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FROM THE EDITOR-IN-CHIEF

Dear readers,

The year of 2012 has come. According to the Oriental Calendar, which is very popular in Russia, this is the year of the Black Water Dragon. The Black Water Dragon is the symbol of major changes in all spheres of life. What has it been marked by? What facts do Russian people keep in their memories? What events are we in for?

First of all, the RF President was inaugurated in May. So, at the same time there is another rotation in the power structures; the changing of the guard.

The Russian people with bated breath are waiting and hoping for changes for the better in their lives. This statement goes without any special comments. Time will show.

The year of 2012 was declared the year of the Russian History. The historical dates are: the 200th anniversary of the Patriotic War of 1812, the battle of Borodino; 400th anniversary of the proscription of the Polish interveners from Moscow under the leadership of Minin and Pozharsky (26 October, 1612); 770 years ago (5 April 1242) Grand Duke Alexander Nevsky defeated crusaders at Chudskoe Lake (the Day of War Glory is celebrated on 18 April); the 1150th anniversary of the origin of Russian Statehood (the RF Presidential Edict No267 of 3 March, 2011).

The 9th of May was the global historical date of the world — the Great Victory over the Fascist Germany, the end of World War II, which was the greatest massacre in the history of humankind. The war took the lives of tens of millions of people, destroyed the whole continent, and appreciably changed the planet’s face. The Germany separated into two states; Great Britain lost its colonies; and the USSR and the USA became new superpowers.

Let the soldiers — liberators and victors — be blessed! Glory, love and support to the war and labor veterans! Nothing and no one have been forgotten.

The editorial staff expresses gratitude to our contributors for their attention to the journal and to our readers for taking interest in our publications.

We are open to cooperation and are ready to publish articles, information and advertisement in our “Russian law: theory and practice” journal.

Editor-in-Chief, 
Doctor of Laws, 
Professor

V. S. Belykh
THE NATIONAL CONSTITUTION VALUES UNDER THE EUROPEAN LAW INFLUENCE: CASE NOTE ON THE CONSTITUTIONAL COURTS DECISIONS

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Introduction

Constitutional courts often behave as agents of the constitutional changes creating or approving them especially in the circumstances of the state accession to the European Union. The European Union as a supranational organization influences the constitutional legislation of the member-states. During the ratification procedure, the Lisbon Treaty was the subject under consideration and interpretation in courts of certain European Union member states. The constitutional courts in the member states had to analyze whether the understanding of European constitutionalism and national constitutional law conflict or cooperate.

The aim of the paper is to examine the key concepts of democracy, sovereignty, the status of national constitution, transfer of powers from the national level to the European Union following from the legal reasoning and motivations in the judgments of the German Federal Constitutional Court and the Czech Constitutional Court on the Lisbon Treaty and to consider the possible impact of these rulings on the status of the constitutions and understanding of their constitutional identity. The essence of these notions and the change in their understanding in the Courts jurisprudence will be discussed in the paper.

The grounds for taking the case law of the German Federal Constitutional Court into consideration are connected with the judicial activity of the Court (one of the most active Constitutional Courts in Europe) and its jurisprudence on the issues of relations between the European Union law and the Basic Law of Germany. Whereas the Czech Constitutional Courts case law was chosen as the con-

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1 This article was written within the framework of the Comparative Constitutional Law: Theory and Methodology in the Context of Constitutional Reforms Project (2009–2011) organized by the Institute of Law and Public Policy, Moscow (HESP ReSET project).
stistical body representing the practice from Russia as a “young democracy” country.

It seems that the issue of the constitutional identity is also important in Russia and will be of practical use for the Russian constitutional law. The influence of the international law on the national, especially constitutional, legislation is often discussed by Russian scholars. In the framework of the paper, it will be interesting to see what role the Constitutional Court of the Russian Federation can play to protect the constitutional identity of Russia and common constitutional values of the European countries.

The Issue of the Transfer of the Competences

In the Maastricht Decision, the Federal Constitutional Court of Germany pointed out that with the expansion of the European Community competencies, there would be a growing need for nationally mediated legitimation to be complemented by the European Parliament, from which supplemental democratic support for the policies of the European Union would emanate.

The Lisbon Treaty Decision of the Federal Constitutional Court of Germany approach was to examine the new and modified competence incorporated in the treaty. M. Bothe says that the Court puts a number of reservations and limitations which are very important for the future behavior of the State organs of Germany towards the European Union, in particular their behavior within the organs of the European Union. Thus, the Constitutional Court puts limits on the integration: Germany must retain substantial competences.

What follows from the analysis of the judgment is that the growth of powers of the European Union is limited. Even where this limitation is respected, such growth requires the consent of the national parliament. The Constitutional Court constructs the line of defense against any possible infringement of German sovereignty, stating that certain fields — the administration of criminal law, the civil and military monopoly on the use of force, fundamental fiscal decisions on revenue and expenditures, provisions governing the media, dealings with the religious communities, shaping of citizens lives via social policy and important decisions on cultural issues (the educational system) — must forever remain under the German control.

The division into areas of exclusive and shared competences does not mean the European Union becomes a federal state. The Court emphasizes that the Treaty

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confirms that the constitutional competence-competence, i.e. the power to amend primary low, remains within the member states. Therefore, the Union cannot be considered to be a federal state or another kind of entity which always stands above an individual state.

The authorization to transfer sovereign powers to the European Union is granted under the condition that the sovereign statehood of a constitutional state is maintained on the basis of the responsible integration according to the principle of conferral and respecting the member states constitutional identity. The European Union must comply with democratic principles regarding its nature and extent and also regarding its own procedural elaboration.

The Basic Law does not grant the German state bodies powers to transfer sovereign powers in such a way that their exercise can independently establish other competences of the European Union.

The Constitutional Court of the Czech Republic also decided on the compatibility of the Lisbon Treaty with the national constitution. The Constitutional Court said that the transfer of certain state competences, which arises from the free will of the sovereign and will continue to be exercised with the sovereign's participation in the manner that is agreed upon in advance and is subject to review, is not a conceptual weakening of sovereignty, but, on the contrary, can lead to its strengthening within the joint actions of an integrated whole.

The Constitutional Court adds that it is in the essence of the competences transfer of the Czech Republic authorities that instead of the Parliament (but also other authorities of the Czech Republic), these competences are being exercised by the international organization to which these competences have been transferred. The conditions of conformity of this transfer with the constitutional order have been comprehensively delimited in paras. 88-120 of the Lisbon Treaty I judgment, where the Court did not find their violation in the case of the Lisbon Treaty either.

Thus, as some scholars mention the Court drew a strong and explicit inspiration from judgments of the German Federal Constitutional Court. It stated that a transfer of sovereign powers would be prohibited if it led to the abolition of the Czech Republic as a sovereign entity. The transfer of the competence to decide on its own competence (“Kompetenz-Kompetenz”) is prohibited. The court also held that every transfer of competences needs a clear ‘demarcation’ of the transferred powers.

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The Issue Of The Requirements For Democratic Representation
In The European Union

In the Lisbon Treaty Decision, the Federal Constitutional Court of Germany asks whether the European Parliament could provide the necessary democratic legitimacy of the European Union’s decisions. The Court denies this *inter alia* because that parliament is not “democratically” elected — its composition is a violation of the principle of equal rights for all voters. As to the national parliament, its rights are respected because the powers of the European Union are limited to those enumerated in the treaty which has been ratified with the parliamentary consent.

The European Union Parliament is not a body of representation of sovereign people of the European Union but a supranational representative body of the peoples of the member states, so the principle of electoral equality, which is common to all European states, is not applicable with regard to the European Parliament.

The Constitutional Court of the Czech Republic says that the *democratic processes on the Union* and domestic levels mutually supplement and are dependent on each other. The senators claim that the democratic character of the state requires respect for the principle of the separation of powers and that the Lisbon Treaty violates it by strengthening the position of the executive power in the Czech Republic (at the expense of the legislative branch). The Court answers that the petitioners are mistaken when they claim that “representative democracy can exist only within states, within sovereign subjects”. The principle of representative democracy is one of the standard principles for the organisation of larger entities, both inter-state and non-state organisations. The existence of elements of representative democracy on the Union level does not rule out implementation of the same elements presupposed by the constitutional order of the Czech Republic, nor does it mean exceeding the limits of the transfer of powers established by the Constitution.

The Issue Of The Constitutional Identity And Sovereignty

The constitutional identity issue was considered in the Maastricht (1993) and Lisbon Treaty (2009) Decisions of German Federal Constitutional Court. J. Arato underlines both cases declare that European integration must respect the inviolable core of the German Constitution.

In the Maastricht Decision, the German Federal Constitutional Court put emphasis on the claims of national sovereignty in Europe, describing the member

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states as “Masters of the Treaties”, and suggesting implicitly that they could withdraw from the European Union at any time⁹. The Federal Constitutional Court of Germany found this violation of Art. 38 of the Basic Law (it relates to democratic elections for the Bundestag). In the decision the Court emphasized the important role of the Bundestag. Because the treaty establishes an association of states, not a European state, the court expects democratic participation in the European Union to be guaranteed primarily through the Bundestag.

In the Lisbon Treaty Decision, the Federal Constitutional Court of Germany examined whether its provisions were in conjunction with Article 23 (1) “The European Union” of the Basic Law: (1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end, the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.

Article 79 (2), (3) “Amendment of the Basic Law” states: (2) Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat. (3) Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible¹⁰.

The Court argues that the European Union is an association of sovereign States, but not a federal State¹¹. The construction of a European Federal State cannot, however, be bypassed in such a way as to arrange jurisdiction of the jurisdiction, which would mean the foregoing of national sovereignty by the Federal Republic. Germany remains a sovereign state and retains responsibility for its fundamental national duties¹².

The association of sovereign States (“Staatenverbund”) is this type of association which the Basic Law allows and even requires Germany to join. The German Constitution is oriented towards opening the state system of rule to the peaceful coop-

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eration of the nations and towards European integration. A closer union could not be formed by relying on procedures provided by the Basic Law, even by constitutional amendment. The German accession to a European federal state would require the creation of a new constitution. The power of constitutional amendment is limited by a certain principle of constitutional identity — democracy, the guarantee of human dignity, the rule of law and certain elements of federalism. Thus, U. Leonardy says that “in terms of comparative federalism, the Constitutional Court tries to locate the European Union somewhere between a confederation and a federation”\(^{13}\).

The Constitutional Court of the Czech Republic also decided on the constitutional identity and sovereignty in the Lisbon Treaty decision in 2009. The Constitutional Court concluded that the Treaty of Lisbon was not in conflict with the constitutional order of the Czech Republic. The European Union integration process was not taking place in a radical way, which would lead to a “loss” of national sovereignty, but it was an evolutionary process. The Court points out that in a modern democratic state governed by the rule of law, the sovereignty of the state is not an aim in and of itself, that is, in isolation, but is a means for fulfilling the fundamental values on which the construction of a democratic state governed by the rule of law stands\(^{14}\).

The Issue Of The Constitutional Identity In Russian Constitutional Law

G.J Jacobsohn in his book “Constitutional Identity”, which is one of the most complete research works in this field mentions that constitutional theorists have had relatively little to say about the identity of what they study, and the question what the constitutional identity is should be answered\(^{15}\). The concept of the constitutional identity in the Russian Federation is not often discussed in the frame of the constitutional law. The political science books consider the questions of the state identity in more details.

At the same time the constitutional identity issues should be analyzed within the framework of the constitutional law categories. Some attempts have been made in this field, e.g., the notion of the constitutional identity was elaborated in the research by E. Gagaeva\(^{16}\).


From the essence of the modern democratic constitutions it follows that every nation has the right to choose its constitutional identity and in the frame of this identity to create the constitutional basis for the state and civil society. As I.A. Kravez underlined the constitutional identity of the Russian Federation is based on the constitutional norms of the Russian Federation (1993)\(^\text{17}\).

The fundamental provisions of the Russian Constitutional Law are stated in Chapters 1, 2 and 9 of the Constitution of the Russian Federation. Article 135 (1), Chapter 9 “Constitutional Amendments and Review of the Constitution” is stated that the provisions of Chapters 1, 2 and 9 of the Constitution of the Russian Federation may not be revised by the Federal Assembly. These provisions deal with the fundamentals of the constitutional system, rights and freedoms of man and citizen and constitutional amendments and review of the constitution. The power to change such provisions does not belong to the Federal Assembly because the bearer of the sovereignty and the only source of power in the Russian Federation shall be its multinational people.

If a proposal on the review of the provisions of Chapters 1, 2 and 9 of the Constitution of the Russian Federation is supported by three fifths of the total number of the members of the Council of the Federation and the deputies of the State Duma, then according to federal constitutional laws the Constitutional Assembly shall be convened. The Constitutional Assembly shall either confirm the invariability of the Constitution of the Russian Federation or draft a new Constitution of the Russian Federation, which shall be adopted by the Constitutional Assembly by two thirds of the total number of its members or submitted to a referendum. In the case of a referendum, the Constitution of the Russian Federation shall be considered adopted if over half of the voters who came to the polls supported it and under the condition that over half of the electorate participated in the referendum.

The Constitutional Court Justice V.D. Zorkin emphasized that the review and amendments of the Constitution have their limits — constitutional identity — that include democracy, supremacy of the law, rights of man and citizen\(^\text{18}\), whereas in Germany the body that considers the question what values belong to the constitutional identity and how the European constitutional identity relates to the German constitutional identity is the Constitutional Court.

\(^{17}\) I.A. Kravets. Pravo na konstitutsionnyu modernizatsiyu v svete teorii sovremennogo konstitusionalizma i jeconomiceskoi konstitutsii [The Right to the Constitutional Modernization in the Light of the Present Constitutionalism and Economic Constitution]. The text is available at: http://justicemaker.ru/view-article.php?id=10&art=1805

The Constitutional Justice N.S. Bondar pointed out that the Constitutional Court’s case law help to spread the constitutional identity values\textsuperscript{19}. It can be done during the interpretation of the Constitutional norms, constitutional correction of the law enforcement practice, etc. At the same time, the constitutional identity values are guaranteed in the Constitutional Courts decisions on constitutional complaints, upon requests of state bodies. Thus, the Constitutional Court decided that the state integrity is an important condition of the equal legal status of all citizens irrespective of their place of residence, one of guarantees of their constitutional rights and freedoms. Due to this, the public political power, which is carried out by the state, is the basis institute of modern constitutionalism and the basic tool for modernization processes in a society\textsuperscript{20}.

