty of terms of proceedings in the supervisory instance, lead to uncertainty and instability of final judgements and are inconsistent with the principle of legal certainty" (Section 9.1, paragraph 3).

The Constitutional Court expressed a view that "the federal law-maker should, with due consideration of legal positions of the European Court of Human Rights and the Resolution of the Committee of Ministers of the Council of Europe of 8th February 2006, within reasonable terms, establish procedures actually ensuring timely discovery and review of erroneous courts acts before they become effective and put legal regulation of supervisory proceedings – upon the basis of the Constitution of the Russian Federation and given this Ruling – in compliance with international law standards as recognized by the Russian Federation" (Section 9.1, paragraph 7).

There is no doubt that in near future the RF Civil Procedure Code will be amended so as to standards as provided for by the Convention for the Protection of Human Rights and Fundamental Freedoms and being construed by the European Court of Human Rights

Daniel Tuzov: Nullity and non-existence of Legal Transaction in the Russian Civil Law

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I. The Relation of Nullity and Non-existence: the Stating of the Problem

Within the framework of this presentation I would like to trace the development due to which the old theoretical problem of non-existing transaction gained the "second act" and became the issue of great importance in the civil law of contemporary Russia. Today it's become apparent in connection with the category of the so-called non-concluded contract.

It's known, that since one came to comprehend the so-called non-existence as an independent legal and doctrinal category, which has to be differentiated from nullity, the correlation between two of them gave rise to many endless disputes among the legal theorists.

Within the framework of the discussion there can be distinguished two main positions.

1) Representatives of the first approach support the idea of differentiating between categories of nullity and non-existence of legal transaction. They emphasize it's practical moment and point out it's logical sufficiency.

This approach appeared due to the concrete practical need, which became apparent in the XIX c. France in the sphere of matrimonial law. There existed the specific principle, according to which the nullity could take place only in cases specially provided by law (*pas de nullités sans texte*). The strict adherence to this principle could lead, in some cases, to rather odd and absurd, from the point of view of that time, consequences. For instance, the marriage between two persons of the same sex had to be considered, according to this principle, as valid, because the legislation did not provide such a cause of nullity. The way out was to consider such marriage to be non-existing. It could help to overcome the strict formality of the principle, which restricted the cases of nullity by a number of causes. It had been claimed, that in such cases there was no marriage at all, hence there was no need to pronounce it to be null and void. This was also employed to justify the position of the legislator, because something, that does not exist can not be the object of nullity[77].

[77] See: *Scognamiglio R.* Contributo alla teoria del negozio giuridico. 2ª ed. Napoli, 1969. P. 349 ss.; *Ferrari S.* Inesistenza e nullità del negozio giuridico, in *Rivista trimestrale di diritto e procedura civile*. 1958. P. 517; *Bianca C. M.* Diritto civile. Vol. III. Il contratto. Milano: Giuffrè, 1995 (rist.). P. 578 s.

It's interesting to emphasize, that once appeared this doctrinal edifice turned out to be rather steady and viable for it found it's way into the legal systems, which did not feel a need for it and for which the mentioned principle was unfamiliar. And even though the sufficiency of this edifice is disputable, it still exists in the contemporary legal doctrine. Not to mention serious dogmatic difficulties, arousing from it, which are also acknowledged by it's adherents themselves[78].

While characterizing this approach it should be noted, that there is no conformity among it's representatives both concerning any common and more or less discernable criterion for the differentiating between the nullity and non-existence, and also as regards the edifice of the non-existing transaction itself. There is no common comprehension of the notion.

2) Another, quite opposite approach sees no difference between the nullity and the non-existence, and in fact identifies them. It is characterized by the strict and unified, as compared to the previous approach, position, according to which there can be no differences between null and non-existing transaction in the sphere of legal relations.

The main point of this approach can be put briefly. A legal transaction either produces some definite legal consequences and in this case it is valid and effective, or it does not produce any, and then it is null and void, and hence – *from the point of view of the law, it does not exist*. There can be no intermediate figure.

If transaction produces some legal consequences, but not those, which are normally connected with it, such transaction exists only as another legal fact, which correspond to such consequences.

Let us see now, how does the Russian law reflect this problem, and how does it follow or contradict one or another of the abovementioned approaches. It is worthwhile to begin with the analysis of the Russian legislation, then proceed to the civilistical doctrine, turn to the court practice and finally draw some generalizations, so that on the basis of the latter the conclusion could be made.

II. Russian-Law Position

In the Russian law the problem under consideration has taken on special significance not because of some dogmatic position (because in fact, currently, there is no any valuable theoretical developments in this sphere), but due to the introducing of the so-called "non-concluded contract" directly into the Russian legal terminology system.

[78] See, for example: *Tondo S.* Invalidità e inefficacia del negozio giuridico, in *Novissimo Digesto Italiano*. VIII. Torino, 1965. P. 996.

Sometimes this category is indicated textually, when in the legal texts it is directly provided that the contract "*is considered to be non-concluded*", or it "*is not considered to be concluded*". Thus, the contract is considered to be "non-concluded" in the absence of agreement about the price in the contract of sale of the immovable property (art. 555 (1) RCC), in the absence of agreement as to the amount of rent by rent of buildings and structures (art. 654 (1) RCC), for the fault of the cash transfer by concluding the loan contract (art. 812 (3) RCC). The contract is "not considered to be concluded" in the absence of agreement as to the quantity of goods by contract of sale (art. 465 (2) RCC), the object in case of sale of the immovable property (art. 554 (2) RCC), the object of the rent contract (art. 607 (3) RCC).

Apart from these concrete directions, the doctrine and the court practice can allot any contract the status of "non-concluded" following the logical interpretation of some positive provisions. There can be marked two main groups of cases when any contract is considered to be non-concluded:

1) *absent agreement as to one of the essential conditions of the contract*. In this case the contract is not considered to be concluded due to the general rule of the article 432 (1) RCC, according to which "the contract is considered to be concluded as far as the parties came to agreement concerning every essential condition in the required form", and also due to some other special regulations, which require to take into account the agreement of some definite condition, the form observance, or some other additional moments;

2) *absent the state registration of contract*, in case the requirement for the latter is provided by law. In this case the basis forms the article 433 (3) RCC: "the contract, which requires the state registration, is considered to be concluded since the moment of such registration, except as otherwise provided by law".

Thus, it is almost generally accepted, that in the absence of agreement as to some essential condition, or for the fault of the state registration, provided by law, the contract is *non-concluded*. The same pattern follows also the court practice. But let us check whether everything is clear in the law itself.

The contemporary Russian law analysis reveals, that in spite of making use of mentioned terminology – namely, such phrases as "the contract is considered to be non-concluded" and "the contract is not considered to be concluded", – there does not exist any clear concept. The civil legislation is full of vague and ambiguous wordings, which neither allow to draw the line of demarcation between nullity and non-existence, nor help to understand any difference between two of them from the juridical point of view.

1) As will readily be observed, the mentioned article 432 (1) RCC by stating that “the contract is considered to be concluded as far as the parties came to agreement concerning every essential condition in the required form”, requires not only the fact of agreement as to every essential condition, but also this agreement to be put “*in the required form*”. This indication is rarely supplied by the commentary, but it’s obvious, that following it one have to consider as “non-concluded” also the contracts with any form defect.

Moreover, in addition to the mentioned rule, there exist other, more general provisions concerning the *form of transactions*. According to them, sometimes the form violation results in the *nullity* of transaction (art. 162 (2, 3), art. 165 (1) RCC), in other cases it does not affect the validity of transaction, only preventing the person from the opportunity to resort to the testimony in order to prove either the fact of concluding transaction or any of it’s conditions. The transaction, consequently, is considered to be *effective* and *valid* (art. 162 (1) RCC).

Thus, as appears from the “letter of the law”, non-concluded, from the point of view of the article 432 (1) RCC, contracts can be either null or valid. Such consequence can hardly be put within the framework of the approach, which seeks to differentiate between nullity and non-existence.

2) No less ambiguous and contradictory are the rules concerning the state registration of some contracts.

Thus, according to the mentioned article 433 (3) RCC “the contract, which requires the state registration, is considered to be concluded since the moment of such registration, except as otherwise provided by law”.

On the other hand, pursuant to the article 165 (1) RCC «violating… in case it is provided by law … the requirement for the state registration of legal transaction leads to the *invalidity* of the latter. Such transaction is considered to be *null* and *void*».

This discrepancy can be traced in a number of special norms, which makes depending on the fact of the state registration now the moment of perfection, now the validity of the transaction. If we acknowledge, that the legislature distinguishes between nullity and non-existence of contract, it would remained unclear, why the identical, in fact, regulations, devoted to the non-observance of the requirements for the state registration, provide two different solutions: in one cases the contract is “non-concluded”, in others it’s null and void.

Finally, extremely remarkable is the following provision, whereby the legislator definitely identifies two notions, pointing out the nullity of the non-concluded contract. Art. 10 of the Mortgage Act, on the one hand, determines, that “non-observance of the state registration rules results in the *non-effectiveness* of the contract of mortgage. Such contract is regarded as *null* and

void". On the other hand, the same article provides that "the contract of mortgage is regarded as concluded and comes into effect beginning from the moment of it's state registration". Thus, in the absence of the state registration the contract should be regarded as non-concluded and null at the same time.

Looking aside the normative aspect, logically it's rather difficult to explain how can a contract be regarded as concluded only from the moment of the state registration (as it is provided by the article 433 (3) RCC). The state registration present itself an administrative act, i.e. an external, surface element for the contract; it can of course validate the latter, providing the contract with the legal effect, but it can not make the contract really concluded, because only parties can do this, by coming to agreement of their intentions, but not a state agency. Actually, it would be more correct to say that before the registration such contract does not have a legal effect, but still it is concluded as soon as the parties agreed, otherwise it would be nothing to register.

Thus, the provisions of the Russian Civil code, despite of making use of wordings such as "the contract is regarded as concluded", or "the contract is not considered to be concluded", "considered to be non-concluded" etc., do not provide sufficient basis for the doctrinal concept of the so-called "non-concluded" contract. Quite the contrary, they confirm that the law does not make difference between them.

III. Doctrinal and Jurisprudential Position

In view of the aforesaid the position of the Russian legal doctrine looks rather weird. Supporting, as a rule, the differentiation between null and "non-concluded" contract (without, any proper theoretical basis), deriving it directly from the "letter of the law", it usually pass over the mentioned contradictions.

As for the court practice, in this respect it presents itself the faithful reflection of the abovementioned state of affairs in Russian civil legislation and legal doctrine. Hence, all the displayed contradictions find their application to the everyday social relations.

Under the profound impact of such doctrinal ideas, Russian economical courts, as if acting in full conformity with the spirit of the so-called "*Begriffsjurisprudenz*" (the jurisprudence of notions), came to inventing the special type of a claim, "*for pronouncing the contract to be non-concluded*", which is supposed to be differentiated from the claim for recognizing the nullity of the legal transaction, and already gained wide distribution in the legal practice. According to it, courts dismiss claimes for invalidation of contract pointing out that the contract is "not concluded" and for that reason it can not be invalidated.

Needless to say that such a practice can introduce nothing but a harmful consequences, leading to the complication and retardation of the court procedures. And how can it be logically explained, when courts deny to recognize the nullity of legal transactions, which do not have the legal effect, because they "*do not exist*"? In case the transaction would not exist as a fact, there also would not exist the subject of controversy! But if we say that the contract does exist *as a fact*, and does not exist *from the point of view of the law*, that is the very point of the claim for recognizing the nullity of contract!

Moreover, sometimes courts, including the Highest economical court, mix these notions, when allowing a claim "*for pronouncing the contract to be non-concluded*", point out the *nullity* of the corresponding contract.

The analysis of the court practice allows to draw a conclusion, that, judges do not regard the "*non-concluded*" contract as non-existing at all. They consider it to be non-existing *from the point of view of the law, legally*; but as a fact it is regarded as existing, and hence – as *concluded*. The same can be said about the special claim "*for pronouncing the contract to be non-concluded*" which also helps to establish a fact of non-existing of contract from the point of view of the law, i.e. as a *legal*, but not empirical fact. Thus, the non-existence of transaction, which is also in hand by non-concluded contracts, is considered by court practice, to be another, extremely drastic form of invalidity of transaction, which is staying very close to nullity. But at this point it reveals it's deep contradiction.

It would be enough to say that sometimes courts regard as *null* and *void* unregistered contracts, which logically should be regarded as non-concluded.

IV. Conclusion

Thus, the analysis of the problem of demarcation between nullity and non-existence of legal transactions in the Russian law leads to the conclusion that such demarcation has neither theoretical, nor legislative basis, and exists rather due to the incorrect shift of the difference between factual and legal reality.

Speaking about existence or non-existence of legal transaction, one should have a clear idea of which of the two of them he means at the moment. The identification of transaction on a factual level is legally irrelevant as far as it is not the question of law. The law provides some definite schemes, or, normative patterns, with the performance of which, a definite legal consequences are connected. The legal transaction, in case it performs the provided scheme, is effective, valid, and hence, legally existing. So it produces the corresponding legal consequences.

And vice versa, in case, the transaction does not perform the provided scheme, it is non-effective and, within the framework of the concrete scheme it does not exist legally. But, at the same time, it can match with some other, alternative legal pattern, and entail due to it the respective consequences. In the latter case, within the framework of the actually performed scheme the transaction is regarded as existing from the point of view of law. Putting it differently, we can not speak abstractly about some null legal transaction that it is does not exist without being connected with some definite legal consequences. But the latter can come only in case if the null from the point of view of the one scheme, transaction performs any other alternative legal pattern, whereby it is considered to be effective and "existing".

Thus, the analysis of the Russian legal experience shows, that "non-existence", understood as self-independent category, cannot find it's own proper place within the system of legal concepts. Considering from the point of view of (positive) law it coincides and can't help coinciding with nullity. Any endeavor (attempt) to draw a line of demarcation between non-existing and null legal transactions in terms of law leads to completely useless and vain discussions, involvement in the court practice and verbalism of jurists. As it was already mentioned in the Russian legal literature "This very distinction is one of the remains after the impact of the jurisprudence of notions".

Let us finally point out, that those who still insist on demarcation between non-existing and null transactions first should work out some definite and consistent (reconcilable) conception of non-existence. Because this task still is not accomplished by them. And in case this conception had some definite basis, it would never restrict itself to the sphere of invalidity of transaction, but would spread first of all to the whole doctrine of the legal act, where it's application would be the most proper.

Alexander Ю. Zezekalo: The Stability of Business Relations and the Role of Mistake by the Formation of Contract in Russian Law

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One of the most important problems in the sphere of legal relations is the problem of certainty. The problem of certainty of law acquires the highest significance with respect to the regulations which deal with evaluative notions. An illustrative example is provided by the rules, concerning the so-called “relevant” or “essential” error. The error, which can serve a ground for invalidation of legal transaction.

It’s common knowledge, that in cases of invalidation the error (or mistake) acts negatively, being a cause of elimination of legal consequences, that is why, the correct assessment of it’s relevance is extremely important for any legal system and Russian civil law is not an exception.

Trying to trace the historical background of the issue in focus, one can notice that, unfortunately, Russian civil law traditionally suffers from disadvantages as concerns the issues of error in transaction.

The main source of the private law of the imperial czar’s Russia, the famous 1st part of the Volume X of the Body of Laws of the Russian Empire contained rather poor regulations regarding the error in transaction. It’s enough to mention that it’s provisions passed the error over in silence, that is why the vital importance acquired the official interpretations of the highest judicial agency — the Russian Ruling Senate. And even though the latter commented, that error and mistake also can be a ground for invalidation of legal transactions, this could not eliminate that certainty gap, which appeared due to the absence of concrete rules and regulations in this sphere.

The situation did not change much in the Soviet period, though direct indications of error had already appeared in legal texts. But, for instance, the Art. 32 of the 1922 RSFSR Civil Code did not go beyond the general principle of taking an error into account, and stated that every transaction concluded under the influence of relevant error could be invalidated at the claim of the party in error. The problem of certainty remained open, because the article did not provide any single criterion for assessing the relevance of the mistake. Similarly, the Article 57 of the subsequent RSFSR Civil Code, which appeared in 1964, also left the decision about relevance of mistake to the discretion of the court. Such approach obviously ignored all the achievements of the error doctrine.

Nevertheless, being twice reproduced in the Soviet civil codes it become a kind of characteristic of the socialist legal order.

In fact, this, at the first glance, evident lack of the law technique had it's certain benefits: among the civil law norms there appeared another so-called "rubber paragraph", which allowed to invalidate on the ground of error nearly any transaction and nearly any contract that for any of several reasons could seem to contradict the social equity. In the socialist literature there was emphasized that „it must be accepted as basically correct, that in Soviet Civil Code there is no detailed regulation of single error cases", and that, under the circumstances, the law leaves to the court, "which takes into account political situation and social-economical moments, find the proper decision"[79].

No need to mention that the transition to the principles of market economy required from Russian civil law securing the higher degree of certainty for the business relations.

The "wind of change" did not pass over the regulation of error in transaction, and the abovementioned technical drawbacks seem to be eliminated in the Civil Code of the Russian Federation.

Though the first part of the Art. 178 actually repeats the corresponding one of the previous 1964 RSFSR Civil Code, establishing the general principle, that the relevant error should be taken into account, and be the ground for the invalidation of transaction at the claim of the party in error, this statement now is accompanied by the explanation of what types of error should be regarded as relevant and operative.

Respectively, the error is considered to be operative as far as it refers:

(1) to the nature of transaction, or

(2) to the identity of it's object, or

(3) to those qualities of the latter, which considerably reduce the possibility of using it according to it's function.

Readers, familiar with history of the error doctrine can easily find a parallel to the old Roman "formal" categories of *error in negotio*, and *error in corpore*, (which both date back to Ulpianus[80]), as well as to the so-called "error in the essential qualities", which was developed by the European legal doctrine rather later and unite the whole three Roman types of error, namely: *error in materia*, *error in substantia*, and *error in qualitate*[81].

[79] *Novitskii I. B.* Сделки. Исковая давность [Transactions. Limitations] Moscow, 1954. P. 103.
[80] Ulp., 28 ad Sab., D. 18.1.9 pr.
[81] See e.g.: *Schermaier M. J.* Die Bestimmung des wesentlichen Irrtums von der Glossatoren bis zum BGB. – Wien, Köln, Weimar: Böhlau, 2000. S. 27.

Actually, the Russian legislator reproduced some categories of the Roman law and *ius commune*. This fairly old solution, though, can not be regarded as totally obsolete. A number of other legal orders also follow this Romanist pattern. For instance, such categories as *error in negotio* and *error in corpore* are also employed by the Swiss Civil Code (Art. 24 (1)), the Italian Civil Code (Art. 1429 (1)), and, among the newest codifications, the Quebec Civil Code whose Art. 1400 (1) states that "error vitiates consent of the parties or of one of them where it relates to the nature of the contract, the *object of the prestation* or anything that was essential in determining that consent".

But, such a wide distribution of the abovementioned approach does not, of course, imply it's full perfection. As it turned out, it can have it's weak points. One of the main disadvantages arouses from the fact of employing doctrinal categories for the purpose of making laws. In Russian jurisprudence it became apparent due to persistent discussions concerning the capacity of the respective notions.

Thus, by taking into account "error in the nature" and "error in the object" of the transaction, the Russian Civil Code does not provide any definitions or comments for the respective terms.

For instance, the so-called "object of transaction", in terms of Russian law, can be understood quite differently.

(1) On the one hand, the term object can denote almost everything, that parties kept in mind by concluding the contract and what their intentions were directed at. So it can be both things and actions of the parties. Taking it for granted, we could say that, for instance, the services can be the object of the *Contract for the compensated rendering of Services*, no less than the thing can be the object of the *Contract of sale.*

(2) On the other hand, it is possible to cover the meaning of the wording "object of transaction" as property *per se*. But, as far as among the property objects one can distinguish between the material and the immaterial ones, in this case one would have to choose between: (1) the property in the narrow sense (i.e. things), or (2) the property in the wide sense (which implies not only things, but also property rights, demands, obligations etc.). Taking into account the wide interpretation of the notion property, that is generally accepted in the Russian Civil Code (Art. 128 attributes to the property not only things, i.e. *res corporales*, but also property rights, i.e. *res incorporales*), it should be admitted that at any occasion error in the object of transaction relates to immaterial objects as well.

If we resort to a comparative analysis, we can also find, that Russian law seem to be the rare legal system where this particular issue turned to the subject of wide speculation.

This problem is of less importance even in the most of legal systems, which, just like the Russian Civil Code, also resort to the standard Roman categories of error. For instance, the Quebec Civil Code (Art. 1400), explicitly and unambiguously speaks about the “object of the prestation”, that leaves no doubt that the matter concerns primarily the property.

Other codes, like, for instance, the Swiss Code (Art. 24 (2)), or the Austrian Code (§§ 871, 872), operate directly with the term “thing” (in German respectively: *Sache*, or *Hauptsache*).

