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ON MODERN CIVIL LAW IN RUSSIA IN THE SYSTEM OF PRIVATE LAW

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The article covers the issues of improving the civil law of the Russian Federation and its enforcement in the modern Russian market economy. The author analyses the specifics of the Concept implementation for further development of the civil law in the sphere of entrepreneurship in the Russian Federation and protective measures if the rights of participants of entrepreneurial activity are violated.

The author draws attention to the fact that some proposals on amendments to the Civil Code, affecting private as well as the public interest are deliberative in nature. It is noted that dramatic change in the substantive law did not result in timely parallel changes in the procedural forms of implementation of the legal norms. Analyzing the specifics of the civil law application in the field of economic relations, the author concludes that the absence of a clear mechanism for the protection of the subjective civil rights, even when a variety of ways such protection could take place, significantly reduces the effectiveness of the substantive law.

Regarding the structure of the judicial system the author believes that the creation of a single pyramid of judiciary will stabilize the uniformity of judicial practice in the country. However, it will require streamlining the procedures and systems of building an independent branch of the judiciary.

The article argues that the perspective should be the expansion of the practice of non-economic disputes by the courts – firsts of all, by the arbitral tribunal. In this respect, the Russian legal system faces the task to implement in legal practice of such alternative methods as mediation, conciliation, negotiation, preliminary estimate of a neutral party, settlement agreement, which were successfully applied in the economic and legal environment of foreign countries.

Keywords: *civil law; abuse of the law; compensation of moral harm; the principle of full compensation of damages; legal entities; judicial protection of civil rights*

JEL classifications: *K10, K40*

СОВРЕМЕННОЕ ГРАЖДАНСКОЕ ЗАКОНОДАТЕЛЬСТВО РОССИИ В СИСТЕМЕ ЧАСТНОГО ПРАВА

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Статья посвящена вопросам совершенствования гражданского права и его соблюдения в современных условиях рыночной экономики. Автор анализирует особенности реализации Концепции развития гражданского законодательства в области российского предпринимательства, а также меры защиты в случае нарушения прав участников данной сферы. Автор обращает внимание на то, что некоторые предложения о внесении изменений в действующий Гражданский кодекс, затрагивающие не только частные, но и публичные интересы, имеют дискуссионный анализ. В статье отмечается, что кардинальные изменения в материальном праве не повлекли своевременного параллельного изменения в процессуальных формах реализации норм этого права. Анализируя специфику применения гражданского законодательства в сфере экономических отношений, автор приходит к выводу, что отсутствие четкого механизма защиты субъективных гражданских прав даже при разнообразии способов такой защиты значительно снижает эффективность норм материального права. В отношении структуры судебной системы автор полагает, что создание единой пирамиды судебной власти позволит стабилизировать единообразие судебной практики в стране, однако потребует упорядочения процедур и системы построения самостоятельных ветвей судебной власти. В статье аргументируется, что перспективной должна стать практика расширения экономических споров негосударственными судами, в первую очередь, третейскими. В этой связи перед российской правовой системой стоит задача внедрения в правоприменительную практику таких альтернативных способов, как медиация, примирение, переговоры, предварительная оценка нейтральной стороны, мировое соглашение, которые успешно применяются в экономико-правовой среде зарубежных стран.

Ключевые слова: *гражданское право; злоупотребление правом; компенсация морального вреда; принцип полного возмещения убытков; юридические лица; судебная защита гражданских прав*

Although the new Civil Code of the Russian Federation, based on the principles of private law as exemplified by the most well-known Civil Codes of France (the «Code of Napoleon» adopted in 1804) and Germany (1900), is adopted and came into effect, our scholars and practitioners continue discussions on its further advancement.

The present (the third in succession) Civil Code of the Russian Federation consists of four parts, and its scope extends its one-volume predecessor – 1964 Civil Code – threefold. It is not easy to master the entire potential of the Civil Code under the conditions of the Russian market economy. Indeed, one is not a lawyer without being a civil law scholar.

The new Civil Code of the Russian Federation is the largest codifying act with over 1500 Articles adopted after hot discussions: in 1995 – the first part, in 1996 – the second part, in 1999 – the third part, and in 2006 – the forth part.