At the same time, there were cases when the Constitutional Court of the Russian Federation had to decide whether the European constitutional identity values (created by the European Court of Human Rights from interpretation of the European Convention) relate to the Russian constitutional identity values. In the case of K. Markin, the Constitutional Court stated that constitutional Article 38 (1) stating that “Maternity and childhood, and the family shall be protected by the State” belongs to the constitutional identity values and there was no violation of the applicants’ rights\textsuperscript{21}. But the European Court of Human Rights in the case of \textit{K. Markin v. Russia} did not consider the arguments based on this article and found the act of violation of the applicants’ rights. In this case, the understanding of the rights of man and citizen as constitutional identity values in the frame of the Russian Constitution and the European constitutional identity approach to the human rights was different.

\textbf{Conclusion}

The Constitutional Court’s case law on the Lisbon Treaty is significant becuase it deals with the understanding of the key concepts — democracy, sovereignty as the feature of the state in the circumstances of the European Union accession, transfer of powers from the national level to the European Union level. Not all scholars define decisions of the German Constitutional Court on Lisbon Treaty positively.


C. Tomuschat said that the Court saw the constitutional complaints which had been filed by the extreme right and the extreme left of the political spectrum as a welcome opportunity to define the constitutional limits of the European integration process. Far from reflecting the views of the framers, the ruling reads like a political manifesto from the judges.

At the same time, the experience of the European Union and member states’ cooperation shows that the Constitutional Courts (German, Czech) elaborated the limits of the European Union influence on the national constitutional law. Some constitutional norms cannot be changed under the European Law due to the fact that such norms have the priority for the state. These provisions compose the constitutional identity of the state. Thus, the Federal Constitutional Court of Germany puts an identity as a limit to European integration. The role of the Constitutional Court was to protect the constitutional identity of Germany.

As to the Russian Constitutional Court, it has already dealt with some issues of constitutional identity, e.g., it attempted to analyze what values belong to the constitutional identity — democracy, the rights of man and citizens, review of the constitutional provisions. The case law shows that there can be a collision in the understanding the human rights as constitutional identity values and European Court of Human Rights approach. It seems that in the case of the conflict the Russian Constitutional Court should analyze whether it protects the constitutional identity or modernize the understanding and values of the constitutional identity in the circumstances of globalization and influence of international law.

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ON INCONSISTENCY OF THE TAX CODE NORMS RELATED TO EXECUTION OF SCIENTIFIC AND RESEARCH WORK

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1. The Ural State Law Academy (the USLA) has concluded economic contracts (general agreements) with “Magnitogorsk Iron and Steel Works” open joint-stock company, “Nizhniy Tagil Iron and Steel Works” open joint-stock company, “Ural Mining And Metallurgical Holding Corporation” limited liability company, “EVRAZ Holding” limited liability company, “Kurganstalmost” closed joint-stock company, and “Production Association Uralvagonzavod” federal state unitary enterprise. The subject of all the agreements is the issues of mutual cooperation. They are to be found in parts of agreements on legal obligations of parties. These obligations may be grouped as: a) obligations on legal servicing; b) obligations on lecturing services; c) obligations on information servicing. All the agreements are long-term ones and serve as a legal basis for regulating issues of mutual cooperation between the USLA and its partners. The parties have chosen such a model of contractual regulation (long-term agreements) as they wanted to define the outlines of the potential cooperation in a general (principal) way. The specification of particular contractual provisions has to find (and has found) its way in additional agreements between parties.

The concluded agreements are mixed civil-law contracts by their nature. They contain elements of various contracts (para. 3 Art.421 of the RF Civil Code). These agreements include elements of a service contract (Ch. 39 of the RF Civil Code) and of a contract for scientific and research, design and experimental, and technological works (Ch. 38 of the RF Civil Code). According to para. 3 Art.421 of the RF Civil Code, rules on contracts, elements of which are to be found in a mixed contract, are applied in corresponding parts to the relations of the parties to a mixed contract if otherwise does not result from the parties’ agreement or the essence of a mixed contract.
2. The USLA obligations on legal servicing include in particular: a) consulting on various (complicated, most of all) matters of legal activity of a Customer; b) representing and defending the legitimate rights and interests of a Customer in a court of justice and other public authorities during adjudication connected with a Customer’s activity; c) legal servicing in effecting civil-law deals (including foreign economic contracts) by a Customer; d) summarizing and analyzing the results of adjudication and submitting proposals on the improvement of a Customer's activity; e) preparing letter certificatory and written opinions on the order of applying current federal and regional legislation, and etc.

As we see, not all types of servicing are the subject of regulation of Ch. 38 of the RF Civil Code devoted to contracts for scientific and research, design and experimental, and technological works. In most cases the question is about consulting services in a broad sense. They are, for example, consulting on various (complicated, most of all) matters of legal activity of a Customer; representing and defending the legitimate rights and interests of a Customer in a court of justice and other public authorities during adjudication connected with a Customer’s activity; lecturing by high-skilled lecturers of the Academy on urgent questions of current legislation and the practice of its application; conducting seminars, round table discussions, conferences on problems agreed by the parties; informing the Customer about the work of the State Duma and the Sverlovskaya Oblast Duma on drafting the bills connected with the questions of economic legislation, etc. However, some of the USLA’s obligations and, correspondingly, provisions of the concluded agreements contain the elements of a contract for scientific and research, design and experimental, and technological works. They are the summarizing and analyzing the results of adjudication and submitting proposals on the improvement of a Customer’s activity; preparing letter certificatory and written opinions on the order of applying current federal and regional legislation. These contractual provisions should be analyzed within the context of Ch.38 of the RF Civil Code.

3. Para. 1 Art.769 of the RF Civil Code provides that according to the contract for scientific and research works, the executor is obliged to do scientific research which is stipulated by the technical performance specification of the customer, and the customer is obliged to recognize the work and to pay for it. The subject of the contract for scientific and research works are scientific research in itself (scientific activity of a scholar-researcher) and the findings. Notably, the eventual findings are knowledge objectivized in scientific reports, scientific documentation, etc\footnote{See: M.P. Ring. Dogovory na nauchno-issledovatelskiye i konstruktorskiye raboty [Contracts for scientific research and design works]. Yuridicheskaya Literatura Publishing House, Moscow, 1967, pp. 21-22.}. For example, G.G. Pilikin wrote the following on this subject:

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\footnote{See: M.P. Ring. Dogovory na nauchno-issledovatelskiye i konstruktorskiye raboty [Contracts for scientific research and design works]. Yuridicheskaya Literatura Publishing House, Moscow, 1967, pp. 21-22.}
“The subject of the contract for scientific and research, design and experimental works is the solving of a scientific or a technical task, which is to be found in the scientific report or in a complex of a technical (design) documentation correspondingly”.

The subject of the above mentioned agreements between the USLA and its partners shall be analyzed from the said point of view.

As a rule, the members of the scientific-pedagogical staff (the faculty) prepare letter certificatory (reports) and written opinions on the procedure of applying current federal and regional legislation, and the practice of its application. This type of works is nothing else but a kind of scientific research within the limit of which the corresponding knowledge finds its objectivized reflection in written reports (in our case these are science opinions). Such a conclusion is supported by other conditions.

The scientific and research works are carried out on the basis of a Customer’s technical task. With regard to high school practice, the role of a technical task is played by letters-tasks of Customers where they formulate not only matters and problems for academic reasoning and decision, but a fable of a task as well. The term “technical task” has a somewhat technical character. But in no case does the said mean that the technical task is connected only with solving technical problems. The thing is that a technical task and a technical project are the elements of the Unified system for design documentation (USDD).

The customer in its tasks and concluded agreements fixes terms of execution (within a month, as a rule), monthly payment for the works done, and the activation of the results of the work done. According to para. 2 Art.769 of the RF Civil Code, the contract for scientific research work with the Executor may comprise the whole cycle of the research and its separate stages as well.

4. Chapter 21 of the RF Tax Code is devoted to a value added tax (VAT). According to Art. 149 of the Code, some operations are not the object of taxation (are exempted from taxation). Among them are the services in the sphere of education related to carrying out a job-training process (within the lines of basic and extended education mentioned in the license) or educational process carried out by a non-commercial educational establishments, apart from consultation services and services on letting the premises (para. 2 subpara. 14 Art. 149 of the RF Tax Code); execution of scientific and research, design and experimental works at the expense of budget funds as well as of the Russian Fund for Fundamental Research, the Russian Fund for Technological Development, and extra-budgetary funds of the minis-

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tries, departments, and associations formed for these purposes in accordance with the Russian legislation; *carrying out scientific and research, design and experimental works by educational and scientific establishments on the basis of business contracts* (para. 3 subpara. 16 Art. 149 of the RF Tax Code). Therefore, according to the RF Tax Code, scientific research works carried out by a high educational establishment are exempted from VAT under the following complex conditions: 1) higher educational institution is educational and scientific establishment; 2) it carries out scientific and research, or experimental and design works, but not consulting services by the task of a Customer; 3) higher educational institution has concluded a civil-law contract for scientific and research, experimental and design works with a Customer.

4.1. Art. 5 of the Federal Law of July, 26, 1996 “On the science and state scientific and technical policy” states that a scientific organization is a legal person irrespective of the form of incorporation, and the form of ownership, as well as a public association of scholars acting on the basis of foundation documents of such an organization, whose basic activity is scientific and (or) scientific and technical activity.

Higher educational institutions have the right to carry out scientific activity according to the norms of Federal Law of July, 22, 1996 “On Higher And Postgraduate Professional Education”. According to Articles 3, 8, 9 of the named Law, the basic types of the higher educational institutions in the Russian federation (a university, an academy, an institute) have the right to carry out *fundamental and applied scientific research within the corresponding spectrum of academic specialties and branches.*

*Therefore,* the Ural State law Academy has right to carry out scientific activity in the form of fundamental and applied research. Besides, Art. 29 of the Law on “On Higher And Postgraduate Professional Education” has a general provision that a higher educational institution in the Russian Federation may, according to its charter, carry out profitable activity in various spheres.

4. 2. Art.2 of the Federal Law “On the science and state scientific and technical policy” names the following legal definitions in the sphere of science:

— scientific (scientific and research) activity is the activity which is directed at acquiring and using new knowledge, including applied scientific research, as research directed mainly at applying new knowledge to achieve practical goals and solve specific problems;

— scientific and (or) scientific and technical result is a product of scientific and (or) scientific and technical activity containing new knowledge or solutions, and fixed in any information carrier;

— scientific and (or) scientific and technical product is a scientific and (or) scientific and technical result, and the result of intellectual activity for realization.
According to Art. 8 of the aforementioned Law, the basic form of relationships between a scientific organization, the Customer, and other consumers of scientific and (or) scientific and technological products is the agreements (contracts) to create, transfer, and use scientific and (or) scientific and technical products, render scientific, scientific and technical, engineering and consultative, and other services, as well as agreements on mutual activity, and distribution of profits.

Thus, the legislation allows to refer paid activity of this or that scientific and educational organization on preparing legal opinions to carrying out scientific and research works according to a specific agreement which provides that the mentioned works are of a scientific character (within the definitions given in Art. 2 of the Federal Law “On The Science And State Scientific And Technical Policy”). The fact of execution of such works for the taxation purpose may be supported by a specific agreement, an acceptance certificate signed after the end of the research or separate stages of the research (para. 2 Art. 262 of the RF Tax Code).

In practice, the judicial authorities while solving these problems suggest estimating the parties’ evidentiary materials in the light of formal requirements: the concluded agreement for scientific and research works, the presence of the technical task, acceptance certificates, etc. (see, e.g. Case No. F09-1127/06-C2 of March 6, 2006, the Act of the Federal Commercial Court for the Ural District).

Tax authorities, in their turn, are eager to prove that in a disputable situation a higher educational institution did not execute scientific and research works but rendered consulting services to a party.

There arises a question on the definition of consultative services. In short, consultative services are services directed at explanation of methods and ways of some acts and activities. Legal and information services may also be referred to as consulting services.

5. The consumers for execution of scientific and research works have problems with profit taxation. According to Para. 2 Art. 262 of the RF Tax Code for the purpose of profit taxation, the expenses for scientific research, and (or) design and experimental works may include works done for the purpose of creating new or modernizing of the existing technologies (products). In the case the Customer uses the legal (scientific) opinions prepared by the USLA lecturers to modernize technologies (e.g: for receiving a patent), such expenses may hypothetically be referred to as other expenses according to Art. 262 of the Code for the purpose of VAT payment, but the sphere of these legal situations is rather narrow.

Alongside with that, the fact that preparation of legal opinions is the product of a specific scientific and research activity in the sphere of jurisprudence does not exclude in itself the possibility to refer payment expenses for these opinions to other (various) groups of expenses for the purpose of calculating profits tax. The deter-
mining criterion in this case might be the manner of application or the usage of such legal (scientific) opinions in the day-to-day operation of an enterprise-customer.

The attention should be drawn to the fact that Subpara.14, 15 Para. 1 Art. 264 of the RF Tax Code include expenses for legal and informational, consulting and other similar services in the list of other expenses. It should be stressed that the current legislation does not exclude the use of the results of scientific and research works by the organization-customer not as scientific research results as such, but in terms of their applied meaning. In particular, the customer may be interested in legal opinions not as if they are the scientific products and dogmatic formulations in the sphere of jurisprudence, but from the point of view of the influence of these formulations and findings on the practice of interpretation and application of legislation. Therefore, the results of scientific and research works within the agreement with a scientific organization may be used by the customer in as a specific informational or consulting product. In the light of this, the expenses for the corresponding services may have various economic meanings for the customer within its current activity. This fact gives grounds for differences in the legal qualification of these expenses and agreements on the basis of which they were incurred.

Thus, there are certain grounds to think that in every specific case the expenses for preparation of legal certificates and opinions on the application of current legislation are necessary to be regarded and qualified within the specific use of the mentioned legal opinions as a certain informational and (or) scientific and research product. The mentioned expenses should be documentarily acknowledged, grounded and economically justified according to the requirements of Art. 252 of the RF Tax Code.