These codifications strictly follow the Romanist pattern, because, as it evidently follows from the famous fragment of the Digest D. 18. 1. 9. pr., *Ulpianus*, speaking about *corpore* obviously meant *material objects*, and namely, things (two lots in the first example, and two slaves in the second).

Hence, we can come to conclusion that in case the Russian error in the object of transaction corresponds to the Roman *error in corpore*, it must refer to the property only (though, including immaterial objects). Otherwise, there can be no correspondence between these categories and we could state that the Russian legislator provided error in the object of transaction with it’s own, special meaning.

Thus, due to the vagueness of the notion “object of transaction” in the legal doctrine and in the court practice there appeared uncertainty as to the correct variant of it’s interpretation. Such uncertainty surely could be avoided by the use of a bit more precise definitions.

The same kind of uncertainty can also arise with respect to the error in the nature of transaction, or, in terms of Roman law and *ius commune*, *error in negotio*.

There can be no doubt, that the nature of transaction is something that characterizes it’s main point, it’s essence. Hence, as far as any legal transaction is aimed at some definite legal consequences, it’s obvious that the latter are able to characterize the main point of transaction most exhaustively.

But right at this point one have to avoid inaccuracy.

First, the nature of transaction should not be described within the scope of legal rights and obligations arousing from the transaction. As far as legal consequences of transaction may include not only rise of obligation, but also alteration or even cessation of the latter, as well as the transition of some property right, it is not correct to describe the nature of transaction referring to the content of the contractual obligation or even to the substantial conditions of the contract. Both mentioned solutions are applicable only as far as the matter concerns transactions which give rise to some obligations (first of all, obligatory contracts), and, at the same time, pass by the transactions which do not lead to such consequences. Such approach would be a serious restriction of the notion “nature of transaction”.

On the other hand, any exaggerations also should be avoided. It has to be borne in mind, that any transaction in fact is aimed at it's own, unique consequences, that is why for the purpose of characterizing the nature of transaction only typical characteristics of them should be taken into account. These typical characteristics reveal themselves in the *causa* of transaction.

Trying to make an intermediate total to the aforesaid, it should be pointed out that the main difficulty arousing in connection with the discussed types of error rests upon the vagueness of the doctrinal concepts. But still, the evident contribution to the stability of contractual relations is already reached by the contemporary Russian Civil Code due to the mere fact of restricting the scope of operative mistakes, and no matter if it results from using the old formal categories of *error in negotio* and *error in corpore*.

Speaking about the last type of error that is recognized to be relevant in contemporary Russian law, the *error in the substantial qualities*, the Russian legislator managed to avoid great troubles, having set in the Civil Code rather clear and effective rules which are more or less adequately applied in court practice. This became possible due to employment of the famous Savigny's approach, by which he managed to abandon the old "material" chemical criteria, and made any differentiations between the old doctrinal categories *error in substantia* and *error in qualitate* useless, for he stated that *substantial qualities* are those, which, according to notions prevailing in everyday life, cause a thing to belong to a specific class of objects, and the chemical substance is not the only possible choice[82]. In Russian legal doctrine this approach was shared by the famous scholar Gabriel Shershenevich who considered that "error in quality lead to invalidation of transaction in case, when, due to the corresponding qualities, the thing became unsuitable for the assumed purpose of use"[83].

In fact, the purpose of use is surely one of the basic criteria for attributing the subject to one or another category. Supposedly driven by the same idea the contemporary Russian legislator also provided to take into account qualities which considerably reduce possibility of using the object of transaction according to it's function.

Long before the Savigny's theory of *error in substantia* inspired the authors of German Civil Code (§ 119 II), according to which a contract may be rescinded on the basis of error as to those characteristics of a person or a thing, which are regarded in business as essential. Following it the Art. 62 of the 1905 Imperial Russian Civil Code draft stated that "the quality of an object or a person is considered as essential if it is accepted to be the same in business".

[82] See e.g.: *Savigny F. C. v.* System des heutigen Römischen Rechts. III. Band. Berlin: Veit & Comp., 1840. P. 283.
[83] *Shershenevich G. F.* Курс гражданского права [Kurs Grazhdanskogo Prava] Tula, 2001. P. 158 -159.

And even though there is no full coincidence between the abovementioned formulae, there is no doubt, that on the whole approach is still the same whether we, following Savigny, speak about the characteristics which cause the thing to belong to a certain class of objects, or, like German Civil Code, point out the characteristics which regarded as essential in business, or, like the Russian Civil Code provides for, take into account the qualities which considerably reduce the possibility of using the object of transaction according to it's function.

The Russian Civil Code pays particular attention to the *error in motive*, which is explicitly indicated as irrelevant. This provision also seems to be aimed at the certainty of law and stability of business relations. Nevertheless the ultimate goal can hardly be reached because of the uncertainty as to the notion of *error in motive*. And again it happens because of making use of doctrinal categories without providing them with any legal interpretation. In Russian legal doctrine it is generally accepted that "the motive remains outside the content of the contract", but in fact this formula requires some further explanations, otherwise one can come across insuperable obstacles. For instance, we know that in the course of it's development, the European error doctrine came to the opinion, that every mistake, relating to a quality of the object constituted an *error in motive* and as such was irrelevant[84]. Hence, by recognizing relevance of *error in essential qualities* and, at the same time, explicitly proclaiming irrelevance of *error in motive*, Russian legislator either falls into the insoluble contradiction, or bears in mind some different idea of the latter. Unfortunately, this issue also remains open.

The Russian Civil Code denies relevance of error as to the person of the contracting party. The "moot point" since the old times of glossators. Today such solution can be explained by a number of arguments.

First of all, the person of the contracting party is as a rule of no moment in the everyday transactions, but exactly this type of transactions presents the majority in the contemporary commercial affairs.

Furthermore, the solution can be explained by realities of the modern world, technical progress, accessibility and availability of information. In such conditions only careless and even negligent person can make such mistakes. At least, from such presumption seem to proceed the Russian legislator.

For the purpose of assessing relevance of the mistake the contemporary Russian Civil Code, in contrast to some foreign legislations, does not require to consider whether the mistake was easy to recognize or whether it was discovered before the beginning of the performance (*re integra*). It

[84] See e.g.: *Savigny F. C. v.* Op. cit. P. 291, 304, 305. Cf.: *Flume W.* Eigenschaftsirrtum und Kauf. Münster: Regensberg, 1948. P. 31.

has to be emphasized, that similar criterion was employed by some representatives of the natural law for the purpose of restricting relevance of *error in motive*. As soon as the latter is evidently pronounced as irrelevant, there is no need to resort to such a decision.

There is also no need to explore, whether the mistake was excusable or not, or whether it was causal for committing the declaration. According to the Art. 178 the positive or negative answer of whether the contract would have been concluded also without mistake, does not make any difference as soon as the error match the requirements set by the Code and refer to one of the "operative" categories.

There only one question of the criterion remains open, which is supposed to be applied by investigating the inner will of the party in error. Should it be an "objective criterion", aimed at some average person, or one have to take into account every single peculiarity of the contracting party, such as the age-specific, mental, medical, intellectual and other characteristics? The Code gives neither an exact answer nor drops a hint, but in the court practice it had been repeatedly emphasized, that for the purpose of establishing the inner will of the party in error, the court has to take into account every circumstance of the case.

Summarizing the issue under discussion we can come to the conclusion, that the Russian Civil Code, currently in force, as compared to the previous Russian legislation, made the considerable step forward, having become, in fact, the first legal act in the whole history of Russian civil law, which provides some definite guidelines and criteria for assessing the relevance of mistake. And accepted in the Russian Civil Code variant of regulating consequences of error, by which the transaction is not invalid *ipso iure*, but may only be rescinded by means of declaration of the other party, also contributes to the stability and certainty of business relations.

Komarov A.S.: Venäjän Kauppa- ja teollisuuskamarin yhteydessä toimivan Kansainvälisen kaupan välitystuomioistuimen toiminta

Venäjän ulkomaankauppa-akatemia

Yleisliittolaisen kauppakamarin yhteydessä toiminut Ulkomaankaupan välitystuomiokomissio (VTAK) perustettiin vuonna 1932.

(Venäjän federaation Kauppa- ja teollisuuskamarin yhteydessä toimiva Kansainvälisen kaupan välitystuomioistuin (jäljempänä MKAS / KKVT))

- eri maiden liikeyritysten välisten riitojen välimieskäsittely
- kauppakamarien sekä muiden kansainvälisten ja kansallisten yrittäjäyhdistysten yhteydessä toimivien välimiesoikeuksien kehittäminen
- kaikissa Neuvostoliiton ulkomaankauppaorganisaatioiden ulkomaisten yritysten kanssa tekemissä sopimuksissa oli maininta riitojen käsittelystä välimiesoikeudessa
- on pysyvästi toimiva välityselin, joka on tarkoitettu kansainvälisten riitojen käsittelyyn
- Laki kansainvälisestä kaupallisesta välitystuomioistuimesta, säädetty v. 1993
    - Yhtenäinen lainsäädännöllinen perusta välitystuomioistuimen kehittämiselle kansainvälisen kaupan alalla
    - Venäläinen laki hyväksyttiin Kansainvälisen kaupan välitystuomioistuimen mallilain perusteella, jonka oli v. 1985 laatinut Kansainvälisen kaupan oikeuskomissio (UNCITRAL).
    - Venäläinen laki poikkeaa hyvin vähän mallilain tekstistä. Nämä poikkeamat kuvaavat tiettyjä traditioita, jotka ovat muodostuneet Venäjällä aikaisempina vuosina kansainvälisessä välimiesmenettelyssä
    - Tämän lain säätäminen loi vakaan oikeudellisen perustan Venäjän kansainvälisen kaupan välitystuomioistuimen kehittämiselle jatkossa
    - Tämän lain säätämisen tärkeä tulos oli myös se, että oikeudellinen säätely yhdenmukaistettiin kansainvälisesti, kun tämä vaihtoehtoinen riitojen ratkaisukeino muodostettiin Venäjällä yli 20 ulkomaisen valtion lainsäädännön kanssa, jotka myös käyttivät UNCITRALin mallilakia kansainvälisen kaupan välimiesmenettelystä omien kansallisten lakien uudistamisessa ja säätämisessä.

Asetus Venäjän federaation Kauppa- ja teollisuuskamarin yhteydessä toimivasta Kansainvälisen kaupan välitystuomioistuimesta (MKAS)

- Kyse on vuonna 1932 perustetun välityselimen oikeusseuraajasta, joka toimii nykyään Venäjän Kauppa- ja teollisuuskamarin yhteydessä;
- Valtio tunnustaa kyseisen välimiesoikeuden tärkeän roolin venäläisessä oikeusjärjestelmässä, huolimatta siitä, että se on luonteeltaan ei-valtiollinen.

MKAS:in ohjesääntö, joka hyväksyttiin vuonna1995

- sisältää tärkeimmät käsitykset vaatimuksista nykyaikaiselle välimiesmenettelylle kansainvälisissä taloudellisissa riidoissa, jotka on ilmaistu Laissa, lisäksi siinä on
- monivuotista kokemusta ja traditioita, jotka ovat osoittautuneet oikeiksi kansainvälisen välitystuomioistuimen vuosikymmeniä kestäneen antoisan toiminnan aikana.
- MKAS:in ohjesäännön uusi laitos, joka hyväksyttiin vuonna 2005 (astui voimaan 1. maaliskuuta 2006)

MKAS on

- Kuuluu Kaupallisten välitystuomioistuinten kansainväliseen federaatioon (IFCAI), johon kuuluvat maailman johtavimmat välitystuomioistuinkeskukset.
- Muutokset ulkomaantaloustoiminnan organisoimisessa ja harjoittamisessa Venäjällä sekä
- Siirtymäkautta elävälle kansantaloudelle luonteenomainen yleinen taloudellinen tilanne
- Monien eri yhtiömuotoisten yritysten ja yhtiöiden aktiivinen pyrkiminen itsenäiseen ulkomaantaloustoimintaan
- Kansainväliseen kaupankäyntiin osallistuvien määrän kasvu Venäjällä on johtanut myös riitojen määrän kasvamiseen.
- Välitystuomioistuimeen kohdistuva kuormitus on lisääntynyt. Sen pitää käsitellä huomattavasti enemmän riita-asioita samalla pätevyydellä sekä nopeasti. Asioiden sisältö ja monimutkaisuus ovat moninkertaistuneet.
- Hyvin lyhyessä ajassa kansainvälisille markkinoille tuli useita tuhansia uusia ulkomaankaupassa kokemattomia osallistujia
- Ammatillinen taso heikkeni tällä hyvin vaativalla yrittäjyyden alalla
- Monissa ulkomaankauppatransaktioiden yhteydessä laadituissa oikeusasiakirjoissa oli virheitä, jotka aiheuttivat jälkeenpäin erimielisyyksiä liikekumppaneiden välillä

- Ulkomaankaupan osapuolet eivät ottaneet huomioon erimielisyyksien ratkaisujärjestystä, erityisesti sitä, että nämä riidat siirretään kansainväliseen välitystuomioistuimeen.
- Ulkomailla jouduimme soveltamaan monimutkaisia oikeusmenettelyitä suojataksemme omaisuusintressejämme, kun niitä rikkoivat ulkomaiset sopimuspuolet.

MKAS:in ohjesääntö (vuodelta 1995) muutti välitystuomareiden listan luonteen, ja siitä tuli fakultatiivinen

- Riitelevät osapuolet saivat oikeuden valita välitystuomareita (välimiehiä) muualtakin kuin Kauppa- ja teollisuuskamarin hyväksymältä listalta
- Välitystuomareiden listaan lisättiin ulkomaisia asiantuntijoita, joiden määrä on noin. kolmasosa kaikista listalla olevista tuomareista.
- Viime vuosien välitysoikeuskäytännön ominaispiirteenä on se, että MKAS:issa käsiteltävien riita-asioiden lukumäärä vähenee vuosi vuodelta, mutta kannevaateiden rahallinen arvo kasvaa.
  - Kanne viedään kansainväliseen välitystuomioistuimeen nykyisin useimmiten silloin, kun erimielisyydet liittyvät huomattaviin summiin ja koskevat todella vakavasti osapuolten intressejä. Silloin välitystuomioistuinkäsittely on perusteltua.
  - Tämä merkitsee samalla sitäkin, että ne tehtävät, joita tuomarit joutuvat ratkaisemaan, tulevat yhä vaikeammiksi.

Kansainvälisen kaupan välitystuomioistuimen (MKAS:in) käsittelyiden ulkomaiset osallistujat

1. Entisten neuvostotasavaltojen alueilla sijaitsevat yritykset (etupäässä IVY-maista)
2. Länsi-Euroopan maista tulevat yhtiöt (n. neljäsosa kaikista tulleista asioista)

- Kaikista MKAS:in käsittelyjen osapuolista noin puolet on venäläisiä yrityksiä.
- Jatkuvasti kasvaa sellaisten välimieskäsittelyiden lukumäärä, joissa on mukana vain ulkomaalaisia yrityksiä

Venäjän federaation Kauppa- ja teollisuuskamarin yhteydessä toimiva Kansainvälisen kaupan välitystuomioistuin (MKAS)

MKAS:in toiminnan oikeusperustana ovat:

- Laki ”Kansainvälisestä kaupallisesta välitystuomioistuimesta”, säädetty 7.7.1993

- Asetus ”Kansainvälisestä kaupallisesta välitystuomioistuimesta” (MKAS:ista), joka on vahvistanut kyseisen välitystuomioistuimen statuksen Neuvostoliiton kauppa- ja teollisuuskamarin välitystuomioistuimen oikeusseuraajana (TPP SSSR)
- MKAS saa mm. käsitellä osapuolten välisiin sopimuksiin perustuvia riitoja (ehtolausekkeet välitystuomioistuinkäsittelystä), mikäli ne oli sovittu vietäväksi ratkaistavaksi Neuvostoliiton kauppa- ja teollisuuskamarin välitystuomioistuimessa (TPP SSSR).
- Venäjän federaation Kauppa- ja teollisuuskamarin vahvistama, voimassa oleva MKAS:in ohjesääntö astui voimaan 1.3.2005.

Venäjän federaation Kauppa- ja teollisuuskamarin yhteydessä toimiva Meriarbitraasiokomissio

”Laki kansainvälisestä kaupallisesta välitystuomioistuimesta”, 1993

- Ei edellytä mitään erityistä menettelyä, jonka mukaan Venäjän federaation alueella olisi mahdollista perustaa pysyvästi toimivia välityselimiä, jotka saavat käsitellä kansainvälisiä kaupallisia kiistoja.
- Tämänkaltainen välimiesoikeus voidaan perustaa ilmoittamisjärjestyksessä.

Asetus MKAS:ista, liite Venäjän federaation ”Lakiin kansainvälisestä kaupallisesta välitystuomioistuimesta”.

- MKAS on itsenäinen pysyvästi toimiva välitystuomioistuin (välimiesoikeus), joka toimii Venäjän federaation ”Lain kansainvälisestä kaupallisesta välitystuomioistuimesta” mukaan.

MKAS:in status

- MKAS:illa on oikeus ottaa käsiteltäviksi riitoja, jotka kuuluvat sen tuomiovaltaan Venäjän federaation kansainvälisten sopimusten mukaan.
- Moskovan yleissopimus vuodelta 1972
- Asetuksen MKAS:ista on normi, jonka mukaan sillä on valtuuksia käsitellä ns. vanhoihin välimiessopimuksiin perustuvia riitoja.

Tuomiovalta

- Riidat, jolloin riitelevien osapuolien välillä on kirjallinen sopimus syntyneen tai mahdollisesti syntyvän riidan antamisesta MKAS:iin käsiteltäväksi.

- Lauseke välimieskäsittelystä, jonka osapuolet ovat laittaneet sopimukseen
- Tapaukset, jolloin osapuolet sopivat välitysmenettelystä riidan ilmaantumisen jälkeen.
- Välimiessopimus voi syntyä sillä, että toinen osapuoli esittää kanteen ja toinen vuorostaan lähettää vastineen kanteeseen. Näissä toinen osapuoli ilmoittaa sopimuksesta käsitellä riitoja MKAS:issa ja toinen ilmoittaa, ettei se sitä vastusta.
- Välimiessopimus voidaan liittää sopimuskirjaan tekemällä viite toiseen asiakirjaan, joka sisältää välimieslausekkeen. Esim. osapuolten välillä aikaisemmin tehty sopimus tai jotkut muut kaupanteon ehtoja sääntelevät yleiset (tyyppi)ehdot.

Aihekompetenssin määrittelevät normit

- Kompetenssi ei ole yleisluonteista
- Kansainvälisiin talousasioihin erikoistunut välitystuomioistuin
- Kun riita-asia menee MKAS:ille annetun tuomiovallan ulkopuolelle sillä ei ole oikeutta käsitellä asioita pysyvästi toimivana välitystuomioistuimena
- Venäläisen ja ulkomaisen yrityksen väliset riitojen, jotka voidaan antaa MKAS:ille käsiteltäviksi osapuolten tämän hyväksyessä, pitää aiheutua sopimus- tai muista siviilioikeudellisista suhteista, joita syntyy hoidettaessa ulkomaantaloudellisia tai muita kansainvälisiä taloussuhteita.
- Riidan ulkomaiseksi osapuoleksi katsotaan se osapuoli, jonka liikeyritys sijaitsee ulkomailla.
- On sovellettava kahta kriteeriä:

  - subjektiivinen (ulkomaisen osapuolen olemassaolo) ja

  - objektiivinen (riidan ulkomaantaloudellinen luonne).

  Mikäli jompikumpi näistä kriteereistä puuttuu, riita ei ole MKAS:in tuomioistuimen ratkaistavissa.

- Tilanteet, jolloin riita on aiheutunut sopimuksesta, joka liittyy fyysisen henkilön ostamaan omistusosuuteen jostakin yrityksestä (mm. osakeyhtiön osakkeiden ostaminen).
    - Jos kyseessä on esimerkiksi ulkomaisen osakeyhtiön osakkeiden hankinnasta, niin tätä kauppaa välittävästä sopimuksesta aiheutuvia riitoja voidaan viedä MKAS:iin käsiteltäviksi.

- Ulkomaisia investointeja omaavien yritysten väliset riidat, Venäjän federaation alueella perustettujen kansainvälisten yhtymien ja organisaatioiden keskinäiset riidat, niiden osakkaiden väliset riidat samoin kuin riidat muiden Venäjän federaation oikeussubjektien kanssa
    - Jos riitasuhteissa on mukana vaikka välillisestikin ulkomaista pääomaa, niin se on riittävä perustelu MKAS:in tuomiovallalle.