Unlike two previous, 1922 and 1964 Civil Codes in Russia that were built up on the principles of public law, the present Code is based on the principles of private law and is formed under the frame of modernizing the law and observing the balance between the power, market values, property and social justice.

Discussing a draft new Civil Code of the Russian Federation in the State Duma, proposals were put forward to also adopt the Economic Code. Under the conditions of Russia's transition to market relations covering all sectors of the economy, this activity is sufficiently reflected in the new Civil Code of the Russian Federation and can be supplemented with additional laws in view with its specifics.

Expediency of drafting and adopting a «Business» (or «Economic») Code along with the Civil Code were actively discussed not only in Russia but also in other CIS countries. The idea, however, was implemented only in Ukraine where both Codes were adopted by the parliament [Rada] on 23 January 2004 (see *Chaschin, 2010; Suleimanov, 2010*). One cannot help quoting the arguments of civil law scholars about the low efficiency of the «Economic Code of Ukraine» that comprises 418 Articles, and that did not reveal any advantages in modernizing the economic law in Ukraine (see *Kuznetsova, 2013*).

As for the subject of regulating civil legal matters in the Russian Federation, business law is a structural unit of the Civil Code that determines specifics of participation of individual entrepreneurs, corporate and unitary legal entities in market turnover (see *Sukhanov, 2013*).

The new Civil Code, according to a well-aimed definition by the former RF President, D. Medvedev, is called the «Economic Constitution», the basis of market relations. Perhaps, this is true. Remember, how its civil construct was carving the way in the world through heated debates – the present Code is built up only on the concept of private law.

Today's prevailing of private law in the field of economic relations means that the initiative is not restricted, and economic relations are developed more intensively; although shortcomings cannot be eliminated in a single step.

Obviously, public interest should be present in the civil law but through the embodied system of institutions, limits and rules.

Transferring public ownership assets to private property (for instance, «Rusal», «Rosneft», «Gazprom», etc.), at the same time the state did not introduce the mechanism of protecting public interests and the social rights of individuals. Only recently big business gave Russia some newly-minted billionaires: O. Deripaska, V. Potanin, R. Abramovich, with profits running into billions. Does not it infringe the public interest? At the very least, their colossal profits and the billions of revenue are subject to the same tax rate (13%), as the earnings of any worker, cleaner, loader, lecturer, small businessman that make their bread by physical or mental work.

How comes the state does not introduce progressive taxation for such super-large revenues? Here lies the public interest in the field of private business that got public ownership assets into their property.

The draft Federal Law «On Introducing Changes to the First, Second, Third and Forth Parts of the Civil Code of the Russian Federation and Some Legislative Acts of the Russian Federation» submitted to the State Duma somehow reduced the tension of civil-law discussions of its content but did not eliminate them until the final introduction of the proposed changes to the current Civil Law through the procedure of considering and adopting by the Legislative Assembly[1].

Considerable changes are proposed to Parts 1, 3, 4 of the Civil Code and to some Chapters of Part 2 of the Civil Code (to the so-called «financial transactions»). After escalated

[1] As pointed recently the Head of the State Duma Committee on Legislation, Pavel Krashennikov, over 2000 amendments on all 4 Parts of the Civil are submitted, that are divided into 10 blocks, half of which are already processed. See: (*Barschevsky, 2014*).

discussions the minimum values of the authorized capital for limited liability companies shall not be increased: the same lowest level is preserved – 10,000 RUB, which in our opinion, will facilitate a wider involvement of mid-income, self-motivated individuals in Russia to engage in business relations, who will also be given a possibility to conclude such corporate agreements as shareholding agreements.

It is justly proposed to separate legal entities into public and private ones and introduce the concepts of a "person that controls a legal entity" and "affiliation".