The result is the following: for the executor to be exempt from VAT, it is important to qualify the concluded business contract as a contract for scientific and research work. In its turn, this qualification does not suit the customer; it creates additional difficulties in profits taxation. It is problematic to prove that legal (scientific) opinions of a higher legal educational institution may be used to create new or modernizing existing technologies (products). So, the customer is eager to re-qualify these works into consulting and legal services and refer the expenses for their rendering to miscellaneous expenses in accordance with subpara. 14,15 para. 1 Art. 264 of the RF Tax Code. The last expenditure item makes it possible to refer expenses for scientific and research work to a prime cost, but not to the customer’s profit.
LOCAL SELF-GOVERNMENT AUTHORITIES IN IMPLEMENTATION OF STATE SUPPORT FOR SMALL AND MEDIUM-SIZED BUSINESSES

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State support for entrepreneurship is a necessary and unavoidable process. Its tasks in the developed market economies are to guarantee business entities support and equal access to the necessary infrastructure; to protect competition, and to protect the customer from dishonest sellers or suppliers of goods and services. The legal basis in the sphere of entrepreneurial activity should constantly be improved to make this regulation effective and to avoid negative consequences.

The constitutional principles laid down in the Fundamental Law make the ground for the legal infrastructure of the modern economy and contribute to the effective protection of rights and freedoms by entrepreneurs. Constitutional norms forming the legal basis for the entrepreneurial activity complement each other and their unity and harmony are of great value. The implementation of the constitutional guarantees is fundamental. It presumes the formation of the normative legal base that defines the provisions of the Fundamental Law and ensures the entrepreneurial activity.

According to Art. 2 of the RF Civil Code, “entrepreneurial activity shall be an independent activity, performed at one’s own risk, aimed at systematically deriving a profit from the use of the property, the sale of commodities, the performance of work or the rendering of services by the persons, registered in this capacity in conformity with the law-established procedure”.

The activity of the subjects of the small and medium-sized entrepreneurship in Russia is regulated by Federal Law No. 209 of 24 June 2007 “On the Development of Small and Medium-Sized Businesses in the Russian Federation” (hereinafter referred...
to as Federal Law No. 209-FL), which contains the criteria for classifying an enterprise as a small or medium-sized entrepreneurship.

**Small and medium-sized enterprises** play a great role in solving current social and economic problems and creating new jobs at the local level. Small and medium-sized enterprises can create a great number of jobs, expand the tax base, facilitate the growth of the national income and provide the production of import-replacing products. This can be done in the shortest period of time. So, creating favorable conditions for the development of entrepreneurship is very important for the small-sized sector and for the economy as a whole.

The level of social development is known to be determined by the effectiveness of legal regulations in the sphere of social relationships because the legal element of state regulation of entrepreneurship creates the field on which other components of this system function; it limits their excessive activeness, and lays the foundation for further development and improvement of the whole system which influences the society.

The state normative and legal support for entrepreneurship consists in creating such a normative and legal base which, regulating the activity of small-sized enterprises at all the stages of the life cycle, would provide the most favorable possibilities for the development of this economy sector.

The legal definition of the entrepreneurial activity is given by the RF Civil Code. **Entrepreneurial activity** is an independent activity performed at one’s own risk, aimed at systematically deriving a profit from the use of the property, the sale of commodities, the performance of work or the rendering of services by the persons registered in this capacity in conformity with the procedure established by the law.

Federal Law No 209-FL regulates a specific sphere of social relationships. First, it operates in the sphere of both small and medium-sized entrepreneurship. Second, the Law regulates the fundamentals of interactions between the subjects of small and medium-sized entrepreneurship and not only public authorities (federal and regional) but also local self-government authorities; with commercial and non-commercial organizations constituting the infrastructure of support for the subjects of small and medium-sized entrepreneurship.

Marketing mechanisms do not appear by themselves but are formed with the help of the state. Federal Law No 209-FL lays down the main principles of the state policy in developing small and medium-sized entrepreneurship in the Russian Federation. The specific role here is played by local state-government authorities. First, the law states that these authorities are responsible for creating favorable conditions regulating the development of subjects of small and medium-sized entrepreneurship; second, representatives of the subjects of small and medium entrepreneurship have the right to participate in the expert evaluation of drafts of legislative acts of local self-government authorities, when these legal acts regulate the development
of small and medium-sized entrepreneurship; third, municipal programs for the development of small and medium-sized entrepreneurship must guarantee equal access of the subjects of small and medium-sized entrepreneurship to state support if they qualify for this support.

For the first time for the regional authorities, the powers to develop small and medium-sized entrepreneurship are distinguished as independent, and the local authorities will be able to support small businesses. Along with the specifying the powers, the Law defines the normative base aimed at forming regional and municipal list of property designated for the needs of small and medium-sized entrepreneurship. Also, the definition of “micro” was given to medium-sized enterprises, and the limit in the number of workers in small-sized enterprises for branches of industries was cancelled.

Federal Law No 209-FL lists the following responsibilities of the local self-government authorities aimed at state support for subjects of small and medium-sized entrepreneurship:

— to adopt and implement municipal programs aimed at the development of small and medium-sized entrepreneurship;

— to define the procedure of establishing coordinating and consultative bodies in the sphere of the development of small and medium-sized entrepreneurship (part 2 Art. 13);

— to keep the register of subjects of small and medium-sized entrepreneurship — recipients of the support provided by local self-government bodies (Art. 8);

— to provide (free of charge) statistical information in the stated sphere of activity to the federal bodies of executive power that carry out functions of forming the official statistical information; to give them documented information on the stated forms; to give information received by them while exercising control and supervision, and other administrative powers in relation to subjects of small and medium-sized entrepreneurship (part 2 Art. 5).

The law prescribes government authorities and local self-government authorities to support the subjects of small and medium-sized entrepreneurship in the sphere of innovations and industrial production by way of ensuring the activity of organizations which form the infrastructure of support for the subjects of small and medium-sized entrepreneurship. These organizations are industrial parks, centers for commercializing technologies, technology development zones, and scientific and industrial zones.

An important aspect in stimulating innovation activity is finding and creating certain forms of scientific and industrial progress and the relevant infrastructure. These forms are the incubators of small-sized business, innovative and industrial centers, innovative and industrial complexes, industrial parks, and technopolises. There are many structures for innovative activities which have similarities and differences. The
detailed analyses of such structures will not be given, though an industrial park (a technopark) can be regarded as the most acceptable structure for all the activities.

The industrial park (a scientific and technological park) is a legal entity having a scientific and production territorial complex. The main aim of the complex is to form the most favorable environment for unification and efficient use of intellectual, industrial, organizational, and financial potential of members of industrial park (individuals, and legal entities) for the development of knowledge-intensive innovative firms-clients.

Federal legislation does not solve many problems connected with industrial parks, their creation and development. So, regions should build their own legislative basis.

All the existing regional laws are similar in having one common task: creation up and development of industrial parks on the territory of a particular subject of the Federation. At the same time, they differ in the conceptual framework that they use.

Thus, for example, the Law No. 70-RL of the Kabardino-Balkar Republic “On Technoparks” of 30 June, 2010 gives the following definition to the term “technopark”: “technopark is a property complex set up for carrying out activities in the sphere of innovative technologies. It consists of office buildings and premises, engineering facilities, transport, residential, and social infrastructure”. The same definition is contained in the Law No. 39-RL of the Republic of North Ossetia-Alania “On Technoparks in the Republic of North Ossetia-Alania” of 15 August, 2007 and in the Law No. 98-KL of the Stavropol Krai “On Regional Industrial, Tourist-Recreational, and Industrial Parks” of 29 December, 2009.

The Law No. 55-OL of the Kemerovo Oblast “On Technoparks in the Kemerovo Oblast” of 2 June, 2008 defines technoparks as a “form of mutual innovative activities for research, planning and design, and educational organizations, industrial enterprises (their branches), investors, and other participants of the market”.

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5 http://www.garant.ru


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Undoubtedly, each region has its specific set of innovative resources. That is why regional technoparks should be set up with account of specifics features of the existing innovative infrastructure. For example, if a region has enough workforce capacity for research, there is no necessity for technoparks to employ new full-time research workers; it is better to form temporary research groups.

One of the activities of a complex technopark may be the planning of regional innovative processes. This function is carried out in close cooperation with regional and local administration.

The proposed organizational and functional structures of regional technoparks that meet specific requirements of regional innovative environment, allow speeding up the innovative processes in the RF subjects on the basis of the rational use of innovative potential.

The development of technoparks is one of the key tasks on the way to “smart economy”. Thus, it is necessary to provide a clear legislative definition to the term “technopark”; to assign the official status to the existing research and production associations in the RF subjects; to formulate fundamentals of interactions between the administration company and the technopark; to lay down the requirements for stimulation and conditions for benefits and preferences, which will make the use of comprehensive measures of state support possible.

Setting up technoparks will contribute to the high and stable pace of the development of high-technology branches of the economy. This development, in its turn, will contribute to the increase of labor productivity in all branches, and the efficiency in the use of human and material resources.

Technoparks are becoming the key elements of the infrastructure supporting and developing innovative activities. They are able to render assistance to innovators at all stages of innovative process from the moment of appearance of the innovative idea to the moment of its commercialization.

First, technopark is a specific type of a free economic zone. Here, the development of science-based production takes place; new staff and technology development zones are formed. From this position, a technopark conforms to the basic processes in the world economy.

Second, science encourages business development, mainly small business, which makes it possible to speak about technoparks as a form of support for small-sized entrepreneurship, the development of which gives an opportunity to rise to a new level of social reproduction.

Technoparks in municipal entities on the territory of the cities lead to creating the environment favoring the development of new small and medium-sized business enterprises; opening new working places; assimilating new technologies; and encouraging partnership relations between the public and private economy sectors.
There is the practice of making agreements between local self-government authorities and technoparks. Thus, the Petrozavodsk Administration (Karelia) and “OTZ-2” Ltd. signed an agreement on implementation of mutual projects to attract investments and to find ways of reducing administrative barriers for the development of enterprises⁸. In 2011, the Autonomous Institution of the Khanty-Mansi Autonomous Okrug — Yugra “Technopark of High Technologies” and the Administration of the city of Urai signed an agreement on cooperation. The basic subject for cooperation in the said agreement is the formation of the infrastructure to support the subjects of small-sized innovative entrepreneurship⁹.

At present, the state’s priorities are to develop the entrepreneurship, to work out and implement special programs to support the entrepreneurship. The economic model for the development of small and medium-sized entrepreneurship on the basis of the cluster approach should be formed. This will lead to a transition to a new stage of state support for small and medium-sized entrepreneurship; and new ideology in the cooperation of the state and the business. The future development of small and medium-sized entrepreneurship is the use of innovative potential; the development of such cooperation forms that will guarantee the stable operation of a municipal institution whose main support will be a strong class of entrepreneurs.

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* [http://www.tp86.ru/about](http://www.tp86.ru/about)
THE SPEECH ON PRECEDENT
(The speech at the Senate Readings at the Constitutional Court of the Russian Federation, Saint Petersburg, Russia, March 19, 2010)

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1. Introduction
I am very pleased to speak in the former residence of the Governing Senate of the Russian Empire — the building which was constructed to accommodate the supreme judicial authority of Russia and where the Constitutional Court of the Russian Federation is working now. Curiously enough, this building has direct relevance to the subject of my speech — precedent.

In the late XIX — early XX centuries, the Civil Cassational Department of the Governing Senate began the practice of formulating precedents in connection with the same questions that are the subject of current discussions among civil lawyers — namely, vindicatory and negatory actions, acquisitive prescription, liability without fault, etc. The results of that highly valuable experience were published, and anyone may study this practice. Unfortunately, our courts cannot base their decisions on that experience: all the courts of the Russian Empire were eliminated after the October takeover in 1917, and their decisions were abolished. But we have to live in the present, not in the past.

2. The conditional character of the term precedent
Recently there has been a lot of talk that decisions of the Russian courts are acquiring precedential character, that we are creating precedents regulating a wide range of social relations. In my opinion, this is becoming a label that some are using to condemn a particular phenomenon, and others are using the label to justify the phenomenon, depending on how legal scholars define the role of judicial acts in the context of their impact on social relations. And the question what to call them — precedent or non-precedent — is not that important.

3. Two ways of impact of judicial decisions on legal relationships
We should distinguish two major ways of impact of judicial decisions on the social relations existing in our society. The first one is that judicial acts affect only the relationship which they were intended to regulate. Judicial acts in such a narrow
sense are individual (non-normative) legal acts. The continental legal approach is consistent with that doctrine to a great extent. But we should make a reservation here because highest courts of many countries of the continental legal family are very close to creating precedents. Compare, for example, the courts of Austria and Finland the activities of which I happened to see. The Supreme Court of Austria hears cases, but the Supreme Court of Finland focuses on creating precedents.

The second way of the impact of judicial acts on social relations presupposes a broader and more varied influence than giving a simple solution to a particular case. This impact also concerns the social relations that have never been the subject of legal proceedings and will probably never be the subject of such proceedings. This approach is more consistent with the Anglo-Saxon legal system, but not only with that system because the spread of the precedent law system is much wider, affecting many civil law countries.

4. Precedent and a rule of law

In the precedent system, judicial acts “outgrow” the level of a particular legal relationship, begin to get applied repeatedly and sometimes even become a standard of a rule of law. However, the idea that a judicial precedent is a rule of law similar to a statute is hardly true. To begin with, a court is obliged to apply statutory rules of law, and if the court does not do that consciously, this court passes an illegal judicial act. The mission of the court is to apply a rule of law to a particular problem which does not always fit in the “procrustean bed” of the rule. In such a case, the court extends the application of the rule to a similar problem.

There is a different situation with application of precedents, i.e., decisions of highest courts on cases under their consideration. These decisions are made in relation to a particular situation, and if the question under consideration is different from the situation in a particular precedent, the latter is not subject to broad interpretation. Only the court that is empowered to create precedents has the right to expand the scope of these precedents. However, when we speak about abstract legal views of courts, their differences from rules of law are rather ephemeral.