Esimerkkiluettelo erilaisista siviilioikeudellisista suhteista, joihin liittyviä riitoja voidaan käsitellä:

- Tavaroiden ostaminen ja myynti (toimitukset),
- Töiden suorittaminen,
- Palvelut,
- Tavaroiden ja/tai palvelujen vaihtaminen,
- Tavara- ja matkustajakuljetukset,
- Kaupallinen edustaminen ja välittäminen,
- Vuokraaminen (leasingtoiminta)
- Tieteellis-tekninen vaihto,
- Teollisuus- ja muiden kohteiden rakentaminen,
- Lisensseihin liittyvät toiminnot,
- Investoinnit,
- Luototus- ja maksutoiminnot,
- Vakuuttaminen,
- Yhteisyritykset,
- Muu teollinen - ja yritysyhteistoiminta.

Kysymyksen jonkin konkreettisen asian kuulumisesta tai kuulumattomuudesta MKAS:in tuomiovaltaan ratkaisee välimiesoikeus, joka muodostetaan varsinaisen asian käsittelemistä varten.

§ Jos osapuolten välille tulee erimielisyyksiä tästä asiasta, niitä on mahdollista ratkaista asia vasta sen jälkeen kun on muodostettu välimiesoikeus varsinaisen asian käsittelemistä varten.
§ On korostettava, että vastaajan Ohjesääntöjen mukaista toimintaa aloitettuun välimiesoikeuskäsittelyyn liittyen (esimerkiksi välimiehen nimittäminen) kun vastaaja samanaikaisesti vastustaa MKAS:in tuomiovaltaa käsitellä kyseistä riita-asiaa, ei pidetä vastaajan suostumuksena MKAS:in tuomiovaltaan.

Turvaamistoimenpiteet

§ MKAS:illa on lain säätämä oikeus määrätä turvaamistoimenpiteitä liittyen riita-asian kohteeseen, jos osapuoli on esittänyt semmoisen pyynnön.
§ Vahingoittamatta omia oikeuksiaan välimiesoikeuskäsittelyn aikana kumpikin osapuoli saa kääntyä tuomioistuimen puoleen ja pyytää, että ryhdytään kanteen turvaamistoimenpiteisiin. Tuomioistuimella on oikeus antaa määräys sellaisten toimenpiteiden toteuttamisesta.
§ Asioiden käsittely välimiesoikeusmenettelyssä
§ MKAS:in Ohjesäännön määräykset
§ Kun käsitellään asioita, joita ei ole määritelty MKAS:in ohjesäännössä eikä osapuolien välisessä sopimuksessa, välimiesoikeudella on oikeus (Venäjän lainsäädännön kansainvälisestä kaupallisesta välitystuomioistuimesta mukaan) käsitellä riita-asiaa siten, mitä se itse pitää oikeana, suhtautumalla osapuoliin tasa-arvoisesti ja antamalla osapuolille mahdollisuuden puolustaa intressejään.

§ *On korostettava, että riita-asioiden käsittelyssä MKAS ei ole velvollinen soveltamaan Välitystuomioistuinprosessilain eikä Siviiliprosessilain normeja.*
§ *Kaikki asiakirjat, jotka liittyvät välimiesoikeuskäsittelyn aloittamiseen ja toteuttamiseen, lukuun ottamatta kirjallisia todisteita, esitetään välimiesoikeudelle sopimuksenkielisenä, tai sillä kielellä, jolla osapuolet ovat olleet kirjeenvaihdossa, tai venäjänkielisinä. MKAS saa oman harkintansa perusteella tai jommankin osapuolen pyynnöstä vaatia toiselta puolelta sille esitettyjen asiakirjojen käännättämistä venäjäksi tai turvaamaan käännöksen saaminen osapuolen kustannuksella.*
§ Kirjalliset todisteet esitetään alkuperäisinä tai oikeaksi todistettuina kopiona. Välimiesoikeudella on oikeus vaatia näiden näyttöjen kääntämistä toiselle kielellä silloin, kun se on tarpeellista käsiteltävän asian kannalta.

Asian suullinen oikeuskäsittely

§ Asia käsitellään suljetuin ovin, millä turvataan välimiesoikeuskäsittelyn luottamuksellisuus
§ Käsittely on useimmiten venäjän kielellä.
§ Osapuolet voivat sopia, että käsittelyn kielenä on joku muu kieli.
§ Osapuolet voivat sopia riidan selvittämisestä pelkästään kirjallisen aineiston perusteella ilman suullista oikeuskäsittelyä. Välimiesoikeus saa kuitenkin määrätä suullisen oikeuskäsittelyn, jos sen mielestä esitetyt materiaalit eivät riitä riidan sisällön ratkaisemiseen.

§ Osapuolet ovat velvollisia todistamaan ne seikat, joihin he viittaavat vaatimustensa tai vastaväitteittensä perusteina. Mutta samalla
  - Välimiesoikeus saa vaatia osapuolilta muiden näyttöjen esittämistä.
  - Välimiesoikeus saa myöskin oman päätöksensä perusteella määrätä asiantuntijaselvityksen, pyytämään todisteita kolmansilta henkilöiltä, kutsua paikalle ja kuulla todistajia.

§ Välimiehet arvioivat todisteita omien vakaumustensa mukaan.
§ Ellei jompikumpi osapuoli toimita tarvittavia todisteita, välimiesoikeus saa jatkaa käsittelyä ja tehdä päätöksensä käytettävissä olevien todisteiden perusteella.

Välimiesoikeuspäätös

§ Päätös tehdään osapuolten kesken sovittujen sovellettavien oikeusnormien perusteella.
§ Mikäli tällaista sopimusta osapuolten välillä ei ole, sovelletaan niitä normeja, joita välimiesoikeus katsoo sovellettaviksi kollisionormien mukaan:
  - Jonkun kansallisen oikeusjärjestelmän osana olevat oikeusnormit sekä
  - Normit, jotka on määritelty kansainvälisissä asiakirjoissa, mutta jotka eivät muodollisesti ole oikeuslähteitä. Sellaisia ovat mm.:
    - Kansainväliset yleissopimukset, jotka eivät ole vielä astuneet voimaan tai
    - Epävirallisia oikeusnormikodifikaatioita, esimerkiksi, Kansainvälisten kauppasopimusten periaatteet, UNIDROIT
  - Kaikissa tapauksissa välimiesoikeus tekee omia päätöksiään sopimusehtojen mukaan sekä ottaa huomioon kyseiseen kauppaan sovellettavia kauppatapoja.

§ Päätös tehdään välimiesoikeuden suljetussa kokouksessa välimiesten äänten enemmistöllä.
§ Jos päätöstä ei voida tehdä äänten enemmistöllä, päätöksen tekee tuomariston puheenjohtaja.
§ Välimies, joka ei hyväksy päätöstä, allekirjoittaa kuitenkin päätöksen ja kirjoittaa oman mielipiteensä, joka voidaan liittää päätökseen.

§ Päätöksessä pitää olla perustelu.
§ Päätös on täytäntöönpantava.
§ Mikäli välimiesoikeuskäsittelyssä osapuolet pääsevät sovintoon, käsittely on lopetettava.
§ Osapuolten pyynnöstä sovinto voidaan rekisteröidä välimiesoikeuden päätöksenä.
§ MKAS:in päätös riita-asian sisällöstä on lopullinen.

Välimiesoikeuskäsittelyyn liittyvät kulut.

- Haastehakemuksen MKAS:iin jättämisen yhteydessä kantaja on velvollinen maksamaan rekisteröintimaksun (1000 USD).
- Jokaisesta kanteesta kantaja on velvollinen maksamaan välitystuomioistuinmaksun etumaksuna.
- Välitystuomioistuinmaksun suuruus, sen maksujärjestys ja jakaminen riitaosapuolten välillä käsittelyn päätyttyä sekä muiden käsittelyyn liittyvien kustannusten korvausjärjestys määrätään Asetuksessa välityskustannuksista ja maksuista, joka on MKAS:in ohjesäännön erottamaton osa.

MKAS:in päätösten toimeenpano

- Osapuolten on täytettävä välimiesoikeuspäätökset niille määrätyssä ajassa.
- Jos päätöksen toimeenpanoaikaa ei päätöksessä mainittu, tämä tarkoittaa, että se on täytettävä välittömästi.
- Täyttämättä jääneitä välimiesoikeuspäätöksiä pannaan täytäntöön lain ja kansainvälisten sopimusten mukaan.
- YK:n yleissopimus ulkomaalaisten välitystuomioistuinten päätösten tunnustamisesta ja toimeenpanosta (New York, 1958). Venäjän federaatio on sen osallistujamaa Neuvostoliiton jälkeen.

Riitojen käsittely MKAS:issa jolloin sovelletaan UNCITRAL ohjesääntöä.

Välimiesoikeuskäsittely *“ad hoc”*, YK:n komission hyväksymän ulkomaankaupan välitysohjesäännön mukaan (Välitysohjesääntö UNCITRAL)

Jotta MKAS saisi mahdollisuuden suorittaa sille UNCITRAL välitysohjesäännön mukaan annettuja toimintoja, osapuolten pitää UNCITRAL ohjesäännön soveltamista edellyttävässä välityssopimuksessaan

Mainita suoraan, että MKAS on toimivaltainen elin kyseisen Ohjesäännön mukaan tai Viitata suoraan Venäjän federaation Kauppa- ja teollisuuskamarin MKAS:in ohjeisiin välitystuomioistuimen toiminnan edesauttamisesta UNISTRAL välitysohjesäännön mukaan.

Комаров А.С.: Деятельность Международного коммерческого арбитражного суда при Торгово-промышленной палате Российской Федерации (МКАС)

Всероссийская Академия Внешней Торговли

Внешнеторговая арбитражная комиссия при Всесоюзной торговой палате (ВТАК) в 1932 году

(Международный коммерческий арбитражный суд при Торгово-промышленной палате российской Федерации (в дальнейшем – МКАС))

- третейское разбирательство споров между коммерческими предприятиями разных стран
- развитие третейских судов при торговых палатах и иных объединениях предпринимателей, как международных, так и национальных
- все контракты, заключавшиеся советскими внешнеторговыми организациями с иностранными фирмами, содержали оговорку об арбитражном рассмотрении споров
- постоянно действующий арбитражный орган для рассмотрения международных споров
- принятие в 1993 году Закона о международном коммерческом арбитраже
    - цельная законодательная база для развития третейского суда в области международной торговли
    - российский закон был принят на основе Типового закона о международном коммерческом арбитраже, который был в 1985 году разработан Комиссией по праву международной торговли (ЮНСИТРАЛ).
    - Российский закон содержит в минимальном количестве отклонения от текста Типового закона, которые отражают определенные традиции, сложившиеся у нас в стране в практике международного арбитража в предшествующие годы.
    - принятие этого закона создало солидный правовой фундамент для дальнейшего развития международного коммерческого арбитража в России,
    - важным результатом этого акта стало также и достижениие международной унификации правового регулирования этого способа альтернативного

разрешения споров в России с законодательством более двадцати иностранных государств, также использовавших Типовой закон ЮНСИТРАЛ при реформировании или создании своих национальных законов о международном коммерческом арбитраже.

Положение о Международном коммерческом арбитражном суде при Торгово-промышленной палате Российской Федерации (МКАС)

- вопрос о правопреемстве в отношении арбитражного органа, созданного в 1932 году и действовавшего теперь под эгидой Российской Торгово-промышленной палаты.
- признание государством той важной роли, которую, несмотря на свой негосударственный характер, выполнял и продолжает выполнять данный третейский суд в отечественной правовой системе.

Регламент МКАС, принятый в 1995 году

- отразил основные представления о требованиях к современному арбитражному разбирательству международных экономических споров, которые были воплощены в Законе, но и
- многолетний опыт и традиции, оправдавшиеся в процессе плодотворной деятельности международного арбитража на протяжении нескольких десятилетий.
- принятие в 2005 году новой редакции Регламента МКАС (вступил в силу с 1 марта 2006 года)

МКАС является

- членом Международной федерации коммерческих арбитражных институтов (МФКАИ), куда входят ведущие арбитражные центры всего мира.
- Изменение в организации и осуществлении внешнеэкономической деятельности в России, а также
- общая экономическая ситуация, характерная для находящегося в переходном периоде народного хозяйства.
- активность многочисленных предприятий и фирм всех форм собственности к самостоятельной внешнеэкономической деятельности.

- Увеличение числа участников международного коммерческого оборота в России объективно привело также и к повышению количества споров.
- резко увеличилась нагрузка на арбитражный суд, который теперь стоял перед необходимостью, не снижая уровня профессиональной компетентности и оперативности, рассматривать значительно большее количество дел, содержание и сложность которых также изменились в сторону повышения.
- В очень короткий период времени на международный рынок вышли многие тысячи новых, не имеющих достаточного опыта внешнеэкономической деятельности участников
- общее снижение профессионального уровня в этой весьма сложной сфере предпринимательской деятельности.
- многие правовые документы, которыми оформлялись внешнеэкономические операции, содержали ошибки, ставшие во многих случаях причиной разногласий между деловыми партнерами
- стороны внешнеторговой сделки не предусмотрели порядок разрешения разногласий, а именно, передачу этого спора в международный арбитраж.
- пришлось прибегать за рубежом к сложной судебной процедуре для защиты своих имущественных интересов, нарушение которых допускалось их иностранными контрагентами.

Регламент МКАС 1995 года изменил характер списка арбитров, сделав его факультативным

- спорящим сторонам было предоставлено право избирать арбитров не только из списка, который утверждается Торгово-промышленной палатой
- список арбитров пополнился зарубежными специалистами, число которых составляет около одной трети всего списочного состава.
- Характерным для практики последних лет представляется то, что уменьшение числа дел, рассматриваемых ежегодно в МКАС, сопровождается увеличением общей суммы исковых требований
  - теперь предъявление иска в международный арбитражный суд имеет место, как правило, когда разногласия касаются значительных сумм и, действительно, серьезным образом затрагивают их интересы, что оправдывает обращение в арбитраж. Такое положение, одновременно,
  - означает и более сложную задачу, которую приходится решать арбитрам в каждом конкретном случае.

Иностранные участники арбитражных разбирательств (в МКАС)

3. предприятия, находящиеся на территории бывших советских республик (преимущественно из стран СНГ)
4. фирмы из стран Западной Европы (около четверти поступивших дел)

- Из общего числа участников разбирательств в МКАС около половины составляют российские предприятия
- неуклонно возрастает число арбитражных разбирательств, где участвуют только иностранные предприятия

Международный коммерческий арбитражный суд при ТПП Российской Федерации (МКАС))

Правовой основой деятельности МКАС является

- Закон “О международном коммерческом арбитраже”, принятый 7 июля 1993 года
- Положение о МКАС, подтвердив его статус как преемника Арбитражного суда при ТПП СССР
- МКАС, в частности, вправе разрешать споры на основании соглашений сторон (арбитражных оговорок), если они договорились о передаче споров в Арбитражный суд при ТПП СССР.
- Действующий Регламент МКАС утвержден Торгово-промышленной палатой Российской Федерации и вступил в силу с 1 марта 2005 года.

Морская арбитражная комиссия при ТПП Российской Федерации

«Закон о международном коммерческом арбитраже» 1993 года

- не предусматривает какого-либо особого порядка создания на территории Российской Федерации постоянно действующих арбитражных органов, которые могут осуществлять рассмотрение международных коммерческих споров
- такой арбитражный орган может быть создан в явочном порядке.

Положение о МКАС в качестве приложения к Закону РФ «О международном коммерческом арбитраже.

- МКАС является самостоятельным постоянно действующим арбитражным учреждением (третейским судом), осуществляющим свою деятельность в соответствии с Законом Российской Федерации "О международном коммерческом арбитраже".

Статус МКАС

- МКАС вправе принимать к рассмотрению споры, подлежащие его юрисдикции в силу международных договоров Российской Федерации.
- Московская конвенция 1972 года
- норма Положения о МКАС, предусматривающая его полномочия рассматривать споры на основе «старых» арбитражных соглашений

Компетенция

- споры, когда имеется письменное соглашение между спорящими сторонами о передаче на разрешение МКАС уже возникшего или могущего возникнуть спора
- арбитражная оговорка, включаемая сторонами в контракт (соглашение)
- случаи, когда спорящие стороны согласовывают арбитражный порядок рассмотрения после того, когда у них уже возник спор.
- арбитражное соглашение может возникнуть путем обмена исковым заявлением и отзывом на иск, в которых одна сторона утверждает о наличии соглашения о рассмотрении спора в МКАС, а другая сторона против этого не возражает.
- Арбитражное соглашение может быть инкорпорировано в договор также путем ссылки на другой документ, в котором содержится арбитражная оговорка, например, ранее действующий между сторонами договор или какие-либо общие (типовые) условия, регулирующие условия сделок.

Нормы, определяющие предметную компетенцию

- компетенция не носит общего характера
- специализированный внешнеэкономический арбитражный суд
- когда предмет спора выходит за рамки закрепленной за МКАС компетенции, он не вправе рассматривать дело в качестве постоянно действующего арбитражного органа.
- Споры между российским и иностранным предприятием, которые могут передаваться на рассмотрение МКАС по соглашению сторон, должны вытекать из договорных и

иных гражданско-правовых отношений, возникающих при осуществлении внешнеторговых и иных видов международных экономических связей.

- Иностранным участником спора рассматривается сторона, если ее коммерческое предприятие находится за границей.
- необходимо использование двух критериев
  - субъективного (наличие иностранной стороны) и
  - объективного (внешнеэкономический характер спора).

  Отсутствие одного из этих критериев будет означать неподсудность спора МКАС.
- ситуации, когда спор возник из договора о приобретении физическим лицом доли участия в каком-либо предприятии, в частности, акций в акционерном обществе
  - если, например, речь идет о приобретении акций иностранного акционерного общества, споры из договора, опосредствующего данную сделку, могут быть переданы на рассмотрение МКАС.
- споры предприятий с иностранными инвестициями и международных объединений и организаций, созданных на территории Российской Федерации, между собой, споры между их участниками, а равно их споры с другими субъектами права Российской Федерации
  - если в спорные отношения вовлечен, хотя и не прямо, иностранный капитал этого достаточно для обоснования юрисдикции МКАС.

Примерный перечень разновидностей гражданско-правовых отношений, споры из которых могут быть переданы на разрешение: отношения

- по купле-продаже (поставке) товаров,
- выполнению работ,
- оказанию услуг,
- обмену товарами и (или) услугами,
- перевозке грузов и пассажиров,
- торговому представительству и посредничеству,
- аренде (лизингу),
- научно-техническому обмену,
- обмену другими результатами творческой деятельности,
- сооружению промышленных и иных объектов,
- лицензионным операциям,

- инвестициям,
- кредитно-расчетным операциям,
- страхованию,
- совместному предпринимательству и
- другим формам промышленной и предпринимательской кооперации.

Вопрос о наличии или отсутствии компетенции МКАС по конкретному делу разрешается составом арбитража, созданным для рассмотрения дела по существу

§ если между сторонами возникают разногласия по данному вопросу, они подлежат разрешению только после того, как будет сформирован состав арбитража для решения спора по существу. Следует подчеркнуть, что

§ совершение ответчиком предусмотренных Регламентом действий в связи с начатым арбитражным разбирательством (например, назначение арбитра), когда он одновременно возражает против компетенции МКАС по данному спору, не будут рассматриваться как его согласие с компетенцией МКАС.

Обеспечительные меры

§ МКАС имеет установленное законом право распорядиться о принятии обеспечительных мер в отношении предмета спора, если об этом заявлена просьба стороны.

§ Без ущерба для своих прав в процессе арбитражного разбирательства любая сторона вправе также обратиться в суд с просьбой о принятии мер по обеспечению иска, который вправе вынести определение о принятии таких мер.

Арбитражное разбирательство

положения Регламента МКАС

§ При решении вопросов, не урегулированных ни Регламентом МКАС, ни соглашением сторон, арбитраж, основываясь на российском законодательстве о международном коммерческом арбитраже, ведет разбирательство таким образом, который он сам считает надлежащим, соблюдая при этом равное отношение к сторонам и предоставляя каждой стороне необходимые возможности для защиты своих интересов. Следует подчеркнуть, что

§ при разрешении споров МКАС не обязан применять нормы ни Арбитражно-процессуального, ни Гражданского процессуального кодексов.

- Все документы, касающиеся начала и осуществления арбитражного разбирательства, за исключением письменных доказательств, представляются арбитражному суду на языке контракта, или на языке, на котором стороны вели между собой переписку, или на русском языке. МКАС по своему усмотрению или по просьбе одной из сторон может потребовать от другой стороны перевода на русский язык представленных ею документов либо обеспечить такой перевод за ее счет.
- Письменные доказательства представляются в оригинале или в виде заверенной копии. Состав арбитража вправе потребовать перевода этих доказательств на другой язык в случаях, когда это необходимо в интересах рассмотрения дела.