It is impossible not to note a sound pattern of implementing certain provisions of the Constitution on further development of the civil law in the Russian Federation with regard to the legal status and types of legal entities, since on 1 September 2014 Chapter IV Part 1 of the Civil Code, that concerns legal entities, was corrected considerably. For instance, the Civil Code now lists in detail all legal entities that can be formed in Russia, determine their status and fully specify their possible organizational and legal forms: commercial organizations (with general legal competence), and non-commercial (with special legal competence); unitary (executive management) and corporate (collective management – general meetings, boards, etc.); two forms of shareholding companies – public and private, which, by the way, eliminates closed shareholding companies (CJSC) and superadded companies[2].

By far not all proposals on introducing changes to the current Civil Code are received unquestionably by civil law scholars, and sometimes to legitimize them it is even necessary to resort to help of the national leaders, especially when it touches not only private but also public interests.

An illustration to the above is a heated discussion on the content and the concept of non-profit organizations, when oppositions tried to include "foreign agents" that could also be involved in uncontrolled political activities with non-transparent financing of non-profit organizations. Obviously such an open the approach would generate possibility of uncontrolled organization of anti-political meetings and demonstrations of all sorts that insert unpredictable consequences in public mind.

A most timely and well-executed intervention in this discussion was the speech of Russian President Vladimir Putin at a meeting of the Committee on public associations devoted to the amendments to the Law on non-government organizations.

Vladimir Putin justly proposed to make activities of "foreign agents" for participating and financing non-government organizations involved in political activities in Russia transparent for civil control.

The President stated that political activity does not include activities in the field of science, culture, preventive health care and treatment, social support and security, protecting motherhood and childhood, social support to the disabled, advocating the healthy way of life, physical culture and sport, protecting animal and vegetal life, and charity. The law should not cover religious organizations, state corporations and non-governmental organizations formed by state corporations. Upon a Putin's initiative, Russian financing of non-governmental organizations is increased threefold, from 1 billion to 3 billion RUB (see *Khamraev, Ivanov and Goryashko, 2012; Zakatnova, 2012; Shkel, 2012; Korchenkova and Goryashko, 2013; Soifer, 2013*).

Novelties to the general provisions in the Civil Code include, in particular, the category of "good faith" that is finalized in Article 1 of the Civil Code (under No. 302 Federal Law of 30.12.2012) as one of the main principles of the modern civil law; while the initial version (Article 10 of the Civil Code) prohibited, albeit not very unambiguously, abusing civil rights, particularly, exercising the right with the purpose to harm another person (the so-called "chicanery"). And what to do if the purpose is to not only inflict

[2] For more details on the changes with regard to legal entities in the civil law of the Russian Federation coming into force on 1st September see an interview of Boris Yamshanov with the Head of the State Duma Committee on Legislation, Pavel Krashennikov (*Yamshanov, 2014*).

harm but to pursue self-interests? Does it mean that violating this fundamental principle, now formalized in Article 1 of the Civil Code, presumes refusing judicial protection[3]?

The recently adopted Federal Law "On Anti-Corruption Enforcement" also will be a good support for the law executors.

So much has been written and said by top officials and in the mass media, recently and in historic retrospective about corruption that overwhelmed the Russian state (and society in general), its symptoms, reasons and consequences, and the need for a decisive and uncompromised anti-corruption efforts, that it will be difficult for us not to touch the issue.

Corruption, as a malignant tumour, afflicts the state system and distorts its vital functions. A shadow rule of bribery and nepotism (cronyism) emerges and exists in-parallel with the legitimate authorities and the rule of law, often pushing them away and suppressing. Corruption prevents establishing the rule of law and civil society, hampers economic development of the regions and Russia in general, as well as self-fulfillment of individuals, and discredit both public authorities and local self-government bodies. Bribes also deprave bribe-takers. Corruption penetrating judicial bodies and Courts has the most severe consequences.

The scope of this paper does not allow to highlight all major novelties and changes to the Civil Code, analyze their efficiency and predict an early closing of discussions on modernizing RF civil law, but it should not be a matter of disappointment, since everything is ahead: in 2014 autumn semester the Civil Law Department, opens an MA programme with in-depth studies of the main provisions and scientific concepts of civil and business law including special courses on the pressing issues of their enforcement. As put nicely by an ancient philosopher and legal theorist Seneca, one cannot be a lawyer without being a civil law scholar.