5. The place of the Russian judicial system

If we look at our judicial system from the point of view of “precedent–non-precedent” dichotomy, we will see that this system lies somewhere in the middle, and it has been there for a long time. Since the moment when our highest courts got the right to issue Plenums’ Rulings on the interpretation of laws, they have switched from the classical continental approach, under which a judicial act affects only the relationship that has been subject to the analysis of the court, to a broader impact of the act on social relations.
Of course, this decision was unusual for a continental legal system. When we talk to our colleagues in West Europe, they are always surprised to find out that our highest courts’ Plenums may pass binding rulings on construction of laws. To many of them it means that we indirectly adopt the Anglo-Saxon approach to formulating legal views. Moreover, the normative character of the Plenums’ Rulings of the highest courts is even higher than that of precedents because precedents only work in courts of law, but the Rulings of the Plenums work far beyond the courts.

The Russian judicial system went further when the Constitutional Court was established and granted the right to give binding interpretation of the RF Constitution and to find unconstitutional the rules of law that do not comply with the Constitution.

6. The national judicial filter

The Constitutional Court is the only one of its kind, and it considers only a small number of cases. Other courts form two systems through which a lot of cases go. Our society has a high level of proneness to conflict (we rank among the first in the world — about 20 million cases per year for 141 million people, i.e., one case per seven people), routine captures more and more space. Creating precedents does not seem timely. Meanwhile, in the Anglo-Saxon legal system, the judges’ workload is lower, which gives them an opportunity to prepare huge judicial acts that hone legal views.

After the normative character of the rulings of highest courts’ Plenums was recognized, and there is one step left to the system of case law. And this step, in my opinion, is made when we come to the idea of selecting judicial decisions to be reviewed by Supreme Courts. Here comes a radical change which allows saying that our system has transformed into a system of case law.

What is the purpose of selecting cases and national filters that are established so that the highest courts can decide only the most important cases? Of course, initially, as always in a judicial system, the establishment of filters played the role of simple tools to facilitate the work of courts. The Supreme Court is overloaded with a number of small cases, and the Court decides to hear only the most important cases.

But then this decision led to some serious legal and organizational consequences. What is the point in selecting cases? They are selected to formulate legal views relating not only to the cases that are most important to society, but also to other similar cases. Otherwise the principle of legal certainty is violated, and serious problems with the right to judicial protection may arise. Why is a court decision in a seemingly unimportant and uninteresting case not reversed by the highest court, while another decision is reversed?
7. The effect of a national filter on the authority of legal views of courts of law

The purpose of the filter is to form legal views which will affect all the other relationships. First, of course, those that get into the orbit of court proceedings, and in the future - those that may never get there, especially in the sphere of private law, since in this sense, private law is more flexible. The parties simply will not enter into such a contract or will not enter into a civil legal relationship in respect to which there exist unfavourable legal views, as opposed to public law, where entering into a particular kind of legal relationships is often rigidly predetermined, where people will have to continue to engage in these relationships because they have no choice.

Once the national supreme court level filter for the selection of judicial decisions is established, regardless of its purposes, the authority of legal views of courts increases immediately, and they begin to influence future judicial decisions, and then — those relationships which may never be reviewed by the courts. And the higher the authority of legal views of a court, the stronger its influence on social relations. We should not forget about the focus of the highest court and its judges on creating precedents because organizational arrangements alone are not enough to do that.

8. The national filter and uniformity of court practice

The existence of a national filter for selection of judicial decisions requires a certain organizational focus of the activities of the highest court. All its activities should focus on creating uniform and consistent legal views, or, as it is stated in the RF Code of Arbitration Procedure, on maintaining the unity of judicial practice. This is not just a slogan, but a vital necessity. After all, if there are different legal views in similar cases, this decreases the authority of the highest court, reduces the significance of its acts, and violates the principle of legal certainty.

But if in the highest court there is no single body developing legal views, inconsistency in the judicial practice is inevitable. Judges are human, humans are fallible, and the independent status of judges only increases this risk because they can afford not to look back on their colleagues' opinion. Therefore, in terms of organization, the highest court, applying the national filter, should ensure independent selection of cases, on the one hand, and the resolution of already selected cases by a single body composed of judges — the Senate, the Presidium, a chamber, etc. - on the other.

In this regard, I would like to draw attention to the existence of two bodies (chambers) within the Russian Constitutional Court that work out legal views, which, however, is partly compensated by the possibility to hear cases by the entire court (the Plenum).
9. The Differences In Models Within The Russian Judicial System

If we look at our judicial system from the perspective of the filter and its role in creating precedents, we can find out that one of our courts — the RF Supreme Court — is, in fact, working on the principles of the same continental model with the addition of the Plenums’ Rulings, which themselves constitute a departure from the continental model. The court combines all instances — the first instance, cassation, and supervision, with the supervision having a multistage character. But the main thing is that this court, in my opinion, is not intended to create precedents although its organizational structure makes their creation possible.

And there are two other highest courts — the Constitutional Court and Supreme Commercial Court — which have established the filter and now select the most important cases, which *volens nolens* pushes them to create precedents. This process is going by itself, regardless of their wishes. Here you cannot accuse anyone of the desire to make precedent a source of law. The courts have simply chosen a model for their work, and such a model inevitably results in the precedent-oriented character of their legal views.

10. Advantages Of The Precedent-Based System

The final transition to the system of judicial precedent is movement in the right direction because in such a system, there are a lot of important advantages.

First, it is the stability of legal views in their gradual evolution, the absence of sudden revolutionary changes, which is especially important to private law relationships (the idea of “the stability of civil circulation”), consistent development of the law, compliance with the internal logic of this development, and finally, a clear, almost photographic display of problems of practice, an adequate response to the problems that have arisen in the field of application of law.

Second, the precedent approach enables the judiciary to take a proper place in the system of separation of powers that exists in a democratic society. This is especially true in our situation where there is a certain bias towards the executive power. The precedent system, in the conditions of ensuring the irremovability of judges and the stability of courts, strengthens the positions of the judiciary.

Third, the precedent-based system can significantly reduce the impact of various external factors — the administrative pressure, corruption, etc. — on judges. Russia is a huge country, and at times it is very difficult to evaluate whether a decision has been made upon the judge’s inner conviction or under the influence of external factors mentioned above. But it is always possible to determine whether a decision which is being evaluated is consistent with the precedent that has already been formulated.

As to the forming of precedents by highest courts, the influence of external factors on them is minimized. Moreover, additional measures are possible which
exclude such an influence completely. In respect to local courts, doing such things is more difficult.

That is why there are reasons to strengthen the approach that has been developing in our system during the last 20 years to give the force of precedents to judicial acts.

11. Disadvantages Of The Precedent System

The reasons to negate precedents are usually divided into two categories.

First of all, there are subjective reasons. Those who consider them usually say, “Who is entrusted with formulating legal views, what kind of judges are they?” In other words, the level of professional skills of members of the judiciary brings us to the conclusion that they cannot be entrusted with such an important function as formulating legal views. I have heard such words repeatedly. However, the quality of the judiciary is, first, a changeable thing and, second, it is often a matter of taste. Such words are usually said by people who lose cases in courts from time to time.

But it is impossible to deny the existence of objective reasons for the negative attitude to precedents. There are several reasons of this kind.

They include certain “secretiveness” in creating precedents. I mean the fact that laws are adopted by the parliament formed by the will of the nation, but, as a rule, judges are appointed by the president (the executive branch) or by the parliament (the legislative branch), i.e., indirectly in relation to the will of the nation. Life is changeable, political trends are changing as well, the will of the nation changes in essence, but judges always keep their jobs creating precedents. Many people point out such a disadvantage of the precedent system.

As we can see, there are certain grounds to criticize the precedent system. But there are strong objections to this criticism. Modern legislation has reached a very high abstract level. My words may seem too harsh, but the Russian deputies in legislative bodies have difficulty formulating abstract legal views. They can find simple solutions and take these decisions fast. But when it comes to interpreting fundamental provisions, creating conceptually new legal views based on the interpretation of the previous legal views and principles, precedent is more convenient and useful here than the adoption of laws by the parliament.

Many people understand what I mean if they know the work of deputies who are prone to instantaneous impulses and often want to solve simple legal problems, ignoring serious and fundamental legal principles. Besides, in such a large country as Russia, the direct will of the nation during parliamentary elections is susceptible to various outside influences (by means of parties’ mechanisms, influence of mass media and promotional events), and from this point of view, deputies of the parliament are as far from the nation as judges are.
Moreover, some representatives of liberal movements maintain that the precedent system limits the independence of each particular judge in considering a case. Indeed, precedents created by the highest court bind lower courts. But these precedents have been created on the basis of the analysis of a great number of similar cases, of the court practice on a national scale. The selection of judges to the highest court, specific guarantees of their independence, the organizational mechanism of the highest court’s activity (for instance, the creation of precedents by a body consisting of a significant number of judges), uniformity of its practice bring us to the conclusion that being bound by a precedent is not a bad thing. The principle of legal certainty has a higher value than the independence of judges. Otherwise, we can come to the absurd conclusion that a judge does not have to follow the law if this conflicts with his/her inner convictions. Besides, a judge of a lower court can always decide that the case under consideration does not fall within the precedent created by the highest court...

The disadvantages of the precedent system that have been mentioned can be compensated in the conditions of any country, including Russia. In any case, there are no any serious theoretical objections against the implementation of the system of precedent law in Russia, as the advantages of precedents far exceed their disadvantages.

12. The Main Directions Of The Development Of The Precedent Law

In conclusion, I would like to focus briefly on the main directions of the development of the precedent law in Russia.

The first direction is publishing judicial acts in the Internet, which is one of the major measures to raise the transparency of the court system. We have been doing it for over two years, and now in the Internet there are 12 mln documents on more than 2 mln 700 thousand cases (1 mln of final decisions). Anyone can analyze these documents, though they are most useful to those whose cases have not been heard by a court of law yet. Now we can see the rapid growth of applications with references to court decisions published in the Internet and confirming a particular position.

What is important for the precedent law is not the fact of publication, but a careful analysis of judicial acts to find out what legal views they contain. Therefore, there has to be a deeper analysis of the total volume of existing court decisions in order to find similar decisions among them. The court system must work out and implement the organizational mechanisms that enable to analyse the published court practice and react efficiently to particular deviations.

The second direction is explanations by the highest court of the refusals to review court decisions. With the national filter helping to select court decisions for review,
it is necessary to explain why one decision has been selected for the review and another decision has been left outside the sphere of the highest court’s influence. I mean motivated refusal decisions. The Constitutional Court of RF was the first to provide such explanations.

I am not speaking about whether refusal decisions can contain legal views intended to be repeatedly applied. But the very fact of publication of refusal decisions and their explanation definitely increases the influence of highest courts on forming judicial practice because an independent branch of such practice is formed. Along with the judicial acts of highest courts which review acts of lower courts, there are also refusal decisions containing explanation why these decisions are not reviewed. If the refusal decisions are published, they begin to influence application of law.

The third direction is expanding procedural opportunities to apply the developed legal views while reviewing other cases. I mean the review of cases in the light of new circumstances. I mean new, and not newly discovered circumstances, because this term is contained in the draft law on amendments to the Arbitration Procedure Code, which we initiated on the basis of the well-known Ruling of the Constitutional Court of the Russian Federation of January 21, 2010, No. 1-P. This decision has been widely discussed in the media and the scientific community in Russia. I am not going to analyze it in details.

I will only say that this Ruling concerned the review of cases pending in the Supreme Commercial Court of the Russian Federation while the Court has formulated a new legal view. If a legal view of the Supreme Commercial Court of the RF has already existed at the time of the contested judicial act, then, on the basis of Ruling No. 14 of the Plenum of the Supreme Commercial Court on the review of cases in the light of newly discovered evidence, the mechanism contained in the Ruling can not be applied. However, the Constitutional Court in its ruling has gone further and formed a unified approach to the review of cases, regardless of whether they have been accepted for review by the Supreme Commercial Court of the Russian Federation or not. And now we have to decide whether it is possible to send a judicial act for review in the light of the new (newly discovered) circumstances if the Supreme Commercial Court had already developed its legal views by the time the judicial act was passed.

The fourth direction is the implementation of the so-called pre-judicial request. We have prepared a draft law that would enable lower courts to suspend the proceedings when a problem requiring the interpretation of the highest court arises. This opportunity exists within the constitutional proceedings. In this sense, we are not pioneers. But we suggest applying this model within a single judicial system.

The introduction of prejudicial request is based on purely practical considerations. For example, we have already noted that our tax legislation is said to have
been changed too often and not very efficiently, so every change results in thousands of cases in which there is a dispute about the vague wording of the Tax Code. What should we do? Shall we wait for these thousands of cases solved in different ways to go through all instances and reach our Court? Just imagine how massive the violation of rights of persons involved in the cases can be if one of the possible legal views is adopted. It would be reasonable to stop this flow at an early stage. For the sake of this idea, we are creating a model of pre-judicial request.

When a judge sees that there is a large-scale problem that requires a common understanding across the country, he or she may appeal to the highest court for that court to consider the question of interpretation and to formulate a legal view. The expediency of the proposed solution is clearly seen in tax-related cases because, unfortunately, unlike many other countries, there is only one Tax Code in Russia and no instructions for its application. On the contrary, in other countries such instructions exceed twenty or thirty times the volume of tax codes. There is much more clarity of regulation there than in our country — and similar cases are not considered on a large scale because one judicial decision concerning a particular provision in the instructions is ample for our needs.

Prejudicial request is our response to numerous tax cases, cases in the social sphere, the administrative cases of certain categories. Within the framework of civil law, I believe, such a request would have a smaller value. But the problem with initiating a great number of lawsuits resolved in different ways is not the only reason for the introduction of prejudicial request. No less important is this request for building a proper relationship among court instances.

We have worked hard to destroy the connection between a judge and a higher judge who reviews his or her cases. For this purpose, we have created a system of appellate courts which makes it unclear who gets to hear a case resolved by the first instance, so that nobody in a higher court will be able to dictate his or her position to the lower court. We have deliberately destroyed this connection. Creation of appellate courts was aimed at ensuring a large variability for the parties to a case to enable them to achieve a greater effect when nobody knows what position in relation to this case a higher court will take.