Устное слушание дела

- при закрытых дверях, что обеспечивает конфиденциальность арбитражного разбирательства
- как правило, ведется на русском языке.
- Стороны могут договориться о проведении устного слушания и на другом языке.
- Стороны могут договориться о разбирательстве спора на основе только письменных материалов, без проведения устного слушания. Однако состав арбитража может, тем не менее, все-таки назначить устное слушание, если по его мнению представленные материалы окажутся недостаточными для разрешения спора по существу.
- На стороны возлагается обязанность доказать те обстоятельства, на которые они ссылаются как на основания своих требований или возражений. Вместе с тем,
    - арбитражный суд может потребовать представления сторонами и иных доказательств.
    - Он вправе также по своему усмотрению назначить проведение экспертизы и испрашивать представление доказательств у третьих лиц, а также вызывать и заслушивать свидетелей.
- Оценка доказательств осуществляется арбитрами по их внутреннему убеждению.
- Непредставление стороной надлежащих доказательств не препятствует арбитражному суду продолжить разбирательство и вынести решение на основе имеющихся у него доказательств.

Арбитражное решение

- Решение выносится на основе применимых норм права, определенного соглашением сторон, а

§ при отсутствии такого соглашения - руководствуясь правом, определенным арбитражем в соответствии с коллизионными нормами, которые он считает применимыми.

- правовые нормы, являющиеся составной частью какой-либо национальной правовой системы, но и
- нормы, имеющие своим источником документы, принятые на международном уровне, но не являющиеся формальными источниками права. В частности, это могут быть
  - еще не вступившие в силу международные конвенции. Или
  - неформальные кодификации правовых норм, например, Принципы международных коммерческих договоров УНИДРУА.
- Во всех случаях арбитраж должен принимать свои решения в соответствии с условиями договора и с учетом торговых обычаев, применимых к данной сделке.

§ Решение принимается на закрытом совещании арбитражного суда большинством голосов арбитров.

§ Если решение не может быть принято большинством голосов, то оно должно быть принято председателем состава арбитража.

§ Арбитр, который не соглашается с решением, тем не менее, подписывает решение, указывая на свое особое мнение, которое может быть приобщено к решению.

§ должно обязательно включать мотивы, на которых оно основано.

§ является обязательным для исполнения.

§ Если в ходе арбитражного разбирательства стороны достигнут мирового соглашения, то арбитражное разбирательство подлежит прекращению.

§ По просьбе сторон арбитража может зафиксировать это урегулирование в виде арбитражного решения на согласованных условиях.

§ окончательность решения МКАС по существу рассмотренного им спора.

Расходы по арбитражному разбирательству.

§ При подаче искового заявления в МКАС истец обязан уплатить регистрационный сбор (1000 долл. США)

§ По каждому поданному иску истец обязан уплатить авансом также арбитражный сбор

§ Размер арбитражного сбора, порядок его уплаты и распределения между спорящими сторонами после завершения разбирательства, а также порядок покрытия других расходов по арбитражному разбирательству устанавливаются Положением об арбитражных расходах и сборах, являющимся неотъемлемой частью Регламента МКАС.

Исполнение решений МКАС

§ исполняется сторонами в определенные им сроки.

§ Если срок исполнения в решении не указан, оно подлежит немедленному исполнению.

§ не исполненные в срок арбитражные решения приводятся в исполнение в соответствии с законом и международными договорами.

§ Конвенция ООН о признании и приведении в исполнение иностранных арбитражных решений (Нью-Йорк, 1958 год). Российская Федерация является ее участницей, как продолжатель Советского Союза.

Рассмотрение МКАС споров по регламенту ЮНСИТРАЛ.

§ арбитражное разбирательство “ad hoc” в соответствии с Арбитражным регламентом, принятым Комиссией ООН по праву международной торговли (Арбитражный регламент ЮНСИТРАЛ)

§ Для того чтобы МКАС получил возможность выполнить функции, возложенные на него в соответствии с Арбитражным регламентом ЮНСИТРАЛ, стороны в своем арбитражном соглашении, предусматривающем применение Регламента ЮНСИТРАЛ для разрешения своих споров, должны

- прямо указать, что компетентным органом, предусмотренным данным Регламентом, будет МКАС или
- прямо сослаться на Правила МКАС при ТПП РФ по оказанию содействия арбитражу в соответствии с Арбитражным регламентом ЮНСИТРАЛ.

Popondopulo V. F.: Avoin osakeyhtiö: Intressitasapainon turvaaminen

Pietarin valtiollinen yliopisto

1. Osakkaiden intressitasapainon turvaaminen ”yhteishyödyn” prioriteetin tunnustamisen perusteella

Venäjän osakeyhtiölainsäädäntö on kehittymässä. Osakeyhtiölain säätämisen päivämäärästä lähtien siihen on tehty muutoksia yli 15 kertaa ja nämä muutokset olivat aika merkittäviä. Osakeyhtiölainsäädännön kehitystyö ei ole vieläkään päättynyt, vaan se jatkuu edelleen. Venäjän federaation hallituksessa käsitellään parhaillaan yrityslainsäädännön ja yritysjohtamisen konseptioluonnosta ja osakeyhtiölain muutosehdotukset on valmisteltu. Tulen käyttämään joitakin niistä esitelmässäni.

Loppujen lopuksi osakeyhtiöoikeuden ongelmat liittyvät korporatiivisiin intresseihin ja näiden intressien keskinäisiin konflikteihin.

Korporatiiviset suhteet ovat keskipisteessä, kun monien henkilöiden intressit törmäävät objektiivisesti yhteen. Niitä ovat yhtiön osakkaiden ja sen työntekijöiden, osakkaiden ja luotonantajien, osakkaiden ja johtajien, suurosakkaiden (eli enemmistöosakkaiden) ja pienosakkaiden (eli vähemmistöosakkaiden) intressit.

Oikeudellisen säätelyn avulla kaikki nämä intressit on saatava tasapainoon. Pitkäjänteistä talouspolitiikkaa kuvaavia prioriteetteja on varmistettava lainsäädännön avulla. Samalla on otettava huomioon Venäjän yhteiskunnan kehitystä määritteleviä psykologisia, poliittisia ja taloudellisia tekijöitä. Nämä seikat huomioon otettuina yhtiön kanssa tekemisissä olevien henkilöiden intressien tasapaino edellyttää mielestäni seuraavia prioriteetteja (etuoikeuksia):

- osakkaiden intresseillä on etuoikeus yhtiön työntekijöiden intresseihin nähden sillä ehdolla, että työntekijöille työlainsäädännön antamat takuut on turvattu (oikea-aikaisen ja oikeudenmukaisen palkan, loman ym. takuut). Sellainen lähestymistapa luo edellytykset osakeyhtiön ja koko valtion talouden etenevälle kehitykselle;

- yhtiön velkojien intresseillä on etuoikeus osakkaiden intresseihin nähden. Muu lähestymistapa, jonka mukaan osakkaiden intresseillä olisi etuoikeus velkojien suhteen on täysin kelvoton, koska se johtaa velkojien oikeuksien loukkaamiseen ja taloudellisen aktiviteetin vähenemiseen;

- osakkaiden intresseillä on etuoikeus johtajien intresseihin nähden sillä ehdolla, että johtajien valtuudet ja oikeudet on selkeästi määritelty ja varmistettu;

- yhtiön strategisia investoijia olevien suurosakkaiden (eli enemmistöosakkaiden) intresseillä on etuoikeus pienosakkaiden (eli vähemmistöosakkaiden) intresseihin nähden. Vähemmistöosakkailla pitää samalla olla omien intressiensä suojelukeinoja, jotka ovat etupäässä kompensaatioluonteisia (eli oikeus tietyn summan korvaamiseen). Vähemmistöosakkailla ei saa olla veto-oikeutta osakeyhtiön tai sen pääomistajien merkittävimpiin asioihin liittyvässä päätöksenteossa.

Liittyen käsiteltäviin asioihin hyvin mielenkiintoiseksi tulee eturistiriitojen (intressien konfliktin ja korporatiivisen konfliktin) doktriinin kehittäminen. Sitä ei ole vielä riittävän pitkälle kehitetty venäläisessä oikeustieteessä eikä sitä sovelleta usein lainsäädännössäkään.

Yhtiön korporatiivisten intressien konflikti juontuu itse korporatiivisten suhteiden luonteesta. Kun osakas riskeeraa osakkeisiin sijoitettuja rahojaan, osakkaan (investoijan) tavoite on saada osinkoa tai osakkeiden ostamisen tai myymisen yhteydessä saatavaa osakkeiden hinnan kurssieroa. Enemmistöosakkaat tavoittelevat samalla yhtiön pitkäjänteistä kehitystä; he haluavat mieluummin voiton pääomittamista kuin osinkojen saamista, koska se edistää yrityksen vakavuutta ja helpottaa yrityksen strategisten kehityssuunnitelmien toteuttamista. Vähemmistöosakkaiden pääintressi liittyy useimmiten yhtiöön osallistumisesta seuraavaan osingon saamiseen. Yhtiön johtajat eivät ole yhtiön osakkaita. Heillä ei ole omaisuutensa menettämisen riskiä. Heidän intressinsä on yrityksen mahdollisimman tehokas käyttäminen, työpaikan säilyttäminen sekä korkean palkan saaminen. Näiden tavoitteiden saavuttamiseksi johtajat aika usein riskeeraavat liikaa yhtiön omaisuutta (mikä on loppujen lopuksi osakkaiden omaisuutta). Joskus kyseessä on jopa valtuuksien väärinkäyttö. Osakkaiden ja johtajien välisten ristiriitojen lieventämistä sekä korporatiivisten konfliktien ehkäisemistä hoitaa yhtiön johtajien neuvosto (hallitus). Tämän tehtävän hoitamiseksi johtajien neuvoston on oltava riippumaton sekä osakkaista että johtajista. Jäseninä siinä pitää olla pääsääntöisesti riippumattomia johtajia.

Korporatiivinen konflikti – todelliset erimielisyydet (riidat) yrityssuhteiden osallistujien, esimerkiksi yhtiön osakkaiden ja johtajien, välillä, jotka voivat johtaa oikeudenkäyntiin eli kanteen

nostamiseen yhtiötä tai sen johtajia vastaan. Markkinasuhteiden muodostuksen vuosina Venäjällä on ollut runsaasti esimerkkejä korporatiivisista konflikteista, joissa aiheena oli omaisuuden jako, varojen uudelleenjako, yritysten kaappaus jne.

Korporatiiviset konfliktit syntyvät monista eri syistä, mm:

- venäläisten yritysten tiedottaminen on suljettua. Tämä johtuu siitä, että menestyviin yrityksiin kohdistuva hallintaviranomaisten painostus on voimakasta, yrityskaappaajat ovat aktiivisia jne;
- puuttuu tehokas mekanismi saattaa johtajien neuvoston jäseniä ja johtajia vastuuseen;
- yritysjohdon tilan heikko sisäinen valvonta itse yhtiössä (tässä on ehdotus nostaa tarkastuslautakuntien riippumattomuusastetta: on kiellettävä yhtiön hallintohenkilöstön osallistuminen lautakunnan toimintaan, määrättävä kumulatiivinen äänestystapa tarkastuslautakunnan jäsenten valinnassa, minkä avulla pystytään turvaamaan vähemmistöosakkaiden intressit);
- korporatiivisten riitojen riittämätön oikeudellinen valvonta (tarvitaan tuomareiden erikoistumista korporatiivisiin riitoihin ja tuomioistuinten tuomiovaltakonkurenssin poistamista; yhtiöoikeuden periaatteiden lainsäädännöllinen selkeys puuttuu).

Osakeyhtiölainsäädännön tarkoitus on mm. turvata intressitasapainoa, suojata etuoikeuksia sekä estää oikeuksien väärinkäyttöä. Näihin asioihin liittyvät myöskin ne ohjeet, jotka sääntelevät suurten kauppojen tekemistä, sellaisten kauppojen tekemistä, joihin liittyy osapuolten henkilökohtaisia sidoksia ja intressejä, yhtiöiden fuusiotoimia jne. Käsittelemme ensin yleisellä tasolla osakkaiden intressien tasapainon turvaamista yhteishyödyn prioriteetin tunnustamisen perusteella ja sen jälkeen käymme läpi joitakin erityiskysymyksiä osakkaiden intressien turvaamiseksi.

Kuten tiedetään osakeyhtiöt ovat kaupallisia organisaatioita, jotka akkumuloivat osakepääomaa tulevaa sijoittamista varten tavoitteena saada hyötyä systemaattisesti. Se on eräs mahdollinen tapa yhdistää pääoma ja sen jatkokäyttö liiketoiminnassa. Osakkeiden ostajat ottavat osakeyhtiön toimintaan liittyviä riskejä, suostuvat intressiensä rajoittamiseen yhtiön yhteisen hyödyn eteen ja loppujen lopuksi sijoitetun pääoman korkoa (eli osinkoa) saamista varten. Juuri siksi pääkriteerinä yhtiön ja sen osallistujien intressien tasapainon löytämisessä on yhtiön

määräävien intressien prioriteetti sillä ehdolla, että osakkaiden ja varsinkin vähemmistöosakkaiden intressit on turvattu.

Osakkeisiin perustuvan, varsinkin avoimen osakeyhtiön muodossa olevan liiketoiminnan erikoispiirre on se, että se koskee monien satojen pienosakkaiden (investoijien) omaisuusintressejä. Tämä lainsäätäjän huomioima seikka määrää monia avoimen osakeyhtiön oikeusaseman ominaisuuksia.

Yhtäältä osakeyhtiölainsäädäntö tähtää osakkaiden oikeuksien ja laillisten intressien suojeluun. Tämä ilmenee joinakin oikeudellisina rajoituksina ja kieltoina, jotka liittyvät yhtiön toimeenpanevien elinten toimintaan; yhtiön hallintoelinten valtuuksien jaon sääntöinä; avoimen osakeyhtiön asioidenhoidon julkisuuden vaatimuksena; osakasrekisterin pitämisen velvollisuutena (jos osakkaita on yli 50 niin rekisteriä pidetään rekisteröintiorganisaation kanssa tehdyn sopimuksen perusteella); etuoikeusosakeannin rajoituksena (korkeintaan 25%:ia peruspääomasta); obligaatioemission rajoituksena (ei saa ylittää peruspääoman tai kolmansien henkilöiden antaman vakuuden arvoa); jne.

Toisaalta osakeyhtiölainsäädäntö tähtää yhteishyödyn suojeluun eli itse avoimen osakeyhtiön suojeluun kaupallisena organisaationa, jotka toiminnan tavoitteena on voiton saaminen. Osakkaiden liiallinen puuttuminen osakeyhtiön operatiiviseen taloudelliseen toimintaan ei edistä yritystoiminnan tehokkuutta eikä se vastaa objektiivisesti itse osakkaiden intressejä. Siksi Osakeyhtiölaki asettaa rajat osakkaiden puuttumiselle, mikä takaa osakeyhtiön yritystoiminnalle tiettyä vapautta ja heijastuu johtajien toimintaan. Näitä sääteleviä rajoitteita ovat mm, yhtiökokouksen kutsumisen ja järjestämisen tiukka menettely. Näin ainoastaan ne osakkaat, joilla on vähintään 2%:ia yhtiön osakkeista saavat esittää asioita yhtiökokouksen käsiteltäviksi. Yhtiökokouksessa käsitellään ainoastaan niitä asioita, jotka kuuluvat sen valtapiiriin sekä jotka ovat kokouksen päiväjärjestyksessä (pykälä 48). Osakkaalla on oikeus valittaa yhtiökokouksen päätöksestä oikeuteen ainoastaan lain suoraan edellyttämissä tapauksissa (pykälä 49). Laki myöskin rajoittaa osakkaiden mahdollisuuksia tutustua kirjanpitoasiakirjoihin ja yhtiön toimeenpanevan elimen kokousten pöytäkirjoihin (pykälä 91).

Näin ollen osakeyhtiölainsäädännön päätavoite on yhtiösuhteiden kaikkien osallistujien eli osakkaiden (vähemmistö- ja enemmistöosakkaiden), itse yhtiön (yrittäjänä) ja sen johtajien intressien tasapainon varmistaminen. Ja siinä ratkaisevana periaatteena on se, että yhtiön intressit

yleisesti ottaen ovat hallitsevina muiden osakeyhtiösuhteiden osallistujien (eli osakkaiden, johtajien ja isännöitsijöiden) intresseihin nähden.

Venäjän federaation Perustuslakituomioistuimen 24.03.2004 päivätyssä päätöksessä No 3-P on suoraan sanottu, että yhtiön intressit ovat hallitsevia ”siinä määrin, kun se toimii osakeyhtiön yhteishyödyn saavuttamiseksi”.

2. Osakkaiden intressien tasapainon turvaamisen erikoisongelmia

A). Oikeus osinkojen saamiseen voidaan toteuttaa ainoastaan siinä tapauksessa, jos päätöksen osinkojen maksamisesta tekevät johtajien neuvosto ja yhtiökokous (pykälä 42 kohta 1). Johtuen siitä, että tällaisia päätöksiä ei tehdä venäläisissä osakeyhtiöissä kovin usein, osakkailla ei ole mahdollisuutta saada osinkoja. Tämän seurauksena syntyy riitoja osakkaiden (yleensä vähemmistöosakkaiden) ja johtajien välillä, jotka liittyvät nimenomaan yhtiön voiton jakoon. Miten tässä on mahdollista turvata intressien tasapainoa?

Olen sitä mieltä, että asiassa on edettävä OECD:n corporate governance -periaatteissa vahvistetusta lähestymistavasta, jonka mukaan yhtiön yleinen intressi (strateginen intressi) on ”osakkaiden tulojen optimointia”, eli tuloja osakkaiden sijoittamasta pääomasta. On ymmärrettävä, että osakeyhtiön saama puhdas voitto ei ole ainoastaan yhtiön liiketoiminnan tulos, vaan myös seurausta osakkaiden tekemistä sijoituksista. Siksi yhtiön puhdas voitto on laitettava ei ainoastaan yhtiön kehitykseen (kapitalisoimiseen) vaan myös osinkojen maksamiseen osakkaille.

B). Yhtiön peruspääoman korottaminen ja pienentäminen (pykälät 28-29).

Yhtiön peruspääomaa voidaan korottaa nostamalla osakkeiden nimellisarvoa tai sijoittamalla lisäosakkeita. Päävaara osakkaille siinä on se, että heidän osuutensa peruspääomasta mahdollisesti tulee epäselväksi. Johtuen siitä Laissa on edellytetty erilaisia aineellis-oikeudellisia osakkaiden oikeuksien sekä menettelyihin liittyviä takuita. 1) Osakkeiden nimellisarvoa voidaan nostaa osakeyhtiön laskuun, jolloin kaikkien osaketyyppien ja -kategorioiden nimellisarvo nousee vastaavasti. 2) Lisäosakkeiden sijoittamisesta: niitä voidaan sijoittaa ainoastaan osakeyhtiön yhtiöjärjestyksessä ilmoitetun osakemäärän puitteissa, josta kaikki osakkaat tietävät etukäteen. Kun lisäosakkeita sijoitetaan yhtiön omista varoista, lisäosakkeita jaetaan osakkaiden kesken suhteessa niillä oleviin osakkeisiin. Näin turvataan osakkaiden intressit.

Osakeyhtiön peruspääomaa voidaan pienentää pienentämällä osakkeiden nimellisarvoa tai vähentämällä niiden yhteismäärää mm. sillä, että yhtiö ostaa joitakin osakkeita itselleen, jos se on mahdollista Osakeyhtiölain sekä osakeyhtiön yhtiöjärjestyksen mukaan, tai kuoletetaan osittain maksettuja osakkeita, joita yhtiö ei myynyt vuoden kuluessa siitä, kun niitä on tullut sen haltuun (pykälä 34, kohta 1). On olemassa muitakin keinoja pienentää peruspääomaa (pykälä 35, kohta 4, pykälä 72, kohta 3, pykälä 76 kohta 6). Johtuen siitä, että osakeyhtiön peruspääoman pienentäminen voi koskea myöskin sen lainanantajien intressejä, yhtiö on velvollinen ilmoittamaan heille asiasta. Lainanantajilla on tässä tapauksessa oikeus vaatia yhtiöltä sen velvollisuuksien ennenaikaista täyttämistä tai suhteiden lopettamista sekä tästä aiheutuvien tappioiden korvaamista (pykälä 30). Tällä tavalla turvataan osakeyhtiön lainanantajien intressit.

C) Osakkeiden ostaminen tai lunastus yhtiön toimesta

Osakkeiden ostamisella tarkoitetaan kauppaa, jolloin yhtiö ostaa osakkeita osakkailtaan yhtiökokouksen päätöksellä. Tällaisissa tapauksissa yhtiö tekee ehdotuksen osakkeiden ostamisesta ja osakkailla on oikeus ottaa ehdotus vastaan tai hylätä se. Osakeyhtiöllä on oikeus ostaa sen sijoittamia osakkeita vain lain edellyttämissä tapauksissa:

1) Jos se on mahdollista yhtiöjärjestyksen mukaan tavoitteena peruspääoman pienentäminen; 2) muissa tapauksissa liikkeellä olevien osakkeiden kokonaisnimellisarvon 10%:n puitteissa. Yhtiökokous päättää siitä, minkä ajan kuluessa osakkeita ostetaan, mutta se ei saa olla vähemmän kuin 30 päivää.