Another important problem of Russian civil law cannot go unnoticed: executing fundamental changes in substantive civil law and building up efficient procedural remedies for the rules of substantive law that correspond to such changes.

Russian judicial system, led by the "three-headed serpent", has always been "a household name "for many civil law scholars who discussed it at various conferences. It is understandable since Lenin's definition that "the law is nothing without an apparatus the purpose of which is to enforce the law" is also true in our legal reality: the actual burden (the number of considered cases) per judge in Russia has increased more than twofold.

Sprawling judicial branch into three federal parts, organizationally independent from each other (under Articles 125, 126 of RF Constitution), led to an excessive spreading, primarily, of the Courts of general jurisdiction subordinate to the Supreme Court of the Russian Federation, the structure of which does not match the system of Arbitration Courts subordinate to the Supreme Arbitration Court. It does not always encourage uniformity in applying the norms of substantive law and sometimes requires corrections of their work by the Constitutional Court (for instance, in the disputes on reclamation of property from a good-faith purchaser applying the provisions on the consequences of invalidity of legal transactions under Articles 167, 302 of the Civil Code; in investigating claims on compensating moral damages to legal entities under Article 152 and in other cases).

Under the framework of the concept of developing the judicial system, reputable civil law scholars pointed out that there must not be provisions, which prevent uniformity of the standards of arbitration and civil proceedings, establishing the procedures for considering civil cases of common nature at Courts of general jurisdiction and Arbitration Courts.

[3] Scholars participating in the Interregional Round Table on civil law in Krasnodar on 13 March 2013 under the "Modernization of General Provisions of the Civil Code of the Russian Federation: Problems and Prospects" Programme reasonably referred to this circumstance: Lukyantsev (*2013*), Kamyshansky (*2013*), Tsybulenko (*2013*), Mareev (*2013*).

Self-sufficiency and independence of these Courts from each other allow them to actively intervene into other jurisdictions, ignoring the legal norms on delineating jurisdictions over civil cases. The emphasis on the number of Court instances for reconsidering judicial acts to the detriment of the quality of the administration of justice is the main shortcoming of the system of general jurisdiction Courts.

Based on these considerations, on 7th October 2013 President Putin introduced the draft Law "On the Supreme Court and the Prosecutor's office" with amendments to the Constitution to the State Duma, that excludes mentioning Arbitration Courts in the Constitution and establishes the single Supreme Court.

The President of the Russian Federation put forward an initiative, supported by the Federal Assembly – the Parliament of the Russian Federation, to launch the reform of judicial administration in Russia. The Supreme Arbitration Court of the Russian Federation will be consolidated with the Supreme Court of the Russian Federation, while arbitration procedural law is excluded from the constitutional competence of the Russian Federation. The "new" Supreme Court of the Russian Federation shall be the supreme judicial body, in particular, on economic disputes (see the new version of Article 126 of the Constitution of the Russian Federation).

A natural question is: what will happen with Arbitration Cassation Courts (Federal District Arbitration Courts), Arbitration Appeal Courts and Arbitration Courts of the constituent territories of the Russian Federation? The question concerns not only judges of all above Courts, whose personal professional careers depend on the solution to an issue, but also everybody involved in any extent in resolving economic disputes. Another natural question is: what will be a better approach of the law-makers to the above Arbitration Courts and – in a broader sense – what is a better approach to develop judicial settlements of economic disputes?

Perhaps, predicting what will happen with Arbitration Courts of the subjects of the Russian Federation is pretty easy. These Arbitration Courts will be most likely consolidated with the general jurisdiction Courts of the relevant subjects of the Russian Federation. In our opinion, however, specialized benches should be formed on the basis of the abolished Arbitration Courts of RF subjects at the general jurisdiction Courts of the relevant RF subjects to resolve economic disputes. Such benches should exercise the role of First Instance Courts on economic disputes.