Prejudicial request gives more freedom to judges and makes them less dependent on higher courts. Every judge gets the right to choose whether to solve the case by himself/herself or to send a request to the highest court.

13. Conclusion

We need to move on to ensure that all the highest courts proceed from the common principles of influence of their legal views on social relations, that is, [they] adhere to the idea of precedent law. The system should be organized in such a way
that the two highest courts focus on creating precedents, and the third one is indifferent to this issue. But haste in implementing the proposed ideas is unacceptable since *non est civitas judicii causa sed omne judicium hominis causa constitutum est*. Thank you for your attention.
The International Association of Procedural Law was established in 1948 on the initiative of Italian academicians. Today the Association unites 500 scholars from 50 countries of the world. Its official languages are English, French, German, Italian, and Spanish.

The Association conducts world congresses every four years, and during the intervals it conducts annual conferences on various topical problems of legal procedure. The congresses and conferences attract a great number of scholars and practicing lawyers. On 18–21 September, 2012, the International Organization of Procedural Law will hold their session in Russia for the first time.

On the threshold of the international conference, the Federal Commercial Court of the Ural District has prepared a number of articles about the Russian Commercial Procedure that reflect basic directions for the development of current procedural law and the practice of its application. The articles were prepared by the judges and the staff of the court having academic degrees in the sphere of civil and commercial procedure. They are the members of the Expert Advisory Group on the Application of the RF State Arbitration Procedural Code.

THE EVOLUTION OF THE CIVIL JUDICIAL PROCEDURE IN RUSSIA

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The civil judicial procedure of each country is specific; it reflects the existing legal, national, and cultural traditions, but at the same time it cannot stand off the world trends in the civil procedure development.

According to Art. 118 of the RF Constitution, justice in Russia is exercised in four forms. They are the constitutional, civil, criminal, and administrative judicial procedures. The civil judicial procedure in its turn includes two types of the procedure. The first one is the civil procedure itself in courts of general jurisdiction. The second one is the arbitration procedure in state specialized courts on economic disputes referred to as commercial courts. As there are two types of civil procedure, the second one is often referred to as the civilist procedure.
It is a common thought that two systems of judicial procedure — inquisitorial and adversarial — have been historically formed. The adversarial system originated from Great Britain, and then was accepted in the USA, Canada, India, Australia, and other common law countries. That is why the adversarial procedure has the following characteristic features: the procedural branches of law are highly developed; the laws are not codified; the significance of judicial precedent is high; the courts play a very important role in the life of the society. Nevertheless, in recent years the adversarial procedure has begun to change, absorbing some features of the modern mixed type of judicial procedure (e.g., Lord Woolf’s Reform).

The inquisitorial system has been more developed in the continental Europe countries. These countries base their legal systems on civil, or Roman, law. As the mentioned system is based on the Roman type of law, this system has its own peculiar characteristics: the rule of law, the judicial practice subordinate to the law, the dominance of civil law, and the codification of rules for administering justice, etc. The countries with the said type of the procedure are often called the civil law countries, as civil law is dominant there.

The classic inquisitorial procedure was based on secretiveness, written language, formal evidence evaluation, absence of representation and rights of parties to protect their interests in court. The inquisitorial principle of judicial procedure entrusts the court with a duty “to find out the essence of the case on its own initiative; the inquisitorial principle also gives the way for arbitrary rules”; so the consequences of the said are the sluggishness of the proceedings and other abuses. The said procedure was used in the middle ages in Russia. In the times of Peter the Great, the process was uniform. There was no division into civil and criminal procedure.

The Russian Court Reform of 1864 began the transition from the inquisitorial procedure to a mixed type and dramatically changed the judicial procedure. The court reform was based, first of all, on the French codification experience and less on the Austrian and Prussian legislation. The Russian Court Reform of 1864 had the following characteristic features: the separation of judicial power from the legisla-

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tive and administrative branches of power; the introduction of the independent status of a judge, the adversarial type of the proceedings, and the publicity and the orality of the procedure; changes in the system of appeal against court decisions⁵.

The 19th century court reform resulted in a mixed type of the judicial procedure in Russia⁶ which took the main features of the adversarial procedure. Nevertheless, the inquisitorial roots of the Russian judicial procedure could not disappear completely — the court in Russia still played a more active role than in the countries with a classical adversarial procedure.

The next important period in the development of the Russian judicial procedure is the Soviet period. After the Revolution of 1917, the pre-revolutionary court system and the system of advocacy was cancelled. The search for a new model of the judicial system took several years. Many lawyers refused to work in the socialist state; that is why in court proceedings parties tended to represent their interests themselves, the court had to be more active in collecting and examining evidence on specific cases, and all these facts found their reflection in the legislation. The requirements for being a judge were minimal. They were the RF citizenship and the age of not less than 25 years old. Till the 1980s, there were judges without higher legal education. Due to objective causes, the court had to take an active part in collecting and examining evidence on specific cases; the principle of objective truth became a standard of proof that had to be established by the court in each case.

At the same time, during the Soviet period the principles of orality, publicity of the judicial procedure, the independence of judges, and other innovations of 1864 remained the same; besides, unique procedural institutions appeared, e.g., the supervisory procedure guaranteeing the review of judicial acts at any time independently of the date when the judicial decision entered into force. There was another innovation in the Soviet procedure — the participation of the prosecutor and public organizations in civil proceedings. These institutions can be considered similar to the existing institutions of law and public interest in England and especially in the USA⁷. For objective reasons, the Soviet civil procedure lost some adversarial features, but at the same time did not return to the classical inquisitorial procedure.

The next stage of the development of civil procedure was in the 1990s.

First, in 1992 the commercial courts were set up. They were specialized state courts which resolved economic disputes between enterprises and sole proprietors.

Accordingly, the Commercial Procedure Code was adopted independently from the Civil Procedure Code of the Russian Soviet Federative Socialist Republic (RSFSR).

Second, the judiciary was separated from the legislature and the executive. Russia was ahead of many countries in taking courts out of the subordination to the Ministry of Justice and establishing the bodies of judges’ community (the Judicial Council and the RF Highest Qualifications Board of Judges with their branches in the constituent entities of the Russian Federation). Later the Judicial Department at the RF Supreme Court was established. The judicial system was no longer supervised by the Prosecutor’s Office. The final structure of the judicial system was formed by the end of 1996 with the adoption of the No. 1 Federal Constitutional Law of 31 December “On the RF judicial system”, the creation of federal courts and the courts of the RF constituent entities, and the proclamation of uniformity of judicial system irrespective of the hierarchy and types of courts. Then, the judicial system was complemented by independent commercial courts of appeal.

Third, in the middle of the 1990s, considerable changes were introduced into the RSFSR Commercial Procedure Code, which resulted in rejecting the principle of objective truth; the court ceased to have the power to collect evidence on the case; the writ and *absentia* proceedings as forms of speeding and simplification of court proceedings were introduced. Till 1996, the court was obliged not to be limited by the submitted materials and explanations and to take all measures provided by law for detailed, full and objective clarification of the real facts of the case, rights and duties of the parties. So, it was the court that had to collect and present evidence.

In 2002, the new RF Commercial Procedure Code and the RF Civil Procedure Code were adopted. They developed the adversarial character of the judicial procedure and used the experience of common law countries.

During the last decade, the procedural legislation has been significantly improved in adversarial character. There have been some significant achievements in modern commercial procedure.

This modern commercial procedure not only proclaims adversarial character but also guarantees all components of this principle.

The *first component* is the activity of the parties to the commercial procedure. To be active, parties must be given not only rights but also duties to prove their case by evidence (in the Soviet procedure); the model of the procedure should require parties to be active. Now, the court is not obliged to collect evidence; its authority to schedule expert examination and other things is limited. The Commercial Procedure Code contains a logical mechanism of the roles played by the court and the parties in the process of providing evidence. The court defines the object of proof

(part 1 Art. 64 of the Commercial Procedure Code) proceeding from the norm of material law and the cause of action. The parties, according to their burden of proof, present evidence giving grounds for circumstances for which they refer (Art. 65 of the Commercial Procedure Code). If the court sees that the circumstances to be proved are not proved by the party, it suggests presenting additional evidence (part 2 Art. 65 of the Commercial Procedure Code). The right to present or not to present evidence belongs to the party that is obliged to prove the case. So, the case will be decided on the fullness of the established evidence. Otherwise, the court conclusions will not be consistent with the facts of the case, or not all facts of the case will be proved. The said is the ground for reversing the act by higher judicial authorities (part 1 Art. 270 of the Commercial Procedure Code). It is very important that under the law, incomplete finding of the facts important to the case but not their establishment (part 1 Art. 270 of the Commercial Procedure Code) is a ground for reversing the act by higher judicial authorities.

The burden of proof is directly connected with the so called standard of proof. The term “standard of proof” is common in English and American procedure and means the moment at which the court is able to pass a decision. In Soviet times, obtaining objective truth was such standard of proof. At present, the court makes a decision depending on whether the circumstances of the case have been proved, proceeding from the fulfillment of the burden of proof by the parties.

In other words, today the standard of proof is connected with the fulfillment of the parties their burden of proof. When there is a well-grounded motion, the court renders assistance in presenting evidence, but the initiators of these actions are the parties or other persons involved in the case.

The RF Commercial Procedure Code contains such adversarial institutions as: the exchange of pleadings, the disclosure of the evidence (the answer to the complaint is the defendant’s defendant), the preliminary hearings, etc. The introduction of the disclosure has resulted in a statutory prohibition, according to which parties involved in the trial cannot refer to the evidence about which the other parties have not been informed. The said provision has to encourage parties to commit proce-

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9 It is interesting to note that part 2 Art. 66 of the Commercial Procedure Code has a dispositive formulation “The Commercial Court has right to offer parties participating in the case to produce additional evidence necessary to find the facts which are important for correct proceeding and passing of a legal and well-grounded act before the court hearings or within the time limit stated by the court”. At the same time, courts concluded that in accordance with the systemic interpretation of Art 268 of the Commercial Procedure Code, which provides the possibility to submit additional evidence in the appellate court, it is better to interpret part 2 Art 66 of the Commercial Procedure Code imperatively and suggest that parties present evidence in the absence of evidence related to these or those facts at issue.

dural actions in good time. The Commercial Procedure Code contains the presumption of the so called, tacit consent; according to part 3.1 Art. 70 of the Code “circumstances to which a party refers in substantiating the claim or objections, are considered accepted by the other party if the latter does not contest them directly, or disagreement with the circumstances are not the result of other evidence substantiating the produced contests relating to the essence of the stated claims”.

The said provisions and some other ones indicate the following: if a party wishes to “win” cases, it has to fulfill an assigned burden of proof by committing certain actions in good time.

As parties exchange pleadings, disclose evidence and so on, the pre-trial stage has an adversarial character.

The enumerated innovations were not immediately applied in practice. In 2002 the Commercial Procedure Code was adopted, and the courts of the first instance faced in a dilemma: if they do not admit the non-disclosed evidence, then the decision can be reversed. That is why the judges did not obey the prohibition of Art. 65 of the Code. So, the practice of reversing judgments had a negative impact which resulted in the following: the first instance courts started to ignore the normative prohibition. Only in the last years the courts ceased to admit non-disclosed evidence in the procedure, and the appellate instance rarely admitted evidence non-disclosed in the first instance. Why was it difficult for the courts to accept new adversarial rules? Because they were afraid that their acts would be reversed by higher courts, and the hovering spirit of objective truth was very strong. Also, higher judicial instances tended to reverse the court acts if the court had not ascertained the facts in the case though the law required and requires these facts to be established.

If parties involved in the case have the right to active participation in the trial, then there is a certain risk of negative consequences in the case they did not fulfill the procedural duties and did not use the procedural rights. “Parties involved in the trial bear the risk of consequences which may arise if they commit or do not commit procedural actions” (part 2 Art. 9 of the RF Commercial Procedure Code). The lawmaker considers this provision to be an example of the adversarial character of the judicial procedure, that is why the inclusion of this norm in the article devoted to the said principle is not incidental.

For example, if the party did not produce evidence in the first instance court, then during the appeal procedure, the law limits the possibility of referring to new evidence. According to part 2 Art. 268 of the Commercial Procedure Code, “the appellate commercial court admits the evidence if a person participating in the proceedings has proved that it was impossible to produce the said evidence in the trial court because there were reasons which did not depend upon him or her, including
when the trial court denied the motion to submit evidence, and the appellate court regards these reasons excusable. Thus, the parties involved must produce evidence in due time or they may lose an opportunity to examine them during the hearings.

The parties bear risks of choosing the model of behavior, which may lead to negative consequences: they may lose the case or fail to achieve the intermediary procedural goal (e.g., during the motion, etc.).

The regulation of judicial notifications based upon the concept of procedural risk also became a novation: when a party receives the first judicial act on the case, it is for the party to track the case progress through the Internet. This type of regulation is the cardinal innovation of the Russian procedure in terms of adversarial procedure and responsibility of the parties. The law reduces the level of the court responsibility to notify the parties properly, so the parties’ responsibility grows.

The parties’ activity presumes not only the creation of the adversarial model, but its real implementation in the behavior of the parties’ representatives. At the same time, Russian representatives have not turned into “legal gladiators”, as J. Jacob figuratively said, and the court does not look like a referee in a tennis match, as M. Zander said. Though the parties are usually represented by professional lawyers, but as a rule by corporate lawyers, not advocates.

Chapter 19 of the Commercial Procedure Code does not contain a detailed regulation of interviewing witnesses, and of examining evidence, etc. The Civil Procedure Code regulates the said procedure in details. Thus, according to Art. 177 of the Civil Procedure Code, “every witness is interviewed separately. The presiding judge finds out the witness’s attitude towards the persons participating in the proceedings and asks the witness to tell the court everything he/she knows about the facts of the case. After that the witnesses may be questioned. The first person to ask questions is the one who asked to summon this witness and the representative of this person, and then other persons participating in the case as well as their representatives may ask questions. Judges have the right to question the witness at any time during the interrogation. If necessary, the court may question the witness again during the same or next proceedings as well as interview witnesses to examine their contradictory evidence”.