Kun osakkeita ostetaan on noudatettava periaatetta, jonka mukaan kaikilla osakkailla pitää olla samat mahdollisuudet myydä osakkeita. Siksi viimeistään 30 päivää ennen aikaa, jonka kuluessa osakkeita ostetaan, yhtiö on velvollinen tiedottamaan osakkaille siitä. Jokaisella osakkaalla on oikeus myydä osakkeita, ja yhtiö on velvollinen ostamaan niitä. Jos myytäviksi tarjotaan enemmän osakkeita kuin yhtiö on ostamassa, osakkeita ostetaan osakkailta suhteessa jokaisen osakkeita myyvän osakkaan tarjoamaan määrään (pykälät 72-73).

Yhtiö lunastaa osakkeita osakkaiden vaatimuksesta. Osakeyhtiö on velvollinen tyydyttämään vaatimuksen eli ostamaan omat osakkeensa seuraavissa tapauksissa: 1) yhtiön uudelleenjärjestelyn tapauksessa; 2) ison kaupan tekemisen tapauksessa; 3) yhtiöjärjestyksen muuttamisen tapauksessa, mikäli se rajoittaa osakkaiden oikeuksia. Yhtiö lunastaa osakkeita niiden

markkinahinnalla. Laki määrittää rajoitetun ajan, jonka kuluessa osakkaalla on oikeus esittää vaatimuksia osakkeiden lunastamisesta: 45 päivää yhtiökokouksen vastaavasta päätöksestä. Viimeistään 30 päivän kuluessa sen ajan päättymisestä, jolloin osakkaat voivat esittää lunastusvaatimuksia, yhtiö on velvollinen lunastamaan niiden osakkaiden osakkeita, jotka esittivät lunastusvaatimuksen (pykälät 75-77).

D) Suurten kauppojen ja ”sidoskauppojen” tekeminen

Suuria kauppoja ovat a) sellaiset yksittäiset kaupat tai toisiinsa liittyvät kaupat, joiden perusteella yhtiö ostaa tai vieraannuttaa omaisuuden, jonka arvo on enemmän kuin 25%:ia yhtiön aktiivojen kirjanpitoarvosta; b) kaupat tai muutama toisiinsa liittyvä kauppa, jotka liittyvät tavallisten osakkeiden tai muiden tavallisiin osakkeisiin konvertoitavien arvopapereiden sijoittamiseen.

Tällaisia kauppoja tehdään ainoastaan yhtiön johtajien neuvoston tai yhtiökokouksen hyväksynnän perusteella. Päätöksen suuren kaupan hyväksymisestä, kun kyseessä on omaisuus, jonka arvo on 25-50%:ia yhtiön aktiivojen kirjanpitoarvosta, tekee johtajien neuvosto yksimielisesti. Jos yksimielisyyteen ei voi päästä, kaupantekoa käsitellään yhtiökokouksessa.

Päätökset suuresta kaupasta koskien omaisuutta, jonka arvo ylittää 50%:ia yhtiön aktiivojen kirjanpitoarvosta, tehdään yhtiökokouksessa. Kaupanteon puolella pitää olla 3/4 osakkaista – kokouksessa läsnä olevat äänivaltaisia osakkeita omistavat osakkaat. Jos suuri kauppa on samalla sellainen, että siihen liittyy sidoksia, silloin sen tekoa säännöstelee vain ”sidoskauppoihin” sovellettava järjestys. Suuri kauppa, jonka tekemisessä on rikottu kaupanteon hyväksymisen sääntöjä, voidaan mitätöidä yhtiön tai osakkaan oikeusvaateen perusteella (pykälä 79, kohta 6).

Kauppoja sanotaan ”sidoskaupoiksi” silloin, kun laissa määritellyt asianosaiset henkilöt (johtajien neuvoston jäsen, toimeenpanevana elimenä oleva henkilö, osakas, jolla on 20%:ia osakkeista tai enemmän yms.), heidän puolisonsa, vanhempansa, lapsensa, veljensä, sisarensa ja muut henkilöt, jotka voivat vaikuttaa heihin
a) ovat edunsaajaosapuolena, välittäjänä tai edustajana kyseisessä kaupassa;
b) omistavat 20%:ia tai enemmän sen juridisen henkilön osakkeista (osuuksista), joka on kyseisessä kaupassa edunsaajana, välittäjänä tai edustajana;

c) ovat sen juridisen henkilön johtotehtävissä, joka on kyseisessä kaupassa edunsaajana, välittäjänä tai edustajana (pykälä 81).

Sidoshenkilöt ovat velvollisia ilmoittamaan Osakeyhtiölle kiinnostuneisuudestaan yhtiön tekemästä kaupasta (pykälä 82). Kaupalle, johon liittyy sidoksia, on haettava yhtiön johtajien neuvoston tai yhtiökokouksen hyväksyntä ennen sen tekemistä. Päätöksen sellaisen kaupan hyväksynnästä tekee:

1) johtajien neuvosto, niiden johtajien äänten enemmistöllä, jotka eivät ole sidoksissa kaupantekoon, jos osakkaita on 1000 tai vähemmän;

2) johtajien neuvosto, riippumattomien sekä kaupan tekoon liittymättömien johtajien äänten enemmistöllä, jos osakkaita on yli 1000;

3) kaupantekoon liittymättömien osakkaiden kokous seuraavissa tapauksissa:

(a) kun kaupan kohteen arvo ylittää 2 %:ia yhtiön aktiivojen kirjanpitoarvosta,

(b) kun kauppa liittyy äänivaltaisten osakkeiden sijoittamiseen tai muihin äänivaltaisiin osakkeisiin muutettaviin emissioarvopapereihin, joiden määrä on enemmän kuin 2%:ia yhtiön aikaisemmin sijoittamista äänivaltaisista osakkeista.

(c) kun kaikki johtajien neuvoston jäsenet ovat sidoshenkilöitä.

Kauppa, jonka teosta on kiinnostuneisuutta sekä jonka tekemisessä on rikottu yllä mainittuja vaatimuksia, voidaan mitätöidä yhtiön tai osakkaan oikeusvaateen perusteella. Kiinnostunut henkilö vastaa yhtiön edessä yhtiölle aiheutettujen tappioiden rajoissa. Jos vastuussa on muutama henkilö, niin heillä on yhteisvastuu yhtiön edessä.

E). Osakkeiden konsolidaatio ja splittaus

Osakeyhtiösuhteiden osallistujien intressien ristiriita ilmenee osakkeiden konsolidaation ja splittauksen yhteydessä. Konsolidaatiossa yhtiön kaksi osaketta tai enemmän konvertoidaan yhdeksi saman kategorian (tyypin) osakkeeksi (Osakeyhtiölain pykälä 74 kohta 1). Sen tuloksena pienen osakemäärän omistavat osakkaat voivat menettää ilman heidän suostumustaan kokonaisia osakkeita saaden siitä korvausta. 24.05.1999 säädetyn Osakeyhtiölain mukaan nämä osakkaat käytännössä menettivät osakkaan statuksensa. Voimassa olevan Osakeyhtiölain mukaan konsolidaatiossa muodostuvia ”murto”-osakkeita ei mitätöidä ja niiden omistaja säilyttää osakkaan statuksensa. Murto-osakkeet tunnustetaan itsenäisiksi vaihdon kohteiksi ja niiden omistaja saa oikeuden vaatia sellaisten osakkeiden lunastusta (pykälä 25).

Tässä näemme kaksi erilaista lähestymistapaa, miten lainsäätäjät suojelevat vähemmistöosakkaiden oikeuksia. Mikä lähestymistapa kuvaa objektiivisesti osakeyhtiön intressien tasapainoa, kumpi on suotuisempi?

Jos lähdettäisiin siitä periaatteesta, että yhtiön intresseillä on etuoikeus muiden osakeyhtiösuhteisiin osallistujien intresseihin nähden, siinä määrin, miten yhtiö toimii oman hyötynsä saavuttamiseksi, suotuisempana mielestäni on kuitenkin se lähestymistapa, joka ei sallinut murto-osakkeita (kuten oli aikaisemmin). Tämä lähestymistapa kuvaa objektiivisemmin Venäjän taloudessa tapahtuvia prosesseja ja turvaa sekä pienosakkaiden oikeuksia että yhtiön yleisiä liiketoiminnan intressejä.

Pienosakkaiden oikeuksia turvataan sillä, että heidän omaisuusintressinsä tyydytetään säilyttämättä oikeutta murto-osakkeeseen, sen sijaan heille maksetaan kohtuullista rahallista korvausta, joka Euroopan Ihmisoikeustuomioistuimen mukaan kuuluu perusperiaatteisiin, joiden noudattaminen on välttämätöntä, kun rakennetaan julkisten ja yksityisten intressien tasapainoa, kun rajoitetaan tai riistetään yksityishenkilön omistusoikeuksia. Venäjän federaation perustuslain pykälä 35 myöskin edellyttää ennakollista ja samanarvoista korvausmahdollisuutta yksityisomaisuuden takavarikointitapauksessa.

Voimassa olevassa Osakeyhtiölaissa lainsäätäjä teki perusteettoman kompromissin. Aiheuttaen vahinkoa suurosakkaille ja osakeyhtiölle yrittäjänä lainsäätäjä on säilyttänyt oikeuden murto-osakkeisiin. Säilyttäen osakkaan statuksensa pienet osakkaat eivät kuitenkaan pysty tyydyttämään intressejään: johtamaan yhtiötä, odottamaan osinkojen maksua, edullista osakekurssia ja likvidointikiintiötä. Tämä ei tarkoita sitä, että murto-osakeinstituutio olisi mahdoton. Joidenkin maiden lainsäädännössä sitä on, mutta Venäjälle sen käyttöön ottaminen on ennenaikaista eikä se ole periaatteessa toivottavaa.

F). Osakkeiden kontrollipaketin ostaminen.

Kontrolloivan osakkaan intressien ja vähemmistöosakkaiden intressien ristiriita on luonteeltaan objektiivinen. Tämän ristiriidan ratkaisemista tavoittelevat Avoimen osakeyhtiön osakkeiden kontrollipaketin ostamisen kauppojen säännöt (yhtiöiden valtaamiskaupat) (Osakeyhtiölaki, pykälä 84.1-84.10). Sellaisten sääntöjen säätäminen saattaa Venäjän

osakeyhtiölainsäädännön vastaamaan Venäjän federaation Perustuslakituomioistuimen oikeuskannan vähemmistöosakkaiden korporatiivisten oikeuksien kompensaatioluonnetta ja kansainvälisiä standardeja (esim. Euroopan parlamentin ja neuvoston direktiivi 2004/25/CE, 21.04.2004, joka liittyy julkisiin ostotarjouksiin). Tästä myöskin muodostuu tarvittava intressien tasapaino.

Käsiteltävät Osakeyhtiölain säännöt ovat eriytetty ostettavan arvopaperipaketin koon mukaan: 1) Kaupat, joissa ostetaan yli 30%:ia Avoimen osakeyhtiön arvopapereista; 2) kaupat, joissa yli 95%:ia avoimen osakeyhtiön osakkeista ostanut henkilö ostaa jäljelle jääneitä arvopapereita niiden omistajien vaatimuksesta tai kontrollipaketin omistajan vaatimuksesta.

1). Enemmän kuin 30%:ia arvopapereista on mahdollista ostaa tarjouksen (julkisen offertin) perusteella, joka voi olla vapaaehtoinen, pakollinen tai kilpaileva.

Vapaaehtoisessa tarjouksessa sillä henkilöllä, joka aikoo ostaa yli 30%:ia avoimen osakeyhtiön osakkeista hänen ja lähipiirin (affiliated persons) omistuksessa olevat osakkeet mukaan laskettuina, on oikeus lähettää yhtiölle osakkaille osoitettu julkinen offertti (pykälä 84.1. kohta 2).

Pakollisessa tarjouksessa sillä henkilöllä, jolla on jo yli 30%:ia avoimen osakeyhtiön osakkeista, ml. hänen ja lähipiirin (affiliated persons) omistuksessa olevat osakkeet, on velvollisuus 35 päivän kuluessa osakkeiden ostamisesta lähettää yhtiön emissioarvopapereiden omistajille julkinen offertti ostaa heiltä näitä arvopapereita (pykälä 84.2. kohta 2).

Sen jälkeen kun yhtiöön on saapunut vapaaehtoinen tai pakollinen tarjous, jokaisella henkilöllä on oikeus lähettää vastaavia arvopapereita koskeva kilpaileva tarjous. Tällöin tarjouksessa mainittujen ostettavien arvopapereiden hinta ja määrä eivät voi olla pienempiä kuin aiemmin lähetetyssä vapaaehtoisessa tai pakollisessa tarjouksessa mainitut hinta ja määrä.

15 päivän kuluessa arvopapereiden ostotarjouksen saamisesta osakeyhtiö on velvollinen lähettämään vastaavan tarjouksen, yhdessä yhtiön johtajien neuvoston suositusten kanssa kaikille arvopaperiomistajille. Arvopaperiomistajilla on oikeus ottaa heille osoitettu tarjous vastaan lähettämällä ilmoitus arvopapereiden myynnistä. Jos arvopapereiden, joista on tehty myynti-ilmoitus, kokonaismäärä on suurempi kuin se arvopaperimäärä, jonka vapaaehtoisen tarjouksen

lähettänyt henkilö haluaa ostaa, arvopapereita ostetaan osakkailta suhteessa ilmoituksissa olevaan arvopaperimäärään, ellei muuta ole tarjouksessa tai myynti-ilmoituksessa edellytetty.

Arvopapereiden luovuttaminen tapahtuu arvopapereiden omistajan ja ostajan tekemän sopimuksen perusteella.

2). Tehokkaan korporatiivisen hallinnon turvaamiseksi osakeyhtiölaissa on edellytetty mekanismia, joka antaa yli 95%:ia yhtiön osakkeista omistavalle osakkaalle oikeuden vaatii muilta (vähemmistö-) osakkailta heidän omistuksessaan olevien osakkeiden pakkomyyntiä. Kontrolloivan osakkaan ja vähemmistöosakkaiden intressien tasapainon turvaamiseksi, vähemmistöosakkaille (yhtiön ulkopuolisille) taas annetaan oikeus vaatia hallitsevalta osakkaalta heidän osakkeidensa lunastusta.

Osakeyhtiölaissa on edellytetty avoimen osakeyhtiön arvopapereiden yli 95%:ia osakkeista ostaneen henkilön vaatimuksesta tapahtuvan lunastuksen järjestys (pykälä 84.8). Henkilö, joka omistaa yli 95% osakkeista lähettää yhtiön arvopapereiden omistajille vaatimuksen heidän arvopapereidensa lunastuksesta 6 kuukauden kuluessa vapaaehtoisen tai pakollisen tarjouksen vastaanottamisajan päättymisestä. Tehdyn sopimuksen perusteella arvopaperit kirjataan arvopapereiden omistajan henkilötililtä ostajan henkilötilille.

Laki Osakeyhtiöistä edellyttää myös menettelyä, jonka mukaan henkilö, joka on ostanut 95%:ia yhtiön osakkeista, lunastaa osakkeita niiden omistajien vaatimuksesta (pykälä 84.7). Eli yli 95%:ia osakkeista omistava henkilö on velvollinen lunastamaan jäljelle jääneet yhtiön arvopaperit niiden omistajien vaatimuksesta. Sitä varten ostaja on velvollinen 35 päivän kuluessa 96%:in osakkeiden ostamisesta on velvollinen lähettämään yhtiön arvopapereiden omistajille, joilla on oikeus vaatia arvopapereiden lunastusta, tiedotteen siitä, että heillä on sellainen oikeus. Osakkeiden omistajat saavat esittää lunastusvaatimuksia 6 kuukauden kuluessa siitä, kun heille on lähetetty kyseinen tiedote. Tehdyn sopimuksen perusteella arvopaperit kirjataan arvopapereiden omistajan henkilötililtä ostajan henkilötilille.

G). Johtajien intressikonfliktit

Johtajien eturistiriidat syntyvät silloin, kun johtajien toiminta tavoittelee omia intressejä ja lähipiirin (affiliated persons) intressejä eikä yhtiön etuja. Käytännössä ristiriita on osakkaiden

(pääoman omistajien) intressien ja hallintohenkilökunnan välillä. Osakkaiden intressien turvaamiseksi laki vaati johtajilta lojaalisuuden periaatteen noudattamista.

Johtajien neuvoston jäsenten, yhtiön toimeenpanevien elinten sekä työtehtäviä suorittavien hallintotyöntekijöiden on toimittava yhtiön intressien saavuttamiseksi, käytettävä oikeuksiaan ja täytettävä velvollisuuksiaan tunnollisesti ja järkevästi (Venäjän federaation Siviililakikokoelma, pykälä 53; Osakeyhtiölaki, pykälä 71 kohta 1). Näitä tärkeitä johdon käyttäytymisen arviointikriteerejä ei aina huomioida. Siihen on muutama syy: ensinnäkin laista puuttuu näiden periaatteiden yksityiskohtainen kuvaus, jota olisi mahdollista käyttää sovellettaessa näitä lakipykäliä; yhtiön sisäinen valvonta on puutteellista; tuomioistuimilla ei ole riittävästi kokemusta sellaisista subjektiivisista kriteereistä kuten tunnollisuus, järkevyys ja lojaalisuus. On joitakin muita syitä. Nyt näistä seikoista yksityiskohtaisemmin:

Osakeyhtiölaki edellyttää osakkaiden oikeuksien turvaamista liittyen yritysjohdon toimintaan. Siinä on muun muassa seuraavia sääntöjä:

- johtajien neuvoston uudelleen valitseminen vuosittain, osakkaiden vuosikokouksessa. Tämä antaa osakkaille mahdollisuuden olla valitsematta niitä ihmisiä, jotka eivät pärjänneet edellisen kuukauden aikana. Johtajien neuvoston valtuuksia voidaan riisua johtajilta pois ennenaikaisestikin ylimääräisen kokouksen päätöksellä;
- jos yhtiön osakkaita on enemmän kuin 1000, johtajien neuvoston jäseniä valitaan kumulatiivisen äänestämisen kautta, mikä antaa osakkaiden vähemmistölle valita edustajansa johtajien neuvoston jäseneksi äänestyksellä;
- kollegiaalisen toimeenpanevan elimen jäsenet eivät voi muodostaa enemmistöä johtajien neuvostossa. Yhdestä henkilöstä koostuva toimeenpaneva elin ei voi olla samalla johtajien neuvoston puheenjohtajana. Toisaalta tämä kielto toteuttaa ”vallanjaon” periaatteen ja toisaalta antaa johtajien neuvostolle mahdollisuuden käytännössä seurata toimeenpanevan elimen toimintaa ja turvata osakkaiden oikeudet;
- osakkaiden intressien turvaamiseen liittyy sekin normi, ettei johtajien neuvoston jäsen saa antaa ääntään toiselle johtajien neuvoston jäsenelle;
- oikeus muodostaa yhtiön toimeenpaneva elin kuuluu yhtiökokoukselle ellei osakeyhtiön yhtiöjärjestyksen mukaan tätä oikeutta ole annettu johtajien neuvostolle;
- johtajien neuvoston jäsenet, kollegiaalisen toimeenpanevan elimen jäsenet ja yhdestä henkilöstä koostuva toimeenpaneva elin kantavat vastuuta yhtiön edessä yhtiölle tuottamuksellisilla toiminnoilla (toimettomuudella) aiheutetuista tappioista (Osakeyhtiölaki, pykälä 71);

- Osakkaiden oikeuksien takuuna on myöskin Avoimen osakeyhtiön monimutkainen hallintojärjestelmä; toimivaltuuksien jakaminen hallintoelinten välillä sekä sisäisen valvonnan järjestelmä.

Lainsäädännössä olevista takuista huolimatta on olemassa ongelmia

Johdon vastuun ongelma. Lain mukaan osakkailla, joilla on enemmän kuin 1% osakkeista, on oikeus esittää epäsuora kanne ei-tunnollisia johtajia vastaan jossa vaaditaan yhtiölle aiheutettujen tappioiden korvaamista. Osakeyhtiölain pykälän 71 soveltamiskäytäntöä ei lähes ole ollenkaan. On ehdotettu, että Venäjän prosessilainsäädäntöä täydennettäisiin epäsuorien kanteiden käsittelyn menettelyillä. Epäsuoran kanteen instrumenttia voivat käyttää vähemmistöosakkaat (Venäjän federaation välitystuomioistuimen täysistunnon määräys No 19, päiv. 18.11.2003, ”Federatiivisen osakeyhtiölain soveltamisesta”, kohdat 37 ja 38)

Venäjän federaation hallintorikkomuslakikokoelman mukaan on olemassa administratiivinen rangaistusmääräys – hallintotehtävissä olevien henkilöiden diskvalifiointi, eli juridisen henkilön toimeenpanevan hallintoelimen johtovirkoihin nimittämisen ja johtajien neuvostoon (hallintoneuvostoon) kuulumisen oikeuden rajoitus. Hallinnollisen rangaistuksen diskvalifioinnin muodosta määrää tuomari (pykälät 3.11, 14.21, 14.22). Käytäntöä diskvalifioinnin soveltamisesta korporatiivisessa johtamisessa ei valitettavasti ole. On ehdotettu, että osakkailla (eikä ainoastaan valtuutetulla valtion virastolla (FSFR)) olisi oikeus kääntyä suoraan oikeuteen tai valtuutettuun valtionelimeen ja vaatia diskvalifiointia (kuten on mahdollista Yhdysvaltojen joissakin osavaltioissa).