It seems that it is more difficult to predict what will happen with Arbitration Cassation Courts and Arbitration Appeal Courts. These Arbitration Courts can even be completely liquidated – reassigning their judges to the general jurisdiction Courts of the relevant RF subjects. What should the law-makers do with Arbitration Cassation Courts and Arbitration Appeal Courts? We believe that Arbitration Cassation Courts and Arbitration Appeal Courts should be transformed into specialized cassation and appeal benches on economic disputes. Formally, they can belong to the Supreme Arbitration Court of the Russian Federation. Such specialized benches can exercise the role of Appeal Courts and Cassation Courts for resolving economic disputes.

The current reform of judicial administration in Russia objectively is associated with considerable risks; primarily the risk of losing the intellectual potential of the system of Arbitration Courts in case of rubber-stamp merging with general jurisdiction courts. Economic disputes are characterized by a significant specifics, and "farming" them to the judges of present general jurisdiction courts can considerably decrease the quality of the administering of justice (expressed, first of all, in legitimacy and reasonableness of judicial acts as well as administration of justice within reasonable periods). If economic disputes are in competence of District (Town) Courts of general jurisdiction (as Courts of First Instance), apart from bureaucratic delays, plaintiffs will experience additional difficulties when determining jurisdiction over the case subject matter to a particular district (town) Court, especially in the towns with complicated district division.

Also, it will be more difficult for seconded plaintiffs' representatives to get to the seat of judgment (Arbitration Courts were located in the capital cities of the RF subjects).

It seems that the described idea on transforming Arbitration Courts in specialized benches for solving economic disputes enables minimizing the majority of claims associated with the current reform of judicial administration in Russia.

In our opinion, the practice of solving economic disputes by non-state Courts, first of all – arbitral tribunals, should be very promising. Russian legal system also faces the task to implement in the law enforcement practice the advantages of other alternative methods in every possible way, such as mediation (factoring), reconciliation, negotiations, ex-ante assessment of a neutral party, amicable settlement, successfully used in economic sphere in foreign countries.

An attempt of Russian law-makers to regulate out-of-court settlement – mediation, in order to relieve general jurisdiction courts from excessive number of judicial cases through alternative procedures has not generated any significant results yet (just yet!) in spite of the Federal Law "On an Alternative Settlement Procedure with Intermediaries (the Mediation Procedure)" came into force on 1st January 2011. For instance, a member of the Parliament, Mikhail Kapur thinks that "to achieve the goal, conditions should be created in Russia for settlement arrangements, and their advantages must be advocated" (*Kapur, 2012*).

According to a fair observation of professor Nosyreva, "alternative dispute resolution becomes a trend in general legal development; any rule-of-law state must encourage one's desire to adjusting disputes by peaceful methods and support it by establishing legitimate, accessible and simple procedures" (*Nosyreva, 2005*).

Recently some other civil law scholars also emphasized the importance of expanding alternative means of resolving civil law disputes and methods of their out-of-court settlement using reconciliations or other lawful procedures based on a voluntary declaration of intent by the parties (see *Stankevich* and *Korotkii, 2012; Rozhkova, 2011*).

The author, who for many years has been a member of the Permanent Arbitration Tribunal, at the Chamber of Commerce and Industry of the Rostov region, would like to join the club.

Recently the Ministry of Justice devised a draft Law "On Arbitration Tribunals and Arbitrage", providing for a possibility to form arbitration tribunals only as of non-governmental organizations and upon a permission by the Commission at the Ministry of Justice of the Russian Federation See (*Titov, 2014*).

The concept of "mediation" comes from Latin "mediare" – moderate, which means negotiations with involvement of the third, neutral party interested only in the parties solving the dispute with the maximum benefits for each other. The institution of mediation is designed to unburden the judicial system and has been used very effectively in such countries as the USA, Germany, the UK, China, Korea, Japan, India, etc.

We believe that in Russia this institution also should develop successfully in view of the foreign experience and effective employment in the field of civil-law relations built under the private law system (see *Denisenko, 2013*).

It is to be noted that recently Courts apply mediation widely through the instrument of amicable settlement. "Reconciliation and mediation rooms" are used by Courts in Rostov, Volgograd, Moscow, Kaliningrad and other cities, and more than 25 regional reconciliation centres are already in place in various industries across Russia (*Shishkova, 2014*).

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