It is easy to note that the Russian version of interrogation retained the previous structure: at the beginning, there is a free story of a witness about the facts of the case and then comes the questioning. In the Russian judicial procedure, there is no mechanism of examination and cross-examination, like in adversarial procedure. Also, there are no so called partisan methods of conducting proceedings. The court is very active in examining evidence and is usually the first to ask questions. Though, since the times

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of the Soviet legislation, the rules of court proceedings have not prevented representa-
tives from interviewing witnesses and applying to disallow a question. But usually it is
the court that conducts interrogation, and then the representatives may ask their ques-
tions. Unfortunately, bringing up the advocates of new generation may take time.
Adversarial procedure demands a great patience from the court. It must not prevent
parties and their representatives to compete; there should be enough time for court
proceedings. If a judge has more than ten hearings a day, it is obvious that all the hear-
ings are conducted in a hurry, which is unacceptable for this adversarial procedure.

Russian parties in the hearings differ from similar subjects of the adversarial
procedure because they are not reconciliation-oriented. Thus, in 2011 the commer-
cial court system terminated the proceedings of the case because of amicable settle-
ment agreement of the parties only in 2.8% of all the cases considered. In the US federal courts in 1962, 1.5% of civil cases were considered in the first
instance courts, in 2002 — 1.8%. This statistics is taken from the article of
M. Galanter. He says that everything increases: the number of lawyers, literature on
law, documents, but not the number of cases considered by court. Thus, every
federal district court in 1962 considered 20.8 civil cases; in 2002 it considered 7.4
cases! One of the reasons for “vanishing trials” is the parties’ resorting to alternative
forms of dispute resolution, such as mediation.

Such conciliation procedures are not very popular in Russia for many reasons:
— court hearings in Russia do not take much time, and legal costs are not very
high. Sometimes the expenses for a mediator are higher than the legal costs, so the
economic component does not encourage reconciliation;
— representatives of the parties are not active at the pretrial stage. They do not
negotiate and do not ensure the provision of evidence, etc. The Commercial Proce-
dure Code ensures the possibility of pre-trial securing of claim and evidence, but
these procedures are not often used. As a result, by the beginning of the trial the
parties do not have full information about the opponents’ arguments and cannot
see the perspectives of dispute resolution;
— absence of obligatory professional court representation of persons involved in
the case;
— possibly, there is, probably, a habit to apply to the great of this world for dis-
pute resolution, and not to seek ways to solve the dispute by means of reconcilia-
tion;

13 Vysshii Arbitrazhnyi Sud Rossiiskoi Federatsii. Statisticheskie pokazateli o rabote arbitrazhnyh sud-
dov v Rossiiskoi Federatsii v 2011 godu [The Supreme Commercial Court of the Russian Federa-
14 M. Galanter The Vanishing Trial: An Examination of Trial and Related Matters in Federal and State

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— reconciliation agreement is concluded in the court which validates it, checking the legality of conditions and nonviolation of rights and interests of the third parties. The parties seldom conclude civil contracts to terminate a dispute, etc.

Various procedures concerning the disclosure of evidence have not yet become the pre-trial practice. The modern Russian version of the discovery stage concerns only written evidence that must be attached to the claim or the answer to the claim. For example, there are certain forms of discovery:

1) The oral sworn testimony. The interrogation under the similar judicial procedure is conducted by the parties’ counsel. A person who testifies then signs the record made during the testimony;

2) The written sworn testimony. The procedure is similar to the oral sworn testimony. The main difference is the absence of a party’s counsel. A witness is read the questions prepared by the counsel, and oral answers are recorded;

3) The exchange of written questions that either party may send to the other to have them answered in due time. The information is mailed;

4) Requests for written and material evidence. In accordance with federal legislation, a party may examine documents and objects of property in the possession or control of the other party;

5) Requests for admissions.

The advantages of the discovery procedure are obvious. The parties can evaluate strengths and weaknesses of their position in the case, which facilitates the reconciliation agreement. The parties are protected from the appearance of unknown evidence; consequently, the grounds for delaying an action arise very seldom.

The active behavior of the parties and their representatives should be confronted with the passive behavior of the court that keeps silence during the hearing (this does not concern the Russian courts). The court should not initiate the beginning of the process and go beyond the declared claims of the parties. This provision is contained in the current Commercial Procedure Code. In practice, very rarely does the court go beyond the limits of the declared claims. However, this can happen indirectly, demonstrating the former active behavior of the court in determining the way of protecting the violated rights. Thus, lodging a complaint against an act (or omission to act) of the Russian Register authorities on registering rights to real property, the claimant often chooses an administrative procedure and lodges a complaint according to the rules of the said procedure. A person draws up an application and pays a stamp duty in accordance with the complaint against the actions of a state body. A judge, accepting a petition, sees that the case should be tried

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according to the rules of action proceedings, as there is no complaint against the actions connected with registering right to real property. In this case, there is a substantive dispute connected with the right to real property. But the judge cannot change the subject of the request at his/her discretion, and the party, using the principle of a discretionary rule, has chosen a non-claim procedure of protection of its rights. What can be done if the applicant does not wish to change the object of the complaint? There are two ways: the first way is to try the case in action proceedings, and the second way is to leave the application unconsidered and ask the applicant to bring an action. In practice, the first way is used, and the Commercial Procedure Code does not provide for the ground to leave the application unconsidered. Does the court have the right to ignore the applicant’s will in choosing ways of protecting his/her rights?

This example demonstrates, on the one hand, a certain legislative gap in regulating the consequences of choosing an incorrect way to protect somebody’s rights. On the other hand, this example demonstrates the active behavior of the court that tries, instead of the party, to solve the problem of choosing a proper way to protect the violated right. The RF Civil Procedure Code has chosen another way: “If at the time when application is filed, it is established that there is a dispute falling within the court’s jurisdiction, the judge leaves the application unconsidered and explains the applicant the need to file a complaint complying with the requirements of a law.” Undoubtedly, defining the nature of a dispute at the moment of accepting the application does not always seem possible.

It should be said that in countries with adversarial procedure, the court is passive in trying cases, but at the same time, the court has always had strong powers. Only a strong court may allow the parties to “struggle” during the proceedings and is not afraid to lose these powers. Therefore, it is very important not to let the visual passiveness during court proceedings mix with the absence of court power. There are sufficient reasons to believe that the judicial branch is the third branch of power in the state. The procedural legislation empowers the court with the authority symbolizing the most important statement — the court is the body that exercises the state function of administering justice in the state.

Whether the system belongs to the common law family or to the Roman family has a great impact upon the adversarial and inquisitorial justice. One example is the role of judicial practice. In Roman law countries, there is the principle of the rule of law, and judicial practice plays a subordinate role. Common law countries have a developed precedent law. The role of judicial practice is growing in modern Russia, while the rule of law principle is preserved.

Thus, according to the Commercial Procedure Code, the declaration may contain references to resolutions of the Plenum of the RF Supreme Commercial Court.
on questions of judicial practice, and resolutions of the Presidium of the RF Supreme Commercial Court (part. 4 Art. 170 of the Commercial Procedure Code). If resolutions of the Plenum of the RF Supreme Commercial Court provide the generalized interpretation of judicial practice, then resolutions of the Presidium of the said court are passed on specific cases. In this connection, it is possible to say that precedent law is developing in Russia.

The practice of reviewing judicial acts due to new circumstances and newly-discovered circumstances is developing in the same direction. Moreover, according to Resolution No. 52 of the Plenum of the RF Supreme Commercial Court of 30 June, 2011 “On applying the provisions of the RF Commercial Procedure Code when reviewing judicial acts due to new circumstances and newly-discovered circumstances”, the legal view of the said provision may be given a retroactive effect. For this effect, the Resolution should contain the following indication: “Valid acts of commercial courts on cases with similar factual circumstances that were passed on the basis of the legal norm in the interpretation contradicting the interpretation of the given Resolution may be reviewed in accordance with para. 2 part 3 Art. 311 of the RF Commercial Procedure Code if there are no other impediments”.

If resolutions of the Plenum or the Presidium of the Supreme Commercial Court contain several legal views, the retroactive effect may be given to one of them if it is directly stated in the corresponding act. In the absence of such an indication, if there is the retroactive effect provision, this retroactive effect extends to all legal views formulated in the corresponding resolution.

Resolutions of the Plenum or the Presidium of the RF Supreme Commercial Court may define the judicial acts to which the effect of the said provision is applied.

This approach has given grounds to speak about the development of principles of precedent law in Russia. Precedent law and adversarial proceedings are interconnected phenomena.

The modern stage in the development of the commercial litigation procedure symbolizes the adversarial character of judicial procedure. The parties become more active (mainly, at the legislative level) and more responsible for performing or non-performing procedural actions. Indisputably, the role of judicial practice is growing. At the same time, the Russian commercial procedure still differs from classical adversarial procedure, which can easily be explained as the Russian procedure has its own peculiar roots and development). As judicial systems of different types are getting closer, this process will inevitably lead to reciprocal exchange of certain features that did not use to be inherent to these systems.

THE STRUCTURE OF THE RUSSIAN CIVILISTIC PROCEDURE

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In the Russian civilistic procedure, the issue of its structure is viewed in 3 aspects. First, the dual nature of civil jurisdiction is taken into account — the existence of commercial courts and courts of general jurisdiction. Second, procedural rules for considering cases depend on the substantive law essence of the case — different kinds of proceedings are distinguished. Finally, the consideration of each case goes through three stages in time.

Civil Procedure And Commercial Litigation Procedure

First of all, different kinds of legal conflicts are resolved by different organs (courts, other state organs of extra-judicial jurisdictions), using different rules of procedure (the RF Criminal Procedure Code, the RF Civil Procedure Code, the RF Commercial Procedure Code, the RF Code for Administrative Offences, etc.).

The main criterion is the sphere of conflict. Thus, substantive peculiarities of the case imply relevant rules for its resolution, which is reflected in the existence of constitutional, criminal, civil and administrative procedure.

Because of economic changes in Russia, at the end of the 1980s—the beginning of the 1990s, the need for commercial litigation arose. In 1992 commercial courts were created.

At present, civil and administrative disputes in Russia are heard by commercial courts and courts of general jurisdiction between which the cases are distributed with the help of the institution of jurisdiction.

Commercial courts are specialized courts in relation to courts of general jurisdiction. Under Part 1, Art. 27 of the RF Commercial Procedure Code, commercial courts have jurisdiction over economic disputes and other cases connected with the performance of entrepreneurial and other economic activity by legal entities and sole proprietors, and in cases stipulated by the RF Commercial Procedure Code and other federal laws, by other organizations and individuals. Courts of general jurisdiction conducting proceedings according to the Civil Procedure Code are competent to consider other disputes in the sphere of civil jurisdiction.
Until now, disputes about the demarcation of jurisdiction between two judicial systems have been dramatic. This dispute is rooted in the question of the necessity to distinguish commercial courts and independency of commercial litigation law.

It should be noted that the existence of the system of commercial courts considering cases under the rules of Commercial Procedure Code gives grounds to a number of scholars to believe that commercial procedure law is an independent branch of the Russian law the object of which is commercial litigation procedure.\footnote{Arbitrazhnyi protsess: uchebnik [Commercial Procedure: Textbook] Under the ed. of V.V. Yarkov. Moscow, Yurist Publishing House, 2001, p.24; Arbitrazhnyi protsess: uchebnik. [Commercial Procedure:Textbook] Under the ed. of M.K.Treushnikov, Moscow, Gorodets Publishing House, 2007, etc.}


This viewpoint implies the existence of uniform procedural law in which, among others, specific features of commercial disputes are reflected.

Within the framework of the article, taking into account the goals set, we can afford to avoid the discussion. At the same time, in this article the term “civilistic procedure" will be used in order to unite civil and commercial procedure.

The existence of two jurisdictions has its advantages and disadvantages. Among its advantages are the following:

1) The possibility of timely and expedited consideration of commercial disputes which is among the prerequisites and grounds for distinguishing commercial jurisdiction.\footnote{We borrowed the term “civilistic procedure" from T.V.Sakhnova. See: T.V.Sakhnova. Sudenbuye protsedury (o budushchem tsivilisticheskogo protsessa. // Arbitrazhnyi i grazhdanskii protsess [Judicial procedures (about the future of civilistic procedure). //Commercial and cibvilprocedure], 2009, No.2}

But on the basis of this approach, for persons interested in justice a question arises about equality before the law. Government must ensure the timely and professional resolution of any conflicts without giving preference to a particular sphere of relationships. At the same time, if we compare the time limits for action proceedings in trial courts, we can see that under Art. 154 of the RF Civil Procedure Code, this time limit does not exceed 2 months, but under Art. 152 of the RF Commercial Procedure Code it is not more than 3 months. Thus, within the framework...
of the laws, one cannot make the conclusion about the timely and expedited nature of commercial procedure.

2) Commercial proceedings are more simplified in terms of procedure in comparison with the court of general jurisdiction. Rules of procedure in the RF Civil Procedure Code and the RF Commercial Procedure Code are different when they regulate similar relationships.

But the analysis of similar legal institutions gives no grounds to speak about the commercial procedural form as a more simple one.

3) The competition between the two jurisdictions contributes to their development and enriches them. Competition in business can often cause confrontation. Without clear criteria for demarcation of jurisdiction, there is every ground to be concerned about attempts to penetrate into the “wrong” territory, which often happens.

4) The existence of commercial courts for consideration of commercial disputes helps implement special tasks typical only of such disputes.

Under para.6, Art. 2 of the RF Commercial Procedure Code, one of the tasks of commercial courts is to facilitate and develop business partnership relationships, customs and business practices. There is no such a task in the RF Civil Procedure Code. Meanwhile, the analysis of provisions of the RF Commercial Procedure Code does not bring us to the conclusion that this task is successfully fulfilled by commercial courts. For example, Chapter 15 of the RF Commercial Procedure Code is aimed at accomplishing the task stated in para.6, Art. 2 of the RF Commercial Procedure Code. According to the Report about validation of settlement agreements by commercial court judges in Russia in 2008-2011, court proceedings were terminated due to the validation of the settlement agreement only in 3% of all the cases considered. Thus, the distinctive task of commercial courts is not fulfilled.