Heikko sisäinen valvonta itse yrityksissä. Voimassa oleva Tarkastuslautakunnan muodostamisen menettely ei anna mahdollisuutta käyttää tämän tarkastuselimen todella vakavia valtuuksia. On ehdotettu, että muutetaan tarkastuslautakunnan muodostamismenettelyä seuraavasti: 1) Kielletään kaikilta poikkeuksetta yhtiön hallintohenkilökunnalta (ei ainoastaan johtajilta) kuuluminen tarkastuslautakuntaan; 2) otetaan käyttöön pakollinen kumulatiivinen äänestys tarkastuslautakunnan jäsenten valitsemiseen (vähemmistöosakkaiden mielipiteen huomioon ottamista varten).

Korporatiivisten riitojen riittämätön oikeudellinen valvonta. Kyseessä on tuomioistuinten valvonnan puutteellinen erikoistuminen korporatiivisten riitojen käsittelyyn. Eri tuomioistuinten välillä (Yleiset oikeudet ja välitystuomioistuimet) on olemassa hallinnonalojen välistä kilpailua, liittyen esim. yhdestä henkilöstä muodostun tai kollegiaalisten toimeenpanevien elinten valtuuksien lopettamiseen. Yleiset siviilituomioistuimet käsittelevät myös riitoja, kuten työriitoja. Välitystuomioistuimet käsittelevät myös riitoja, kuten yritysriitoja. Joskus tehdään suoraan ristiriitaisia oikeuspäätöksiä, joiden takia sekä tuomioistuimet, että Venäjän oikeusjärjestelmä menettävät arvovaltaansa.

Yhtiön hallintoelinten toimivallan tasapainon ongelma. Osakeyhtiöihin liittyvät Siviilikaaren määräykset ja Osakeyhtiölain säätämät normit eivät vastaa toisiaan. Näin esimerkiksi Siviilikaaren pykälän 103 mukaan (Saksan malli) kaikki, mikä ei kuulu yhtiökokouksen ja johtajien neuvoston toimivaltaan, kuuluu toimeenpanevien hallintoelinten toimivaltaan. Osakeyhtiölain mukaan toimeenpanevien elinten toimivalta rajoittuu yhtiön operatiivisen hallinnan toimintoihin.

Venäjän osakeyhtiölainsäädännön mukaan Osakeyhtiön ylin hallintoelin on yhtiökokous. Länsimaisissa malleissa yhtiökokousta ei tunnusteta hallintoelimeksi, vaan sellaisena on hallintoneuvosto (Johtajien neuvosto).

On ehdotettu, että avoimen osakeyhtiön hallintoelinten toimintavaltuuksia olisi jaettu maailman standardien mukaan (amerikkalainen ja saksalainen malli):

Yhtiökokouksen pitää ratkaista vain keskeisimpiä periaatekysymyksiä: yhtiöjärjestyksen muuttaminen, uudelleenjärjestäminen, vuosiraportin hyväksyntä, tilintarkastajan hyväksyntä, liikkeelle laskettujen osakkeiden lunastus ja johtajien neuvoston jäsenten valitseminen;

Johtajien neuvoston pitää koostua riippumattomista johtajista (jota omaisuusintressit eivät sido muihin henkilöihin kuten yhtiön virkamiehet, osakkaat, merkittävät sopimuspuolet, luotonantajat ja toimittajat) ja hoitaa strategisia johtamistehtäviä, valvoa hallintohenkilökunnan toimintaa, kuunnella niiden raportteja, nimittää johtajia virkoihin ja vapauttaa heitä valtuuksistaan.

Toimeenpanevien elinten on hoidettava liiketoiminnan operatiivista johtamista ja raportoitava siitä johtajien neuvostolle.

Попондопуло В. Ф.: Открытое Акционерное Общество: Обеспечение Баланса Интересор

СПбГУ

1. Обеспечение баланса интересов акционеров на основе признания приоритета «общего блага»

Российское акционерное законодательство находится в развитии. Со дня принятия Закона об АО в него более 15 раз вносились изменения, порой весьма существенные. Совершенствование акционерного законодательства не завершено, оно продолжается. В Правительстве РФ рассматривается проект Концепции развития корпоративного законодательства и корпоративного управления, подготовлены проекты изменений в Закон об АО. В моем сообщении используются некоторые из указанных материалов.

Проблемы акционерного права, в конечном счете, связаны с корпоративными интересами, конфликтами этих интересов.

Корпоративные отношения являются средоточием объективно сталкивающихся интересов множества лиц: участников общества и его работников; участников общества и его кредиторов; участников общества и его менеджеров; крупных (мажоритарных) и мелких (миноритарных) акционеров.

С помощью правового регулирования все указанные интересы должны быть сбалансированы. Необходимо законодательно закрепить приоритеты, отражающие долговременную экономическую политику. При этом следует учитывать психологические, политические и экономические факторы, определяющие развитие российского общества. С учетом этих обстоятельств баланс интересов лиц, имеющих отношение к обществу, предполагает, на мой взгляд, следующие приоритеты:

- приоритет интересов акционеров над интересами работников общества при условии соблюдения гарантий, предоставленных работникам трудовым законодательством (гарантии своевременной и справедливой оплаты труда, отдыха и т.д.). Такой подход обеспечит поступательное развитие АО и экономики страны в целом;

- приоритет интересов кредиторов общества над интересами акционеров. Иной подход, закрепляющий приоритет интересов акционеров над интересами его кредиторов

неприемлем, так как приведет к нарушениям прав кредиторов и снижению экономической активности;

- приоритет интересов акционеров над интересами менеджеров при условии четкого закрепления полномочий и прав последних.

- приоритет интересов крупных (мажоритарных) акционеров, являющихся стратегическими инвесторами общества, над интересами мелких (миноритарных) акционеров. При этом миноритарные акционеры должны быть наделены средствами защиты их интересов, главным образом, компенсационного характера (правом на выплату определенной денежной суммы). Миноритарный акционер не должен обладать правом вето при решении наиболее значимых для жизни АО или ее основных собственников решений.

В связи с рассматриваемыми вопросами представляет значительный интерес выработка доктрины конфликта интересов и корпоративного конфликта, которая еще не достаточно разработана в российской юридической науке и редко используется в законодательстве.

Конфликт корпоративных интересов заложен в самой природе корпоративных отношений. Так, цель акционера (инвестора), который рискует своими вложениями в акции – это получение дивидендов или курсовой разницы стоимости акций при их покупке и продаже. При этом мажоритарные акционеры настроены на долгосрочную перспективу развития общества; они, как правило, предпочитают капитализацию прибыли, чем получение дивидендов, поскольку это способствует устойчивости и стратегическим планам развития компании. Основной интерес миноритарных акционеров обычно выражается в получении дивидендов от участия в обществе. Менеджеры общества, не являясь инвесторами общества, не несут рисков потери своего имущества; их интерес – это наиболее эффективная эксплуатация предприятия, сохранение работы и получение высокого вознаграждения за нее. Ради достижения этих целей менеджеры нередко чрезмерно рискуют имуществом общества (в конечном счете, имуществом акционеров), а то и злоупотребляют своими правами. Сглаживанием указанных противоречий между акционерами и менеджерами, предотвращением корпоративных конфликтов занимается совет директоров. Однако для выполнения этой задачи совет директоров должен быть независим как от акционеров, так и от менеджеров; состоять преимущественно из независимых директоров.

Корпоративный конфликт – это реальные разногласия (споры) между участниками корпоративных отношений, например, акционерами и менеджерами общества, которые могут привести к судебным искам к обществу либо к его управляющим. Годы становления

рыночных отношений в России изобилуют примерами корпоративных конфликтов, связанных с так называемым переделом собственности, перераспределением активов, недружественными поглощениями компаний и т.п.

Причины возникновения корпоративных конфликтов весьма разнообразны. Это, в частности:

- информационная закрытость российских компаний, что объясняется высоким административным прессом на успешные компании, усилением активности со стороны корпоративных поглотителей и т.п.;

- отсутствие эффективного механизма привлечения членов совета директоров и управляющих к ответственности;

- слабый внутренний контроль за состоянием корпоративного управления в обществе (здесь предлагается повысить независимость ревизионных комиссий: ввести запрет на вхождение в ее состав работников аппарата управления общества, предусмотреть кумулятивное голосование при выборах членов ревизионной комиссии, чтобы обеспечить интересы миноритарных акционеров);

- слабый судебный контроль за корпоративными спорами (здесь необходима специализация судей по корпоративным спорам, устранение конкуренции подведомственности споров; отсутствие четких законодательных принципов корпоративного права).

На обеспечение баланса интересов, защиту приоритетных прав, пресечение злоупотребления правом направлено акционерное законодательств, в частности, правила совершения крупных сделок, сделок с заинтересованностью, сделок по поглощению компаний и др. Рассмотрим вначале общий вопрос обеспечения баланса интересов акционеров на основе признания приоритета «общего блага», а затем некоторые специальные вопросы обеспечении интересов акционеров.

Как известно, АО - это коммерческие организации, аккумулирующие акционерный капитал для последующего его инвестирования в целях систематического извлечения прибыли; это одна из форм объединения капитала для последующего использования его в предпринимательской деятельности. Приобретатели акций добровольно принимают на себя риски, связанные с деятельностью АО; соглашаются на ограничения их интересов ради общего блага общества, а, в конечном счете, ради получения процента (дивиденда) на вложенный капитал. Поэтому основным критерием поиска баланса интересов общества и его

участников является приоритет определяющих интересов общества, при условии обеспечения интересов акционеров, особенно миноритарных.

Акционерная организация предпринимательской деятельности, особенно в форме ОАО, отличается тем, что затрагивает имущественные интересы многих сотен мелких акционеров (инвесторов). Именно это обстоятельство предопределяет многие особенности правового положения ОАО, учитывается законодателем.

С одной стороны, акционерное законодательство направлено на защиту прав и законных интересов акционеров, что выражается в ряде правовых ограничений и запретов, касающихся деятельности исполнительных органов общества; в нормах о распределении компетенции между органами управления общества; в требованиях публичного ведения дел ОАО; в требовании ведения реестра акционеров, а если их более 50 - на основе договора общества с регистратором; в ограничениях на выпуск обществом привилегированных акций (не более 25% уставного капитала); в ограничениях на выпуск облигаций (не более величины уставного капитала или величины обеспечения, предоставленного обществу третьими лицами); и т.п.

С другой стороны, акционерное законодательство направлено на защиту общего блага, т.е. самого ОАО как коммерческой организации, целью деятельности которого является извлечение прибыли. Чрезмерное вмешательство акционеров в оперативно-хозяйственную деятельность акционерного общества не способствует эффективности предпринимательской деятельности, объективно не соответствует интересам самих акционеров. Поэтому Закон об АО предусматривает пределы такого вмешательства акционеров, обеспечивающие известную свободу предпринимательской деятельности общества и выражающиеся в действиях его менеджеров. В частности, это жесткая процедура созыва и проведения общего собрания акционеров. Правом предлагать вопросы для рассмотрения на общем собрании обладают акционеры, владеющие не менее 2 % акций общества. На общем собрании акционеров могут рассматриваться только те вопросы, которые отнесены к его компетенции и включены в повестку дня (ст.48). Акционер имеет право обжаловать решение общего собрания в суд только в случаях, прямо предусмотренных законом (ст.49). Законом ограничены возможности акционеров по ознакомлению с документами бухгалтерского учета и протоколами заседаний исполнительного органа общества (ст.91).

Таким образом, целью акционерного законодательства является закрепление баланса интересов всех участников акционерных отношений: акционеров (миноритарных и мажоритарных), самого общества (как предпринимателя) и его управляющих. При этом

определяющим является принцип превалирования интересов общества в целом над интересами других участников акционерных отношений (акционеров, директоров, управляющих). В постановлении Конституционного Суда РФ от 24 февраля 2004 г. № 3-П прямо указано, что интересы общества являются превалирующими «в той мере, в какой оно действует для достижения общего для акционерного общества блага».

2. Некоторые специальные проблемы обеспечения баланса интересов акционеров

А). Право на выплату дивидендов может быть реализовано только в случае принятия советом директоров и общим собранием акционеров решения о выплате дивидендов (п. 1 ст. 42). Поскольку такие решения в российских АО довольно часто не принимаются, акционеры лишены возможности получать дивиденды, следствием чего являются конфликты акционеров (обычно миноритарных) и менеджеров общества, связанные с распределением прибыли общества. Как здесь обеспечить необходимый баланс интересов?

Полагаю, нужно исходить из подхода закрепленного в Кодексе корпоративного управления Организации Экономического Сотрудничества и Развития, где общий (стратегический) интерес общества обозначен как «оптимизация доходов акционеров», т.е. доходов от вложенного инвесторами капитала. Необходимо понимать, что та чистая прибыль, которую получает АО, является результатом не только предпринимательской деятельности общества, но и следствием инвестиционных вложений, осуществленных акционерами. В этой связи, необходимо чистую прибыль общества направлять не только на развитие общества (на капитализацию), но и на выплату дивидендов акционерам.

Б). Увеличение и уменьшение уставного капитала общества (ст.28-29).

Уставный капитал общества может быть увеличен путем увеличения номинальной стоимости акций или размещения дополнительных акций. Основной опасностью для акционеров при этом является возможное “размывание” их доли в уставном капитале. В связи с этим Закон предусматривает материально-правовые и процедурные гарантии прав акционеров. 1) Что касается увеличения номинальной стоимости акций, то оно производится за счет имущества АО с соответствующим увеличением номинала акций всех категорий и типов. 2) Что касается размещения дополнительных акций, то они могут быть размещены только в пределах количества объявленных акций, установленного уставом общества, о чем заранее известно всем акционерам. При размещении дополнительных акций за счет собственных средств общества дополнительные акции распределяются среди всех

акционеров пропорционально имеющимся у них акциям. Таким образом, обеспечиваются интересы акционеров.

Уставный капитал акционерного общества может быть уменьшен путем уменьшения номинальной стоимости акций или сокращения их общего количества, в том числе путем приобретения части акций обществом, когда это предусмотрено Законом об АО и уставом АО, а также путем погашения не полностью оплаченных акций, которые не были реализованы обществом в течение года с момента их поступления в его распоряжение (п.1 ст.34). Имеются и другие способы уменьшения уставного капитала (п.4 ст.35, п.3 ст.72, п.6 ст.76). Поскольку уменьшение размера уставного капитала АО может затрагивать также интересы его кредиторов, общество обязано уведомить их об этом. Кредиторы в таком случае вправе потребовать от общества прекращения или досрочного исполнения его обязательств и возмещения причиненных этим убытков (ст.30). Таким образом, обеспечиваются интересы кредиторов АО.

В). Приобретение и выкуп обществом акций.

Под приобретением акций понимается покупка их обществом у своих акционеров по решению общего собрания акционеров. При этом предложение о приобретении акций делает общество, а акционеры вправе принять это предложение или не принимать его. АО вправе приобретать размещенные им акции только в случаях, предусмотренных законом: 1) если такая возможность допускается уставом общества в целях уменьшения уставного капитала; 2) в иных случаях в пределах 10% совокупной номинальной стоимости акций, находящихся в обращении. Срок, в течение которого осуществляется приобретение акций, определяется решением общего собрания, но не может быть менее 30 дней. При приобретении акций должен соблюдаться принцип равных возможностей продажи акций всеми акционерами. Поэтому не позднее, чем за 30 дней до начала срока, в течение которого осуществляется приобретение акций, общество обязано уведомить акционеров об этом. Каждый акционер вправе продать акции, а общество обязано приобрести их. Если предложение о продаже акций превышает количество приобретаемых обществом акций, акции приобретаются у акционеров пропорционально количеству предложения каждого акционера, пожелавшего продать акции (ст.72-73).

Выкуп акций обществом осуществляется по требованию акционеров. АО обязано удовлетворить такое требование - приобрести собственные акции в случаях: 1) реорганизации общества; 2) совершения крупной сделки; 3) внесения в устав изменений, ограничивающих права акционеров. Выкуп акций обществом осуществляется по их

рыночной стоимости. Закон устанавливает пресекательный срок для осуществления права акционера на предъявление требования о выкупе акций: 45 дней со дня принятия соответствующего решения общим собранием акционеров. Не позднее 30 дней после окончания срока, в течение которого могут быть предъявлены требования о выкупе акций, общество обязано выкупить акции акционеров, предъявивших требования об их выкупе (ст.75-77).

Г). Совершение крупных сделок и сделок с заинтересованностью.

Крупными сделками являются а) сделки или несколько взаимосвязанных сделок, связанных с приобретением или отчуждением обществом имущества, стоимость которого составляет более 25% балансовой стоимости активов общества; б) сделки или несколько взаимосвязанных сделок, связанных с размещением обыкновенных акций либо иных эмиссионных ценных бумаг, конвертируемых в обыкновенные акции.

Условием совершения таких сделок является их одобрение советом директоров общества или общим собранием акционеров. Решение об одобрении крупной сделки, предметом которой является имущество, стоимость которого составляет от 25 до 50% балансовой стоимости активов общества, принимается советом директоров общества единогласно. Если единогласие не достигнуто, вопрос о совершении такой сделки может быть вынесен на решение общего собрания акционеров. Решение о совершении крупной сделки, предметом которой является имущество, стоимость которого составляет свыше 50% балансовой стоимости активов общества, принимается общим собранием акционеров в 3/4 голосов акционеров - владельцев голосующих акций, присутствующих на собрании. В случае, если крупная сделка одновременно является сделкой, в совершении которой имеется заинтересованность, к порядку ее совершения применяются только положения о совершении сделок с заинтересованностью. Крупная сделка, совершенная с нарушением требований о ее одобрении, может быть признана недействительной по иску общества или акционера (п.6 ст.79).

Сделка считается совершенной с заинтересованностью в случае, если определенные в законе заинтересованные лица (член совета директоров, единоличный исполнительный орган, акционер - владелец 20 и более процентов акций и др.), их супруги, родители, дети, братья, сестры, их аффилированные лица: а) являются стороной выгодоприобретателем, посредником или представителем в сделке; б) владеют 20 и более процентами акций (долей, паев) юридического лица, являющегося стороной, выгодоприобретателем, посредником или представителем в сделке; в) занимают должности в

органах управления юридического лица, являющегося стороной, выгодоприобретателем, посредником или представителем в сделке, а также должности в органах управления управляющей организации такого юридического лица (ст.81).

Заинтересованные лица обязаны сообщить АО об их заинтересованности в совершении обществом сделки (ст.82). Сделка, в совершении которой имеется заинтересованность, должна быть одобрена до ее совершения советом директоров общества или общим собранием акционеров. При этом решение об одобрении обществом такой сделки принимается: 1) советом директоров большинством голосов директоров, не заинтересованных в ее совершении, если число акционеров 1000 и менее; 2) советом директоров большинством голосов независимых директоров, не заинтересованных в ее совершении, если число акционеров более 1000; 3) общим собранием акционеров, не заинтересованных в сделке, в случаях, (а) когда стоимость предмета сделки превышает 2% балансовой стоимости активов общества, (б) когда сделка касается размещения голосующих акций общества или иных эмиссионных ценных бумаг, конвертируемых в голосующие акции, в количестве, более 2% ранее размещенных обществом голосующих акций, (в) когда все члены совета директоров являются заинтересованными лицами.

Сделка, в совершении которой имеется заинтересованность, совершенная с нарушением указанных требований, может быть признана недействительной по иску общества или акционера. Заинтересованное лицо несет перед обществом ответственность в размере убытков, причиненных обществу. В случае, если ответственность несут несколько лиц, их ответственность перед обществом является солидарной.

Д). Консолидация и дробление акций.

Конфликт интересов участников акционерных отношений проявляется при консолидации и дроблении акций. При консолидации акций две или более акций общества конвертируются в одну новую акцию той же категории (типа) (п.1 ст.74 Закона об АО). В результате акционеры, владеющие незначительным количеством акций, могут быть без их согласия лишены принадлежавших им целых акций с выплатой им компенсации. По Закону об АО в ред. от 24 мая 1999 г. такие акционеры по существу лишались статуса акционера. По действующему Закону об АО дробные акции, образующиеся при консолидации, не аннулируются, их владелец сохраняет статус акционера. Дробные акции признаются самостоятельным объектом оборота с наделением их владельца правом требовать выкупа таких акций (ст.25).

Таким образом, налицо два разных подхода законодателя к защите прав миноритарных акционеров. Какой из этих подходов объективно отражает баланс интересов в акционерном обществе, более предпочтителен?