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5) Judges of commercial courts specialize on consideration of a certain category of cases, which helps improve the quality of justice. But in courts of general jurisdiction, there is also specialization of judges in considering certain categories of cases.

Among the disadvantages of having 2 jurisdictions are the following:

1) The existence of different judicial practice in similar cases. The given problem is solved by passing joint Rulings of Plenums to clarify and interpret court practice. For example, Ruling No.10 of the RF Supreme Court Plenum, Ruling No.22 of the Supreme Commercial Court of April 29, 2010 “On Some Questions Arising In Judicial Practice In Resolution Of Cases Connected With The Protection Of Right Of Ownership And Other Property Rights”8 But as practice shows, sometimes it is hard to reach an agreement. For example, Ruling No.54 of the Plenum of the Supreme Commercial Court of the RF of July 11, 2011 “On Some Issues Of Dispute Resolution In Cases Arising From Contracts In Respect To Immovable Property That Will Be Created Or Acquired In The Future”9 was passed in connection with questions that arose in commercial courts considering disputes about immovable property that would be created or acquired in the future. But similar questions arise in courts of general jurisdiction when the participants of the relationships are individual citizens. For these courts, the ruling above is not binding.

2) Inconvenience for clients of justice in determining the competent court — disputes about jurisdiction hamper access to justice.

For example, the non-government association “Sutyazhnik” files an action against the Directorate of Justice of Sverdlovsk Oblast demanding to re-register the organization. On 17 June, 1999 the Commercial Court of Sverdlovsk oblast satisfied the claim of the association and obliged the Directorate to register the claimant. This decision was affirmed by the Federal Commercial Court of the Ural District on 18 October, 1999. According to Ruling 3599/00, the proceedings were terminated due to the court’s incompetence in the case because the case was not economic and, therefore, not subject to consideration by commercial courts10. The European Court of Human Rights, admitting the violation of Art. 6, Section 1 of the Convention, in the final Judgment on the case of Sutyazhnik v. Russia, No. 8269/02, 23 July 2009, stated:

“...as a matter of principle, the rules of jurisdiction should be respected. However, in the specific circumstances of the present case the Court does not detect any pressing social need which would justify the departure from the principle of legal certainty. The judgment was quashed primarily for the sake

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8 Rossiiskaia Gazeta [Russian Newspaper] No. 109, 21 May 2010.
of legal purism, rather than in order to rectify an error of fundamental importance to the judicial system...

In sum, in the circumstances of the case the quashing of the judgment of 17 June 1999, as upheld on 18 October 1999, was a disproportionate measure and respect for legal certainty should have prevailed.”

Thus, a difficult question of jurisdiction resolved in the court of supervisory instance can postpone the protection of rights.

The analysis of advantages and disadvantages of simultaneous existence of commercial courts and courts of general jurisdiction enabled some legal writers to propose uniting the two systems, at least at the federal level. But this question is not theoretical, but political, and it is connected with the necessity to amend the RF Constitution, which in Art. 126, 127 provides for the existence of two highest courts having civil jurisdiction.

Kinds of court proceedings.

The procedure of considering cases in courts is not uniform.

The theory of the Soviet civil procedural law distinguished three types of proceedings: action proceedings, proceedings arising from administrative law relationships, and special proceedings.

The first two types were different in terms of substantive law peculiarities of cases that had caused the dispute. Action proceedings were designed to consider disputes arising from civil law relationships that were founded on the equality of participants in pre-action relationships. On the contrary, pre-action inequality of participants in administrative relationships affected the procedure of the consideration of such cases in the court. When the parties, before initiating the proceedings, were in the relationships of power and subordination, the rules of procedure had to ensure the procedural equality of the participants. Thus, substantive law peculiarities of cases were the criterion for the division of judicial proceedings into separate types. The type of judicial proceedings was viewed as “a procedure regulated by the rules of civil procedural law and aimed at administering justice in civil cases similar to each other in their substantive law nature that stipulated certain procedural peculiarities of their consideration and resolution in the court”.

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Special proceedings were designed to consider cases in which there is no dispute about the law, i.e., another criterion for distinguishing different types of proceedings was “the unquestionable nature of the object of the judicial activity or the objective impossibility to exercise the uncontested right, or unquestionable unilateral procedural form”.14

The abovementioned structure of proceedings existed in the RF Civil Procedure Code of 1964. The RF Civil Procedure Code of 2002 added another four types to the existing three types. At present, the RF Civil Procedure Code provides for the following types of proceedings: 1) writ proceedings (Subsection I); 2) action proceedings (Subsection II); proceedings in cases arising from public law relationships (Subsection III); 4) special proceedings (Subsection IV); 5) proceedings on recognition and execution of decisions of foreign courts and foreign arbitration tribunals (Chapter 45); 6) proceedings in the cases of challenging decisions of arbitration tribunals and issuance of orders of execution for enforcement of decisions of arbitration tribunals (Section VI); proceedings connected with execution of judicial rulings and rulings of other organs (Section VII).

The first RF Commercial Procedure Code of 1992 did not contain any other types of judicial proceedings except action proceedings. In the RF Commercial Procedure Code of 1995, Article 143 stipulated the necessity for commercial courts to consider cases of insolvency (bankruptcy) of organizations and individuals according to the rules specified by the Code with peculiar features established by the law on insolvency (bankruptcy). Besides, in the Commercial Procedure Code of 1995, cases of establishing facts having legal significance were also placed into a separate chapter. But these cases were considered by commercial courts in the procedure specified by the given Code (Art.144), i.e., in the Code there was no indication of particular procedural peculiarities in their proceedings.

The RF Commercial Procedure Code adopted in 2002 specified several types of proceedings: action proceedings (Section II); proceedings in cases arising from administrative and other public law relationships (Section III); proceedings in cases involving foreign persons (Section V); proceedings in cases connected with execution of judicial acts of commercial courts (Section VII). Besides, Section IV of the RF Commercial Procedure Code stipulates peculiarities of commercial courts proceedings in certain categories of cases: cases of establishing facts having legal significance (Chapter 27); insolvency (bankruptcy) cases (Chapter 28); corporate disputes (Chapter 28.1); cases of protecting rights and legitimate interests of a group of persons (Chapter 28.2); cases heard in summary proceedings (Chapter 29); cases of challenging decisions of arbitration tribunals and issuance of orders of

14 I.A. Zheruolis. Sushchnost’ sovetskogo grazhdanskogo protsess [The essence of the Soviet civil procedure], pp. 179-183.
execution to enforce decisions of arbitration tribunals (Chapter 30); cases of recognition and execution of foreign judicial decisions and foreign arbitration decisions (Chapter 31).

These types of proceedings require some explanations.

It should be noted that the three historically developed types (action proceedings, proceedings in cases arising from administrative and other public law relationships; special proceedings) are preserved in the RF Civil Procedure Code and Commercial Procedure Code. But these three types are not only different in commercial and civil proceedings, but also have serious distinctions in some institutions, e.g., in the institution of initiating action proceedings, notification of persons involved, etc. Action proceedings are the basic type. In 2011, 59% of all applications to commercial courts were filed for action proceedings, 37.84% — in cases arising from administrative and other public law relationships; 0.48% — in cases of establishing facts having legal significance15.

Summary proceedings in commercial courts resemble writ proceedings — in both cases the case is considered without the participation of parties. But in contrast to summary proceedings, a writ is issued without court proceedings. The writ is at the same time an execution document, whereas for execution of the decision of a commercial court the issuance of an execution order is required. The judge repeals the writ if the debtor submits objections against the writ within the established time limit. In the case of disagreement with the decision of the commercial court passed in summary proceedings, an appellate complaint has to be filed to the appellate instance. Thus, the procedural regulation of these two institutions is essentially different. Both procedural institutions are the result of simplification of procedural forms.

Proceedings in cases of challenging decisions of arbitration tribunals and issuance of execution orders for enforcement of arbitration decisions, proceedings in cases of recognition and execution of decisions of foreign courts and foreign arbitration decisions are stipulated by the RF Civil Procedure Code and the RF Commercial Procedure Code. Depending on the sphere of dispute, the competent court is determined. If the dispute has arisen from civil law relationships in the process of entrepreneurial and other economic activity, the relevant application is subject to consideration in the commercial court. The procedures provided for these cases by the two codes are similar. The competent Russian court does not review decisions of arbitration tribunals, decisions of foreign courts and foreign arbitration decisions. In this case, the court either recognizes these decisions and enforces them, or

does not recognize them. Thus, these proceedings are control proceedings as to confirmation of the validity of a dispute resolution by an arbitration tribunal or a foreign court (validity of the arbitration agreement, proper notification about the procedure, the absence of exclusive competence of a Russian state court, etc.) and conformity of the decision to fundamental principles of the Russian law.

The proceedings in cases of insolvency (bankruptcy) in commercial litigation procedure have no equivalents in the Civil Procedure Code of the RF because these cases are within the exclusive competence of commercial courts. Cases of bankruptcy of legal entities and individuals, including sole proprietors, are considered by commercial courts in accordance with the rules specified by the Commercial Procedure Code of the RF with peculiarities established by Federal Law No. 127-FL “On Insolvency (Bankruptcy)”\(^\text{16}\). The procedure for consideration of these cases is different.

The purpose of proceedings in these cases is to establish the fact of the debtor’s insolvency or solvency. Thus, these cases belong to cases of special proceedings under the jurisdiction of commercial courts.

Cases involving corporate disputes and cases related to protection of rights and lawful interests of a group of persons are also within the exclusive jurisdiction of commercial courts. The relevant provisions of the RF Commercial Procedure Code establish procedural peculiarities of proceedings in these cases. These cases are a kind of action proceedings. It should be noted that legal literature distinguishes peculiarities of preparing cases involving securities, privatization, land disputes, contracts, recovery of damages, protection of intellectual property, etc., for judicial proceedings in the commercial court.\(^\text{17}\) In courts of general jurisdiction, there are also specific features of consideration of cases arising from employment, marital, family and other legal relationships.\(^\text{18}\)

Peculiarities of consideration of certain categories of cases are found not only in procedural legislation, but also in laws regulating substantive law relationships and in the rulings of highest judicial instances.

Proceedings connected with execution of judicial rulings are regulated by the RF Commercial Procedure Code and the RF Civil Procedure Code. The essence of this kind of proceedings is in the resolution by the court of the major questions con-

\(^\text{16}\) The original text of the document was published in: Rossiiskaia Gazeta (Russian Newspaper) No. 209-210, 02 November, 2002.


connected with initiation, development and completion of execution proceedings on execution of court rulings. Besides, courts of general jurisdiction perform these functions when executing decisions of other organs. Execution proceedings complete the protection of a violated or contested right.

This, even a brief overview of the proceedings shows the absence of clear criteria for dividing them into types. N.A. Gromoshina devoted her research to this problem and came to a similar conclusion. 19

There may be a collision among types of proceedings. For example, a case may contain attributes of action proceedings and proceedings regulated by Chapters 24, 25 of the RF Commercial Procedure Code.

According to para. 56 of Ruling No. 10 of the RF Supreme Court Plenum, Ruling No. 22 of the Supreme Commercial Court of April 29, 2010 “On Some Questions Arising In Judicial Practice In Resolution Of Cases Connected With The Protection Of Right Of Ownership And Other Property Rights,” 20 the registered right to immovable property cannot be challenged by filing claims subject to consideration according to the rules of Chapter 25 of the RF Civil Procedure Code or Chapter 24 of the Commercial Procedure Code because a dispute about the right to immovable property cannot be resolved in the proceedings in cases arising from public law relationships. At the same time, if a person believes that the state registrar has made a mistake during the state registration procedure of registering a right or a transaction, this person can apply to the court under the rules of Chapter 25 of the RF Commercial Procedure Code or Chapter 24 of the RF Commercial Procedure Code, taking into account the jurisdiction of the case.

The judicial act in such cases is the only ground for making a record in the Uniform Register of Rights only if this was stipulated in its resolutive part. The court has power to make such a conclusion if the change in the Uniform Register of Rights will not involve violation of rights and lawful interests of other persons, and also if there is no dispute about the right to immovable property (for example, when a judicial act was passed as a result of the application filed by both parties to challenge the refusal of the registrar to perform the registration).

In para.6, Art. 2 of Federal Law No.122-FL of 21 July, 1997 “On State Registration Of Rights To Immovable Property And Transactions With It", the lawmaker stipulated that the state registration is the only proof of existence of the registered right, and the registered right can be challenged only in the court.

20 Rossiiskaia Gazeta [Russian Newspaper] No. 109, 21 May 2010.
Invalidity of documents serving as a ground for the registration record can be established only within the framework of a civil law dispute and cannot be considered under the rules of administrative court proceedings established by Chapter 24 of the RF Commercial Procedure Code.

Thus, according to the legal view of the Supreme Commercial Court, cases arising from administrative law relationships but the consideration of which requires the resolution of the dispute about the right of other persons must be resolved in action proceedings. The problem of challenging the registered right to immovable property must be resolved within the framework of general ways of protecting the right, and when there is a dispute about the right, the ways of protecting the right must be within civil law regulation, enabling the court to establish, in the resolutive part of the decision, the right of a person to property, with the owner of the registered right as the respondent. The resolution of the dispute about the right by means of a public law dispute (in relation to finding non-normative acts, decisions, actions (omissions) of the registering organ invalid) is unacceptable because this can result in serious violation of civil rights of subjects of entrepreneurial activity.

Given all that, the evaluation of validity of acts underlying the state registration and of transactions can be made only when the dispute about the right to property has been resolved.21

The collision between action proceedings and special proceedings is also possible. According to Part 3 Art. 217 of the RF Commercial Procedure Code, in cases when during the hearing of the case a dispute about the law arises, the commercial court leaves the application about establishment of facts having legal significance without consideration and passes a special ruling. This ruling clarifies to the applicant and other persons involved their right to resolve the case in action proceedings.