Исходя из принципа превалирования интересов общества в целом над интересами других участников акционерных отношений, в той мере, в какой общество действует для достижения общего для него блага, предпочтительным, на мой взгляд, являлся все же подход, не допускавший существования дробных акций (т.е. как было раньше). Такой подход в большей степени отражает объективно происходящие в российской экономике процессы, обеспечивает как права мелких акционеров, так и общий предпринимательский интерес АО.

Права мелких акционеров обеспечиваются тем, что их имущественные интересы могут быть вполне удовлетворены не сохранением права на дробную акцию, а выплатой соразмерной денежной компенсации, которая отнесена Европейским Судом по правам человека к одному из основных принципов, соблюдение которых необходимо при установлении баланса публичных и частных интересов, при ограничении или лишении права собственности частного лица. Статья 35 Конституции РФ также предусмотривает возможность предварительного и равноценного возмещения в случае изъятия частного имущества.

В действующем Законе об АО законодатель пошел на неоправданный компромисс. С ущербом для интересов крупных акционеров и АО в целом как предпринимателя сохранил право собственности на дробные акции. Сохраняя статус акционера, мелкие акционеры не могут реально удовлетворить свой интерес: управлять обществом, рассчитывать на дивиденд, выгодный курс акций, ликвидационную квоту. Это не значит, что институт дробной акции невозможен, он известен законодательству некоторых стран, однако в России его введение преждевременно, а в принципе нежелательно.

Е). Приобретение контрольного пакета акций.

Конфликт интересов контролирующего акционера и миноритарных акционеров имеет объективный характер. На разрешение такого конфликта направлены правила совершения сделок по приобретению контрольного пакета ценных бумаг ОАО (сделок по поглощению обществ) (ст.84.1-84.10 Закона об АО). Установление таких правил приводит российское акционерное законодательство в соответствие с правовыми позициями Конституционного Суда РФ о компенсаторной природе корпоративных прав меньшинства акционеров и международными стандартами (например, Директивой Европейского

парламента и Совета 2004/25/CE от 21 апреля 2004 г., касающейся публичных предложений о приобретении), устанавливает необходимый баланс интересов.

Рассматриваемые правила Закона об АО дифференцированы в зависимости от величины приобретаемого пакета ценных бумаг: 1) сделки по приобретению более 30% ценных бумаг ОАО; 2) сделки по выкупу лицом, которое уже приобрело более 95% ценных бумаг ОАО, оставшихся ценных бумаг по требованию их владельцев либо по требованию владельца контрольного пакета.

1). Приобретение более 30% ценных бумаг общества может быть осуществлено на основе предложения (публичной оферты) об их приобретении, которое может быть добровольным, обязательным либо конкурирующим.

При добровольном предложении лицо, которое имеет намерение приобрести более 30% акций ОАО с учетом акций, уже принадлежащих ему и его аффилированным лицам, вправе направить в общество публичную оферту, адресованную акционерам (п.2 ст.84.1).

При обязательном предложении лицо, которое уже имеет более 30% акций ОАО с учетом акций, принадлежащих ему и его аффилированным лицам, в течение 35 дней с момента приобретения акций обязано направить владельцам эмиссионных ценных бумаг общества публичную оферту о приобретении у них таких ценных бумаг (п.2 ст.84.2).

После поступления в общество добровольного или обязательного предложения любое лицо вправе направить конкурирующее предложение в отношении соответствующих ценных бумаг. При этом цена и количество приобретаемых ценных бумаг, указанные в таком предложении, не могут быть меньше цены и количества ценных бумаг, указанных в направленном ранее добровольном или обязательном предложении.

В течение 15 дней со дня получения предложения о приобретении ценных бумаг АО обязано направить соответствующее предложение вместе с рекомендациями совета директоров общества всем владельцам ценных бумаг, которые вправе принять, адресованное им предложение, путем направления заявления о продаже ценных бумаг. Если общее количество ценных бумаг, в отношении которых поданы заявления об их продаже, превышает количество ценных бумаг, которое намерено приобрести лицо, направившее добровольное предложение, ценные бумаги приобретаются у акционеров пропорционально количеству ценных бумаг, указанному в заявлениях, если иное не предусмотрено предложением или заявлением о продаже ценных бумаг. Передача ценных бумаг осуществляется на основе договора, заключаемого между владелецем ценных бумаг и приобретателем.

2). Для обеспечения эффективного корпоративного управления Законом об АО предусмотрен также механизм, предоставляющий акционеру, владеющему более 95% акций общества, право требовать от остальных (миноритарных) акционеров принудительной продажи принадлежащих им акций. В целях обеспечения баланса интересов контролирующего акционера и миноритарных акционеров (аутсайдеров общества), миноритарным акционерам, в свою очередь, также предоставлено право требовать от преобладающего акционера выкупа их акций.

Законом об АО предусмотрен порядок выкупа ценных бумаг ОАО по требованию лица, которое приобрело более 95% акций (ст.84.8). Владелец более 95% акций направляет владельцам ценных бумаг общества требование о выкупе их ценных бумаг в течение 6 месяцев с момента истечения срока принятия добровольного или обязательного предложения о приобретении ценных бумаг. На основе заключенного договора ценные бумаги списываются с лицевого счета владельца ценных бумаг и зачисляются на лицевой счет приобретателя.

Законом об АО предусмотрен также порядок выкупа лицом, которое приобрело более 95% ценных бумаг ОАО по требованию их владельцев предусмотрен (ст.84.7). Владелец более 95% акций обязан выкупить оставшиеся ценные бумаги общества по требованию их владельцев. Для этого приобретатель в течение 35 дней со дня приобретения 95% ценных бумаг обязан направить владельцам ценных бумаг общества, имеющим право требовать выкупа ценных бумаг, уведомление о наличии у них такого права. Требования владельцев о выкупе принадлежащих им ценных бумаг могут быть предъявлены в течение 6 месяцев со дня направления им уведомлений о праве требовать выкупа ценных бумаг. На основе заключенного договора ценные бумаги списываются с лицевого счета владельца ценных бумаг и зачисляются на лицевой счет приобретателя.

Ж). Конфликт интересов менеджмента.

Конфликт интересов менеджеров возникает, когда их деятельность подчинена не интересам компании, а собственным интересам или интересам их аффилированных лиц. По существу возникает конфликт между интересами акционеров (собственников капитала) и управляющих общества. Для обеспечения интересов акционеров закон требует от менеджмента соблюдения так называемого принципа лояльности.

Члены совета директоров, исполнительные органы общества, управляющие при осуществлении своих функций должны действовать в интересах общества, осуществлять свои права и исполнять обязанности в отношении общества добросовестно и разумно (ст.53

ГК РФ; п.1 ст.71 Закона об АО). Эти важные критерии оценки поведения менеджмента не всегда учитываются, что объясняется рядом причин, в частности, отсутствием в законе детализации этих принципов, которая могла бы быть полезна в целях правильного применения закона; недостаточно хорошо поставленным внутренним контролем в обществе; отсутствием у судов навыков оценки таких субъективных критериев как добросовестность, разумность, лояльность; некоторыми иными причинами. Остановимся на них подробнее.

Законом об АО предусмотрены гарантии прав акционеров в отношении деятельности менеджмента, в частности:

- члены совета директоров переизбираются ежегодно на годовом общем собрании акционеров, что позволяет акционерам не переизбирать тех, кто не справился со своими обязанностями. Полномочия члена совета директоров могут быть прекращены досрочно по решению внеочередного общего собрания;

- члены совета директоров общества с числом акционеров более 1000 избираются путем кумулятивного голосования, которое позволяет меньшинству акционеров избрать своего представителя в состав членов совета директоров;

- члены коллегиального исполнительного органа не могут составлять большинства в совете директоров. Единоличный исполнительный орган не может быть одновременно председателем совета директоров. Данный запрет, с одной стороны, реализует принцип «разделения властей», а с другой – позволяет совету директоров осуществлять реальный контроль за деятельностью исполнительного органа и тем самым защищать права акционеров;

- целям защиты акционеров служит также норма, запрещающая члену совета директоров передавать свой голос другому члену совета директоров;

- право формировать исполнительный орган общества принадлежит общему собранию акционеров, если уставом АО это право не закреплено за советом директоров;

- члены совета директоров, члены коллегиального исполнительного органа, единоличный исполнительный орган несут ответственность перед обществом за убытки, причиненные обществу их виновными действиями (бездействием) (ст.71 Закона об АО);

- гарантией прав акционеров является также сложная система управления ОАО, распределение компетенции между органами управления, система внутреннего контроля.

Несмотря на указанные законодательные гарантии, остаются проблемы.

Проблема ответственности управляющих. Закон предусматривает возможность заявления акционерами – владельцами более 1% акций косвенных исков к недобросовестным

менеджерам о взыскании убытков в пользу общества. Однако практика применения ст.71 Закона об АО практически отсутствует. Предлагается дополнить российское процессуальное законодательство процедурами рассмотрения косвенных исков. Косвенные иски могут применяться миноритариями (п. 37, 38 постановления Пленума ВАС РФ от 18 ноября 2003 года №19 «О некоторых вопросах применения Федерального закона «Об акционерных обществах»).

КоАП РФ предусмотрена административная санкция - дисквалификация лиц, занимающих управленческие должности, т.е. лишение права занимать руководящие должности в исполнительном органе управления юридического лица, входить в совет директоров (наблюдательный совет). Административное наказание в виде дисквалификации назначается судьей (ст.3.11, 14.21, 14.22). К сожалению, практики применения дисквалификации в сфере корпоративного управления нет. Предлагается предусмотреть право акционеров (а не только уполномоченного государственного органа (ФСФР) непосредственно обращаться в суд с требованием о дисквалификации (как это делается в отдельных штатах США) либо в уполномоченный государственный орган.

Слабый внутренний контроль в компаниях. Существующий порядок формирования ревизионной комиссии не позволяет задействовать действительно серьезные полномочия этого контрольного органа. Предлагается изменить порядок формирования ревизионной комиссии: 1) ввести запрет на вхождение в состав ревизионной комиссии для всех без исключения работников аппарата управления компании (а не только для директоров); 2) ввести обязательное кумулятивное голосование при выборах членов ревизионной комиссии (для учета мнения миноритариев).

Слабый судебный контроль за корпоративными спорами. Имеет место недостаточная специализация судебного контроля за корпоративными спорами. Существует «конкуренция подведомственности» между судами общей юрисдикции и арбитражными судами по спорам о прекращении полномочий единоличного или членов коллегиального исполнительного органа. Общегражданские суды рассматривают такие споры как трудовые споры. Арбитражные суды рассматривают такие споры как корпоративные споры. Порой принимаются прямо противоположные решения, что подрывает авторитет как российского права в целом, так и российской судебной системы.

Проблема соотношения компетенции органов управления общества. Нормы ГК об АО и нормы Закона об АО не соответствуют друг другу. Например, ст.103 ГК в соответствии с германской моделью управления указывает, что все, что не входит в компетенцию собрания акционеров и совета директоров, входит в компетенцию исполнительных органов

управления. По Закону об АО компетенция исполнительных органов ограничена функциями оперативного управления деятельностью общества.

Признание российским акционерным законодательством в качестве высшего органа управления АО собрания акционером. В западных моделях общее собрание не признается органом управления, таковым признается наблюдательный совет (совет директоров).

Предлагается разделить компетенцию органов управления ОАО в соответствии с мировыми стандартами (американская, германская модель):

собрание акционеров должно решать только самые принципиальные вопросы: изменение устава, реорганизация, утверждение годового отчета, утверждение аудитора, выкуп выпущенных акций, избрание совета директоров;

совет директоров должен состоять из независимых директоров (не связанных имущественными интересами с другими лицами, включая должностных лиц общества, его акционеров, крупных контрагентов, кредиторов и поставщиков) и решать стратегические вопросы управления, контролировать управляющих, заслушивать их отчеты, назначать их и прекращать их полномочия.

исполнительные органы должны осуществлять оперативное управление бизнесом и отчитываться перед советом директоров.

Таковы некоторые проблемы российского акционерного законодательства и предлагаемые пути их решения.

Shubnikov Ju. B.: Yrittäjyyden taloudelliset ja oikeudelliset näkökohdat Venäjällä

Herzenin pedagoginen valtionyliopisto

Institutionaalinen teoria

- Taloudellisen toiminnan säätelyn oikeudellisia näkökohtia
- omistusoikeusteoria, kontaktiteoria, yritysteoria, valtion teoria, laillisuuden ulkopuolinen (harmaa-) talous.
- Instituutiot, jotka edustavat yleisiä, kestäviä yhteiskunnallisia suhteita, ja
- muodostavat yhteiskunnan tunnustamia käyttäytymistä koskevia algorytmejä tietyissä tilanteissa.
- Yleisen käytännön mukaisina osanottajien käyttäytymissääntöinä ne muodostavat kehityksen ja eloonjäämisen tärkeimmät sosiaaliset olosuhteet.

Instituutioiden rakentaminen

1) aloitteentekijänä voi olla itse väestö kansalaisyhteiskunnassa; tietyn ryhmän sisällä kehitetään soveltuvia käyttäytymissääntöjä käyttämällä tämän ryhmän resursseja.
2) Instituutioita tuodaan yhteiskunnalliseen käytäntöön ulkopuolelta tulevan painostuksen avulla, esimerkiksi valtion taholta, eli

   kyseessä on instituutioiden rakentaminen valtion aloitteesta.

- Olosuhteista riippuen molemmat tavat ovat sovellettavissa reaalikäytäntöön
- Sosiaalinen ja taloudellinen tehokkuus

Instituutioiden rakentamisen maksimioptimointi

- Vanhojen (jo muodostuneiden) instituutioiden aloitteesta lähtevä kehitys
- Uusien instituutioiden käyttöönotto (sidosryhmien resursseilla)
- Instituutioiden rakentamisessa on turvattava valtion kompensaatioilla menettävän väestönosan (eläkeläisten) institutionaaliset kustannukset instituutioiden rakentamisessa hankkivan väestönosan (oligarkkien) kustannuksella

Pienin tehokkuus

- Instituutioiden lainaaminen ulkopuolelta sekä pakottaminen niiden käyttöön.

Instituutioiden rakentamisen tehokkuuteen vaikuttavat seuraavat tekijät:

- Väestön ajattelutapa (mentaliteetti),
- Kehityksen taloudellinen taso,
- Institutionaalisten muutosten alue (mittakaava),
- Yhteiskunnan liikkuvuus uusien käyttäytymistapojen omaksumisessa, mikä on myös johdettavista mm. uskonnosta,
- Valtion sosiaalinen ja poliittinen potentiaali,
- Mahdollisuus jakaa operatiivisesti uudelleen taloudellisia ja poliittisia resursseja joidenkin tiettyjen institutionaalisten subjektien hyväksi.

Transaktio (kauppa, suhde, vuorovaikutus)

- - Subjektien välisen hyödykkeiden vaihdon takia se on välttämätön edellytys ihmisen tarpeiden tyydyttämiseksi.
- Transaktion päätavoite on ihmisen ja yhteiskunnan eloonjäämisen ja kehityksen turvaaminen.

Instituutio systemaattisesti toistettavana transaktiona

- Instituution pohjana ovat pysyvät transaktiot, jotka muodostavat subjektien keskinäisen toiminnan yhdenmukaiset kokonaiskaavat hyödykkeiden vaihtoprosessissa.

«Transaktiokulut»

- Aika-, energia-, materiaali- ja (omaisuus-)kulut transaktion suorittamiseen; nämä kulut eivät liity hyödykkeiden valmistus- (saamis-)kustannuksiin (muuntamis- tai transformointikustannukset)
- Tiedon (sopimuspuolesta, hyödykkeestä, ehdoista) keräämiseen liittyvät kustannukset, transaktioehdoista sopiminen (sopimuskustannukset), sopimuspuolen valvonta, transaktion suojeleminen tuhoamiselta.

Yhteiskunnallisten kustannusten -käsitteen sisällön ja rakenteen laajentaminen

- edesauttaa sitä, että sosiaalisessa ja taloudellisessa käytännössä erotetaan nykyisin kaksi pääsektoria kustannustyypin mukaan:

a) transaktiosektori – institutionaalisten tutkimusten pohjana,

б) transformointisektori – muodostaa perinteisen taloudellisen analyysin perustan.

- Jos instituution muodostavat transaktiot eivät vastaa yhteiskunnassa tapahtuneita muutoksia, ja ne johtavat transaktiokustannusten kasvuun, niin tämä instituutio siirtyy stagnaatiovaiheeseen; se on siis joko poistettava tai sitä on kehitettävä.
- Jos muuttuvissa olosuhteissa transaktiot minimisoivat transaktiokustannuksia, niin nämä transaktiot tulevat yleisesti käytettäviksi muodostaen uuden instituution tai parantaen jo olemassa olevaa instituutiota.
- Transaktiokustannusten erottaminen erilliseksi kustannusryhmäksi, joita yhteiskunta käyttää talouskäytännön järjestämiseen, antaa mahdollisuuden uudelleen arvioida vakavasti valtion ja oikeuden roolia tässä käytännössä.

Oikeus toimii muodollisten instituutioiden rakentamisen mekanismina

- Pystyy edistämään instituutioiden optimointia parantaen niitä sekä lainsäädäntö- että oikeuden soveltamisen vaiheessa.
- Yrittämisen oikeussuhteiden muodostaminen (rakentaminen) tärkeimpänä yrittäjyyden kehittämisen ehtona

Yrittäjyyden historia Venäjällä

§ 1800-luvun loppupuoli:

- yritysoikeuden (kauppaoikeuden) pääinstituutioiden muodostuminen (sopimus, yritys, teollinen omaisuus).
- Oli Kauppa -, Tehdas- ja Teollisuusohjesäännöt sekä Siviilikaari, jotka sisälsivät yritystoimintaa säätteleviä oikeusnormeja.

§ Neuvostoaika

- Yrittämisen määrätietoinen ja aktiivinen hajottaminen valtion toimesta. Samalla kuitenkin tapahtui
- joidenkin sellaisten talousoikeudellisten instituutioiden kehittämistä, joilla on jossakin määrin myös markkinataloudellista (yrittäjyydellistä) käyttöä:
    - toimitussopimus, osuuskunta, talousjohtamisen ja operatiivisen johtamisen oikeus, standardisointi, sertifiointi ja tullioikeus.

§ Venäjän paluu markkinapohjaiseen taloussuhteiden rakentamiseen
- ongelmana on nykyisten oikeudellisten instituutioiden ja talouden alojen saattaminen vastaamaan yritysten tarpeita, lisäksi on rakennettava uusia instituutioita.

Yrittäjyyden oikeudellisen ympäristön luomiseen liittyvät uudistukset: (pääsuunnat)

1. Yritystoiminnan organisaatio- ja oikeusmuotojen sekä yritystoiminnan subjektien oikeudellisen statuksen määritteleminen
- Yritysoikeuden, yksityisyrittäjyys- ja konkurssi-instituutioiden elvyttäminen ja uusiin olosuhteisiin sopeuttaminen.

2. Sellaisten yrittäjäoikeuden oikeusinstituutioiden muodostus, joita ei aikaisemmin tunnettu lähes ollenkaan venäläisessä oikeudessa
- Tuotannontekijöiden, intellektuaalisen – ja ennen kaikkea , teollisen omaisuuden yksityisen omistamisen oikeudelliset instituutiot.
- Arvopaperi- (ennen kaikkea emissiopapereiden) vaihdon oikeudellisen säätelyn elvyttäminen aivan uudelle tasolle.
- Yrityksen saattaminen oikeuden kohteeksi omaisuuskokonaisuutena.

3. Yritystoiminnan sopimusoikeutta modifioidaan
- Toimitussopimus, varsinkin toimitukset valtion tarpeiden tyydyttämiseksi
- Factoring-, franchising-, myynti-, yrityksen vuokraus-, rahoitusvuokra- (eli leasing-) yms. sopimukset
- Investointisopimusten tekemisjärjestys valtion kanssa: sopimus tuotteiden jakamisesta, toimilupasopimus.

4. Yritystoimintakäytännön ympäristöä (ulkoisia ehtoja) määräävien suhteiden säätely
- Venäläisen kilpailunrajoitusoikeuden, yksityistämisoikeuden, sijoitusoikeuden yms. luominen
- Tulli-, vero- ja pankkioikeuden perusteellinen muuttaminen.
- Ulkomaankauppaa säätelevä oikeus on muuttunut.

Kaikkien näiden muutosten mukana seuraa merkittäviä transaktiokustannuksia, jotka aiheuttavat yhä suuremmat sijoitukset sekä yhteiskunnan että myös valtion taholta.
Institutionaalinen lähestymistapa – kustannuskomponentti

- Instituution rakentamiseen ja ylläpitämiseen liittyvien transaktiokustannusten kokonaisuus
- Vaikuttaa sekä itse oikeudellisen instituution valintaan että sen ottamiseen yhteiskunnalliseen käytäntöön.

Kustannuksiin perustuva lähestymistapa

- On käytettävä transaktiokustannusten alentamisen indeksiä
- Transaktiokustannusten alentamiseen markkinataloudessa johtaa taloussubjektien välisen liberalismin vahvistaminen niiden vuorovaikutuksessa, koska tämä antaa mahdollisuuden optimoida niiden yksilökohtaisia kustannuksia.
- Katsotaan tarkoituksenmukaiseksi laajentaa yksityisoikeusperusteita yritysoikeussuhteiden säätelyssä ympäristö- ja sijoitusoikeudessa, standardisoinnin ja sertifioinnin aloilla sekä ulkomaankauppatoiminnassa.
- Samalla on vahvistettava julkisoikeudellisia perusteita niillä aloilla, joihin yritysympäristö nojautuu, ja jotka ovat yritysten taloudellisen toiminnan prosessien ulkopuolella.
    - Kilpailu-, verotus-, tulli- ja valuuttaoikeuden sekä kirjanpidollista toimintaa ja valtiollista valvontaa säätelevien oikeuksien oikeussuhteiden parantaminen.
- Yritystoiminnan perustana toimivien (itseään rahoittavien ja säätelevien) kansalaisyhteiskunnan instituutioiden kehityksen edistäminen on tarkoituksenmukaista
    - Formalisoitujen ei-kaupallisten organisaatioiden kehittäminen ja parantaminen; yrittäjyyteen kohdistuvien vastaavien eettisten, moraalisten, uskonnollisten ja muiden käsitysten kehittäminen.

1) Itserakentaminen ja itsesäätely yritystoimintaympäristössä

- Johtaa osakkaiden varojen kuluttamisen optimointiin.

2) Itseään säätelevien organisaatioiden (kansalaisorganisaatioiden) instituutionmuodostus yritystoimintaympäristössä edistää:

- Oikeusinstituutioiden rakentamisen omarahoitusta itse yrittäjien laskuun.

3) Valtion oikeudellisen infrastruktuurin parantaminen ja kehittäminen

- Yritystoiminnan oikeuksien toteuttamista ja suojelemista turvaavien valtiovaltaelinten ja paikallisen vallan elinten (toimeenpanevat valtaelimet, tuomioistuimet) työn laadun parantaminen; korruption vähentäminen.
- Byrokraattisten menettelyiden vähentäminen ja yksinkertaistaminen jne.

4) Perustuslain ja muiden oikeusasiakirjojen säätämien talousvapauksien turvaamiseen sekä yrittäjän oikeuksien suojaamiseen liittyvät toimenpiteet.

Шубников Ю. Б.: Экономико-правовые аспекты предпринимательской деятельности в России

РГПУ им. А.И. Герцена

Институциональная теория

- правовые аспекты регламентации экономической практики
- (теория прав собственности, теория контрактов, теория фирмы, теория государства, внелегальная экономика).

- институты, представляя собой в самом общем виде устойчиво воспроизводимые общественные отношения,
- образуют признанные обществом алгоритмы поведения в определенных ситуациях.

- выступая в виде правил поведения участников общественной практики, образуют для них важнейшие социальные условия выживания и развития.

Строительство институтов

3) может осуществляться инициативно самим населением внутри гражданского общества путем выработки в рамках той или иной группы приемлемых правил поведения за счет самой этой группы.
4) могут внедряться в общественную практику и посредством внешнего давления, например, со стороны государства, т.е.
   государственное строительство институтов

- в реальной практике находят применение оба эти способа в зависимости от условий
- социальная и экономическая эффективность

Наивысшая оптимизация институционального строительства

- инициативное эволюционное преобразование старых (сложившихся) и
- введение (за счет заинтересованных групп) новых институтов.

- обеспечить государственные компенсации институциональных издержек для потерявших групп населения (пенсионеры) за счет приобретающих (олигархи) в институциональном строительстве.

Наименьшую эффективность

- дает заимствование институтов извне и волевое принуждение в их использовании.

На результативность институционального строительства влияют следующие факторы:

- ментальность населения,
- экономический уровень развития,
- территория (масштабы) институциональных преобразований,
- мобильность общества в принятии новых форм поведения, что производно в частности и от религии,
- социально-политический потенциал государства,
- возможность оперативного перераспределения в пользу тех или иных других институциональных субъектов экономических и политических ресурсов.

Трансакция (сделка, отношение, взаимодействие)

- между субъектами по поводу обмена благ выступает необходимым условием для удовлетворения потребностей человека.
- основная цель трансакции - это обеспечение выживания и развития человека и общества.

Институт как систематически воспроизводящиеся трансакции

- имеет в своей основе устоявшиеся трансакции, образующие совокупность унифицированных схем взаимодействия субъектов в процессе обмена благами.

«Трансакционная издержка»

- затраты времени, энергии, материалов (имущества) на осуществление трансакции, не связанные с издержками по созданию (получению) самих благ (трансформационными издержками)

- затраты на сбор информации (о контрагенте, благе, условиях), согласование условий трансакции (договорные затраты), надзор за контрагентом, защиту от разрушения трансакции.

Расширение представления о содержании и структуре общественных издержек

- содействует тому, что сегодня в социально-экономической практике мы должны выделить два основных сектора по виду издержек:

а) трансакционный сектор, который лежит в основе институционных исследований,

б) трансформационный сектор, который образует основу традиционного экономического анализа.

- Если трансакции, образующие институт, не отвечают произошедшим в обществе изменениям и приводят к росту трансакционных издержек, то данный институт стагнирует и нуждается в ликвидации или усовершенствовании.
- Если же трансакции в изменяющихся условиях минимизируют трансакционные издержки, то они становятся более применимыми, постепенно образуя новый институт или усовершенствуя существующий.
- Выделение трансакционных издержек как вида затрат общества на организацию экономической практики позволяет серьезным образом переоценить роль государства и права в этой практике.

Право выступает механизмом строительства формальных институтов

- способно содействовать оптимизации этих институтов, совершенствуя их как на стадии законотворческого процесса, так и на стадии их правоприменения.
- (строительство) формирование предпринимательских правоотношений как одного из основополагающих условий становления предпринимательства

История России: предпринимательские отношения

§ вторая половина XIX века:
- становление основных институтов предпринимательского (торгового) права (договорного, корпоративного, промышленной собственности).
- действовали Торговый, Фабричный, Промышленный уставы, Гражданское уложение, которые содержали нормы права, регулирующих предпринимательский оборот.

§ советский период

- целенаправленно активное разрушение государством предпринимательских институтов. Но и
- развитие отдельных хозяйственно-правовых институтов, которые в той или иной мере имеют и рыночное (предпринимательское) применение:
    - договор поставки, кооператив, право хозяйственного ведения и оперативного управления, стандартизация и сертификация, таможенное право.

§ Возврат России к рыночным основам построения экономических отношений

- проблема приведения в соответствие с предпринимательскими потребностями существующих правовых институтов и отраслей и строительства новых.

Реформы по созданию правовой сферы предпринимательства: основные направления

1. определение организационно-правовых форм, в которых осуществляется предпринимательская деятельность и правового статуса субъектов предпринимательства

- возрождение и адаптация к новым условиям корпоративного права, институтов индивидуального предпринимательства, несостоятельности (банкротства).

2. становление правовых институтов предпринимательского права ранее практически не известных российскому праву

- институты права частной собственности на факторы производства, права интеллектуальной собственности и прежде всего промышленной собственности.
- возрождение на принципиально новом уровне правового регулирования оборота ценных бумаг и, прежде всего эмиссионных.
- выделение в качестве объекта права предприятия как имущественного комплекса.

3. модифицируется договорное право в предпринимательской сфере

- договор поставки и особенно поставки для государственных нужд
- договоры факторинга, франчайзинга, продажи, аренды предприятия, финансовой аренды (лизинга) и т.п.
- порядок заключения инвестиционных договоров с государством: соглашение о разделе продукции, концессионное соглашение.

4. регулирование отношений, определяющих среду (внешние условия) предпринимательской практики

- создание российского антимонопольного права, приватизационного права, инвестиционного права и т.п.

- кардинальное изменение таможенного, налогового, банковского права.
- изменилось право, регулирующее внешнеэкономическую деятельность.

все эти преобразования сопровождаются значительными трансакционными издержками, которые порождают большие вложения как со стороны общества в целом, так и со стороны государства в частности.

Использование институционального подхода - затратная составляющая

- совокупность трансакционных издержек на строительство и функционирование института,
- влияет как на выбор самого правового института, так и на процесс его внедрения в общественную практику.

Затратный подход

- нужно использовать показатель снижения трансакционных издержек
- К снижению трансакционных издержек в условиях рыночного хозяйствования приводит усиление либерализации в отношениях между хозяйствующими субъектами в процессе их взаимодействия, поскольку это позволяет оптимизировать их индивидуальные издержки.
- представляется целесообразным расширять частно-правовые начала в регулировании предпринимательских правоотношений в экологическом, инвестиционном праве, в сфере стандартизации и сертификации, во внешнеэкономической деятельности.
- В то же время необходимо усиление публично-правовых начал в сферах, обеспечивающих предпринимательскую среду и находящихся за пределами технологических аспектов хозяйственного взаимодействия предпринимателей
    - совершенствование правоотношений конкурентного, налогового, таможенного, валютного права, права, регулирующего учетную деятельность и государственный контроль.
- Целесообразно содействовать развитию институтов гражданского общества (самофинансируемых и саморегулируемых), обеспечивающих предпринимательскую деятельность

- развитие и совершенствование формализованных некоммерческих образований и соответствующих этических, нравственных, религиозных и иных воззрений на предпринимательство.

1) Самостроительство, саморегулирование в предпринимательской среде

- ведет к оптимизации расходования средств самих участников.

2) Формирование института саморегулируемых (общественных) организаций в предпринимательской сфере способствует

- самофинансированию строительства правовых институтов за счет самих предпринимателей.

3) Совершенствование и развитие государственно-правовой инфраструктуры

- повышение качества работы органов государственной и местной власти, обеспечивающих осуществление и защиту предпринимательских прав (исполнительные органы власти, суды), снижении их коррупционности,
- уменьшении и упрощении сопутствующих бюрократических процедур и т.д.

4) Меры по обеспечению декларируемых конституцией и другими правовыми актами экономических свобод и защиты прав предпринимателя.

Irina Troitskaja: Legal Risks of Business Enterprising in Russia

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When we are talking of business enterprising first of all we think about risks that could not be separated from it. It is proved by legal definition of entrepreneurship that could be found in Russian legislation as well as in most of the similar acts all over the world. So business enterprising is free, aimed at revenue generation activity held at one's own risk[85]. So characteristic of risk in business activity is doubtless.

Globally all kinds of entrepreneurship are subjects to different perils which are to be taken into consideration while making any decision. These risks emerge in every sphere of business, some of them are rather common and could be easily avoided, but some are more untypical and cause serious difficulties to manage them. While considering and assessing risks it is also very important to bear in mind that there are usual risks which are common to nearly all fields of activity and identical in all the countries, but some of the risks are distinctive of particular regions and characterize some special business areas.

Russia is still considered as very risky surrounding for business. By way of illustration, the well known Finnish listed company Stockmann could be mentioned. It is operating in Finland, Estonia, Latvia, Lithuania and Russia. The risk level of the business environment in the Stockmann Group's areas of operations varies. The level of business risk in the Baltic countries has diminished significantly after these countries became members of the European Union, nor do the risks differ in any material respect from business risks in Finland. Business risks in Russia are higher than in Finland and the Baltic countries, and the operating environment is less stable owing to factors such as the business culture and the undeveloped state of the country's infrastructure[86]. The pervasiveness of the grey economy, particularly in the importation of consumer goods, is still large and plays a part in distorting properly functioning competition. But Russian business environment is developing rapidly during several past years. The economic situation is becoming more stable helping to minimize some of the regional risks. Over the past years, the operating environment and legislation pertaining to business activities have nevertheless evolved favourably. The country's economic growth has been robust thanks to the strong impetus from export revenues in the energy

[85] Civil Code of Russian Federation. Article 2.
[86] Stockmann's financial statement bulletin, 2006

sector. The corroboration of that is, for example, the Standard & Poor's Sovereign Ratings which have been increasing, both long-term and short term[87].

Business risks in Russia are manifold. No formal classification of risks in business sphere can be found in any legal act. There are up to 40 criteria suggested in economic and legal literature to distinguish more than 220 types of risks which business enterprising is exposed to. There is little certainty in terms used to define these kinds of risk. Often different words are determining the same types of risk making very difficult to find out the original meaning and what concept it is illustrating. Here we quote the most common of classification used in practice while managing business risks. According to this classification there are the following types of risk which the commercial entities are subject to:

1. Credit risk meaning threat of no credit repayment in due time. This risk can be found in banks as well as in other commercial enterprises which have debts receivable;
2. Market risk meaning risk factors that are external to the company and may significantly affect the company's latitude of operations and profitability if they materialize. These kinds of risk factors encompass fundamental and unforeseen changes in market trends;
3. Liquidity risk meaning threat of impossibility to clear off debts payable in due time by assets possessed by the company;
4. Operational risk meaning internal risks associated with operations which may, if they materialize, lead to interruption of business, inefficiency and unprofitability. These risk factors include risks related, for example, to personnel, fraud and abuse, IT and data security risks as well as risks associated with information used in decision-making;
5. Legal risk meaning threat of losses caused by the fact that effective legislation or other normative regulations were not taken into consideration or have changed substantially. It may also occur in situations of disparity between legislation of different countries affecting international commercial relations. To legal risk also relate defects in documentation that make possible for the counterparty not to discharge its duty.

This legal risk might be very important and cause very significant losses. But in comparison to other types of risk it is not so evident and that is why is often neglected by the entrepreneurs. However, as the legal risks consideration necessity is realized, more and more law firms in Russia provide services in assessing and minimizing legal risks.

[87] Now Sovereign Rating of Russia is BBB+/Stable/A-2 in foreign currency and A-/Stable/A-2 in national currency – the same as some European countries as Hungary, Croatia or Bulgaria.

But still there is no certain and identical understanding of the concept of legal risk. Legislation does not give the definition of this term. This words combination could be found only in one official act originated from the state. The Letter of Central Bank of Russian Federation "Of legal risk and risk of business reputation loss management in banking organizations"[88] is this sole act. It is necessary to say that this document is issued in the form of the letter that implies its recommendatory nature. But it contains the definition of legal risk that is very important for comprehension of its concept.

According to the Recommendations of the Central Bank legal risk is the risk of losses that may occur because of the following internal or external factors. To such internal factors relate:

1. Non-compliance with legislation of Russian Federation in part of identification of the clients and beneficiaries;
2. Discrepancy of internal documents of banking organization with effective legislation and also failure to bring it into conformity opportunely with the amendments and changes of legislation;
3. Ineffective organization of legal service inside the company leading to legal faults of employees and management;
4. Violation of contractual terms by the banking organization;
5. Insufficient elaboration of legal aspects while introducing financial innovations and new technologies.

To external factors relate:

1. Imperfection of legislation, including lack of regulation, legal collisions;
2. Impossibility to reconcile differences by negotiation leading to trial procedures;
3. Violation of contractual terms by clients or counterparties of banking organization;
4. Location of banking organization, its branches and subsidiaries, clients or counterparties under action of foreign regulations.

All these factors mentioned in the recommendatory letter of Central Bank obviously concern not only the banking organizations which of course are commercial units, but also the most part of other entrepreneurs. These business entities are affected by similar risk factors as they function in the same environment. The specific features of every business activity imply some specific risks, but the risk factors themselves remain the same. These factors are formulated in a general way so the definition of legal risk given in this document might be easily extended to all the business units operating in Russia.

[88] Issued 30.06.2005

The comprehension of legal risk as probability of losses, comprising of both incurred losses and lost profits, as a result of activity (or inactivity) of owners, managers, employees, clients or counterparties of business organization, related to violation of contractual terms, inappropriate application of legislation or internal documents and change in regulations including foreign regulations makes it possible to generalize this definition and apply to every sphere of business enterprising.

The level of such probability is determined by commercial organization according to regulations in effect either independently or with the help of third parties – experts, auditors or risk appraisers. In both cases the process of exposure of legal risk is crucial to every organization. This process consists of several essential stages:

1. Analysis of legal risk sources – those internal and external factors mentioned above.
2. Legal examination of these factors. The analysis of the reasons why the risk factors may arise is made on this phase. Some preventing actions aimed at minimizing of risk factors' effect can be done if it is possible without change of civil, labor or taxation legal relations of the organization.
3. Preliminary legal assessment of unfavorable consequences caused by materialization of risk factors is made in the third stage. This procedure also implies the examination of legal rules that might be used after the organization has faced one of the risk factors.
4. In the fourth stage the preliminary conclusions are drawn.

After the legal risks have been exposed they need to be assessed basing on results gained in the previous phase. In the organization the executives and divisions taking part and responsible for exposing and assessing of risk factors should be determined. There also must be a procedure defining the time and periods of this activities and how the managerial decisions concerning those issues are made. This process is held by legal department of organization and (or) by legal consultants in assessing risks. Main attention should be paid to untypical or single operations or deals.

As a result of such a process the acceptable level of legal risk of commercial organization is usually defined. This level is no way equal to zero neither theoretically, nor practically. The nature of entrepreneurship implicates risk elements for generating revenue. So both acceptable and unacceptable legal risk is supposed to be positive. The goal of commercial organization is to determine this level in a proper way so that the business activity would not be too venturesome to become critical, on one hand, and not too favorable to make revenue impossible, on the other hand.

The acceptable level of legal risk could only be defined basing on practice of legal risk management and changed according to the temporary financial aims, commercial activity and its results.

After the acceptable level of legal risk has been determined the task of organization is to monitor the legal risk to avoid excess of the fixed level. All the actions aimed at effective management and minimization of legal risk and consequently at reduction of probability of losses are elaborated by the organization independently with consideration of special characteristics of business environment where the company operates and taking into account its short-term and long-term aims.

As we have already said all the commercial units are subjects to legal risks. All of them act in the same business environment characterized by relatively instable regulation, changes and amendments of legislation, uncertainty in contractual relations causing violation of agreements or even some factors of malicious behavior of contractors or third parties. It is impossible to mention all the spheres of entrepreneurship where legal risks play significant role in determining final financial results of business activity. But some of the most typical situation of legal risk effect could be named.

For example, in Russia legal risks concerning operations with real estate are very high. The objects of real estate property used in commercial activities are usually of a great value, both monetary and productive, causing malpractices in the form of raiding or hostile takeovers, for instance, that lay in the field of criminal law. Moreover normative regulations in the sphere of real estate are constantly changing. The aspects of registration of rights and contracts with real estate originally aimed at increasing of confidence of all participants of these relations practically are producing additional legal risks because of imperfection of legislation. Here are some typical risks concerning real estate issues:

1. Risks related to legal status of the real estate object such as
   - risk of ascertainment that the item in question could not be subject of any deals which consequences in claiming the contract being void;
   - argument concerning common property.
2. Risks related to legal documents:
   - claiming of the contract being void;
   - vindication of the real estate object;
   - claiming that the object has been built without permission which consequences in necessity of its demolition.
3. Risks related to legal status of land under the building.

4. Risks related to lack of authority by one of the contractors.
5. Risks related to reconstruction of buildings.
6. Risks related to registration of rights or the contracts.

All these risks have to be taken into consideration by both parties of contract with real estate. Most common situation is the fact of claiming the contract being void. It might be caused by many factors, either of internal or external nature. Internal risks comprise of factors that have not been taken into consideration while entering the deal. Assessment of legal risk is very important here as nearly all the real estate contracts may become voidable because of one or another aspect. The only method to avoid legal risk in this sphere is not to take part in such kind of operations. There could be rather huge amount of third parties in addition to contractors of the deal that might be interested in claiming the contract void, and moreover that have the right to do so.
Another field of business entrepreneurship that could be characterized by high level of legal risks is securities, and first of all bills. There are two main groups of legal risks:

1. Risks not related to forgery, such as: refusal to pay because of defects in form of the bill, irregular indorsement or other cases of bill protestation.
2. Risks related to forgery of the bill, such as falsification of the signature, of the text, seals and other parts of the bill.

The consequences of materialization of such risks are different but all of them are decreasing confidence in using securities as an instrument of payment or credit.
All the methods of legal risk exposure, assessment and minimization mentioned above should be applied by entrepreneurs acting in different fields of commerce to avoid significant losses that may occur if legal risks are materialized. However these instruments have to be used in a balanced way for the company not to face financial crisis as a result of underestimating of risk factors or not to realize impossibility to gain revenue as a result of too “safe” policy of avoiding any legal risk chosen be the enterprise.

Kehittyvä Venäjän oikeus

Tässä seminaarijulkaisussa venäläiset asiantuntijat käsittelevät kehittyvää Venäjän oikeutta. Aineisto pohjautuu Helsingissä 11.6.2007 ja Lappeenrannassa 12.6.2007 järjestettyyn Kehittyvä Venäjän oikeus -seminaariin, jossa esiintyivät:

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