Thus, the application for establishing presence or absence of a right (the right of ownership, etc.), the application for establishment of the fact of fulfilling an obligation by a particular person or of the fact that a property belongs to the applicant under the right of ownership, the application to recognize the contract concluded or not concluded are not subject to consideration in special proceedings (para. 5, 6, 7, 11 of Informational Letter No. 76 of the Presidium of the Supreme Commercial Court of 17 February 2004 “The Overview Of Commercial Court Practice In Establishing Cases Having Legal Significance”).22

As A.V. Yudin correctly put it, “the right choice of the kind of proceedings, undoubtedly, reflects the interests of protecting rights of the person applying to the
court, but this is not a necessary condition for judicial protection, and the mistake in the choice of the kind of proceedings does not necessarily lead to the refusal in judicial protection.”

Thus, the wrong choice of court proceedings in the case when correction is impossible in this procedure does not exclude the possibility of judicial protection in the future. The person involved has the right to apply to a competent court with the proper application, observing the procedural legislation.

Stages Of Proceedings

Consideration and resolution of cases in the court is a focal point in the protection of rights of participants of civil relationships, but not the only major point. To ensure fair court proceedings, there is a possibility to correct judicial errors, including verification stages. Besides, rights are properly protected only when the decision of a jurisdictional organ is fulfilled.

In the domestic theory, a stage in civil procedure is “the combination of procedural actions connected by the closest procedural purpose.”

The purpose of each stage is different. For the proceedings in the court of the first instance, the purpose is to establish factual circumstances, to choose, analyze and apply a rule of law to the factual circumstances, i.e., consideration and resolution of the case.

For verification stages in courts of appellate and cassational instances, the purpose is to consider complaints of persons involved in the case against the judicial acts passed.

The supervisory proceedings are an exceptional stage the purpose of which is the review of judicial acts upon the application of persons concerned as to observation of uniformity in interpretation and application of rules of law by the courts, observation of rights and freedoms of man and citizen, and also of rights and legitimate interests of an indefinite group of persons or other public interests.


The review of the case due to new or newly-discovered circumstances is also an exceptional stage the purpose of which is the new consideration and resolution of the case due to the establishment of the newly discovered circumstances existing at the moment of passing the judicial act in the case, or new circumstances that appeared after the judicial act was passed, but which have a substantial significance for the correct resolution of the case.

Since the second half of the XX century, the question of execution proceedings as a stage of civil proceedings has been debated. M.K. Yukov suggested that proceedings in cases of execution of judicial decisions and decisions of other jurisdictional organs is not a stage of civil procedure, but the object of regulation of an independent branch of law — the law of execution. Since that time, the discussion subsides at times and then runs high again.

Limited by the framework of the article, we can state that the purpose of civil proceedings is the protection of rights and legitimate interests of persons concerned. Passing a just and lawful judicial act by the court, as a rule, does not restore the violated right — very often enforcement of the judgement is necessary. In connection with this, justice without execution of judicial acts is meaningless.

In this connection, 5 stages of court proceedings classified by M.A. Gurvich are still of great practical significance. These stages are:
1) trial proceedings
2) cassational proceedings;
3) review of judicial decisions that have entered into legal force in supervisory proceedings;
4) review of judicial decisions, holdings and rulings that have entered into legal force due to new or newly discovered circumstances;
5) execution proceedings.

In the modern procedure, these forms must be complemented by the appellate proceedings.

Thus, proceedings in the commercial court may consist of 6 stages:
1) trial proceedings;
2) appellate proceedings;
3) cassational proceedings;
4) review of judicial decisions that have entered into legal force in supervisory proceedings;
5) review of judicial decisions, holdings and rulings that have entered into legal force due to new or newly discovered circumstances;
6) execution proceedings in cases of judicial acts of foreign courts.

But not every case goes through all the stages above. If the court decision is not appealed but executed voluntarily (or in the case when the decision is not subject to enforcement, for example, in claims for recognition), the proceedings can be completed in the trial court.

If an appellate or cassational complaint has been filed, the case goes to another stage. If the execution order has not been recognized voluntarily, upon the application of the recoverer additional proceedings can be initiated. In these cases, the procedure consists of more stages.

Thus, the stages mentioned above consistently go one after another but their number depends on the will of the persons concerned. Besides, cassational proceedings and supervisory court proceedings to review judicial acts can take place simultaneously with execution proceedings, and proceedings to review judicial acts that have entered into legal force due to new or newly discovered circumstances can take place even after the execution of the judicial act.

The absence of strict succession of stages and their different number in a particular case enabled Yu.K.Osipov to suggest calling them not stages in the sense of moments of development in application of law separated in time, but law application cycles completed with passing an act of application of law. Each of the cycles includes three stages implying alternation: initiating the activity of law application, preparation and commission of the act (action) of application of law.28

Although this point of view was proposed at the end of the 1970s, its heuristic potential is not exhausted yet.

The ground for distinguishing stages (law application cycles) is their purpose. But in the domestic commercial litigation proceedings, the grounds for such a division into stages are clearly observed. Appellate and cassational instances do not replace each other and trial proceedings. With the other stages the situation is similar.

At the same time, inside every stage (law application cycle) there is no clear division into initiation, preparation, consideration of the case on its merits. The trial proceedings have the most detailed regulation.

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Initiation of proceedings, common for every stage, has some differences at each of them. For example, in considering a case due to new and newly discovered circumstances, the commercial court, as a rule, cannot leave the application without consideration. It is important to note that in order to ensure access to justice, the procedure of initiation is not only regulated in details on each stage, but it is also separated from other steps within the stages. Preparation of cases for consideration at each of the stages cannot start before the proceedings are initiated.

Meanwhile, preparation of the case for the hearing and the hearing itself may coincide in time. The Russian civil procedure has been renovated during the past two decades in terms of many legal institutions. But in the area of structure development of the process, the changes have not been significant.

To a great extent, inconsistency of civil procedure is caused by historical reasons, among others, by the dominance of the principle of objective truth.

For a long time, the only criterion of the right process of the case was the necessity to pass a legal and well-grounded decision. Here the procedural instruments were of secondary importance in the resolution of the major substantive law question. In this connection, before the court retired to the deliberation room, the Soviet procedural legislation allowed to present evidence, submit motions to order expert examination reports, file a counter-claim, etc. To a great extent, this situation still exists. Legal regulation allowing for such actions in considering a case on its merits eliminates the borderline between preparatory actions and the final stage.

The court guides the procedure. But every time the judge starts the trial proceedings, he/she is not sure about the possibility of passing a final procedural act in the forthcoming court hearing. Persons concerned can influence the process of the case through the exercise of their procedural rights. The court has to consider the case fairly and timely. The fairness of the decision implies not only the observance of rules of substantive law, but also securing the procedural rights of the parties that are not limited in time. The exercise of procedural rights of the participants brings unpredictability into the procedure and can be connected with the abuse of these rights.

In this connection, questions of timely submission of applications and motions in the domestic procedure are traditionally viewed within the framework of countering the abuse of procedural rights.

Actions to prepare the case for court hearing stipulated by Art. 135 of the RF Commercial Procedure Code can be committed and are often committed during the consideration of the case on its merits, which does not as a rule involve a pause in court proceedings.

In contrast to the detailed regulation of powers to conduct court proceedings in Part 3 of the Civil Procedure Rules of Britain, the RF Commercial Procedure Code
does not contain such rules. The legal regulation of the conduct of proceedings is exercised within the regulation of the adversarial principle (Part 3, Art. 9 of the RF Commercial Procedure Code), and in some norms regulating certain legal institutions.

Meanwhile, most of these norms are declarative. For example, under Part 1, Art. 70 of the RF Commercial Procedure Code, commercial courts of the first and appellate instances at all stages of the commercial procedure must contribute to the parties’ agreement in evaluation of circumstances as a whole or in parts, demonstrate necessary initiative, exercise their procedural powers and the authority of an organ of judicial power.

Under Part 1 Art. 138 of the RF Commercial Procedure Code, the commercial court takes measures for conciliation of the parties, helps them to settle the case. Meanwhile, the legislation does not contain measures aimed to contribute to the parties’ agreement in evaluation of circumstances or to a settlement agreement.

Thus, for commercial procedure in Russia, theoretical research and practical application of procedural means of conducting the proceedings is still of great importance.

Conclusions
On the basis of what has been said, we can come to the following conclusions:

1. In Russia, civil and administrative cases are considered by commercial courts and courts of general jurisdiction on the basis of the rules of the RF Commercial Procedure Code and the RF Civil Procedure Code, which has advantages and disadvantages.

There is no convincing answer to the question about the necessity of existence of the two procedures for similar cases.

2. The current RF Commercial Procedure Code and the RF Civil Procedure Code contain several types of proceedings. But the criterion for their division satisfying the requirements of formal logic has not been found yet.

3. The civilistic procedure can be divided into stages (law application cycles) according to the test of the closest procedural purpose. Each stage can be divided into steps: initiation, preparation, hearing. Initiation of every stage (law application cycle) depends on the will of the person involved. Preparation and hearing are separated from initiation, but not separated from each other.

These conclusions demonstrate that the issue of the structure of the civilistic procedure in Russia is of great importance and needs to be resolved.
GENERAL PROVISIONS OF THE DOCTRINE OF EVIDENCE IN THE RUSSIAN COMMERCIAL LITIGATION PROCEDURE

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The issue of judicial evidence and proof by evidence is one of the most developed in the domestic doctrine of civil procedure. Well-known Russian legal writers in the sphere of civil procedure, such as K. Yudelson, A.F. Kleiman, S.V. Kurylev, M.K. Treushnikov, A.T. Bonner, A.G. Kovalenko, I.V. Reshetnikova have devoted their works to this issue.

Given all the research works in this area, proof by evidence can be defined as a cognitive procedural activity of those involved in court proceedings in order to establish relevant circumstances.

This definition implies that proof by evidence is subject not only to rules of law, but also to laws of logic. The latter are an objective reality, are not subject to legal regulation and, unfortunately, not well researched by lawyers.

The doctrine of commercial and civil procedure distinguishes judicial proof by evidence from scientific, everyday and other types of cognition.

Undoubtedly proof by evidence relies on scientific methods of cognition (for instance, in the use of expert research), but, nevertheless, differs from the scholarly activity in principle.

First, proof by evidence is cognition aimed at establishing particular facts relevant to the resolution of a case, and not laws of nature.

Second, the procedure of proof by evidence in court proceedings is regulated by procedural legislation in details.

Third, due to the principle of free evaluation of evidence in the Russian civil procedure (Art. 71 of the Commercial Procedure Code of the Russian Federation, Art. 67 of the Civil Procedure Code of the Russian Federation), the discretion of a judge seems to be an inalienable attribute of proof by evidence (or, rather, of evidence evaluation). For example, A.Ya.Vyshinsky was very convincincing when he stated:
“...the attempts to build the system of evidence and the law of evidence on principles ignoring subjective elements of judgement are completely fruitless...”

“the judge, weighing the circumstances of the case, evaluating actions of the defendant, plaintiff or respondent, inevitably relies on his moral, political, ideological principles in his entire understanding of the world, in his vision of relationships among people, on goals and objectives of his own existence”

D.M.Chechot also believed that the court has free discretion in evaluating evidence.

Evidence in the case is legally obtained evidence of facts on the basis of which the court establishes the presence or absence of circumstances substantiating demands and objections of the parties to a case, as well as other circumstances relevant to the proper consideration and resolution of the case. There are certain means of obtaining evidence; explanations of the parties and third persons, witnesses’ testimony, written and physical evidence, audio-and video-recordings, expert examination reports, other documents and materials (Part 2, Art.64 of the RF Commercial Procedure Code).

In the theory of evidence, evidence has the following characteristic features:

First, evidence is information about facts, and not facts themselves.

Second, this is information about facts as part of the total object of proof in the case, i.e., evidence helps to establish presence or absence of circumstances stipulating demands and objections of the parties and other circumstances relevant for the case to be considered and resolved properly. This feature reflects such a property of evidence as relevance.

Third, facts of a case can be established only by means of evidence specified by the law (Part 2, Art. 64 of the RF Commercial Procedure Code).

Fourth, evidence is the information about facts obtained and examined by means of procedure established by the RF Commercial Procedure Code. The last two features of evidence characterize such an aspect of evidence as admissibility.

All the features of evidence exist in combination, and the absence of one of them shows that the evidence is absent or impossible to use.

2 Ibid., p. 118
4 It should be noted that in the RF Commercial Procedure Code, the concepts of evidence and means of proof are confused (sources of evidentiary information, such as witnesses testimony, expert examination reports, etc.). For example, para. 2 Part 2 Art.39 says that parties have the right to file a motion to have their case considered at the place where most od their evidence is located. Here evidence means not information about facts, but means of proof (physical evidence, etc.)
Experts suggest various classifications of evidence included in the total object of proof:

— by the nature of connection of evidence with circumstances to be proved in a case — direct (the text of a contract) and indirect (the parties’ correspondence confirming the presence of certain contractual relationships) evidence;

— by the source of evidentiary information — physical, personal, and mixed (an example of the latter is expert examination reports);

— by the process of formation of evidence — primary and derivative evidence.

In the Russian law, there is the principle of free evaluation of evidence according to which no evidence has a previously established force and is evaluated by the court according to its free conviction (Art. 71 of the RF Commercial Procedure Code).

There is also a viewpoint that the principle of preliminary disclosure of evidence can be distinguished within the framework of the institution of proof by evidence in commercial procedure. This principle is believed to have come from the Anglo-Saxon legal system where it is referred to as discovery. In the RF Commercial Procedure Code it is found in Parts 3-5, Art. 65.

Part 4, Art. 65 of the RF Commercial Procedure Code gives grounds to maintain that the court considering the case has power to establish a deadline for certain evidence to be submitted to the Court and presented to other persons involved in the case. With account of rules of preliminary disclosure of evidence, such a time limit must expire before the court hearing starts. In its turn, in the case the court requirements for the timely submission of evidence are not fulfilled, the person involved can be devoid of the right to refer to such evidence.

At the same time, commercial courts seldom find the evidence, submitted (disclosed) after the deadline, inadmissible. This happens because if such evidence is found inadmissible and a judgement is passed without taking this evidence into consideration, the higher court has a possibility to reverse the court’s judgement as groundless.

Of interest is the explanation given in the last but one subparagraph of para. 26 of Ruling No. 36 (May 28, 2009) of the Plenum of the RF Supreme Commercial Court “On application of the Commercial Procedure Code of the Russian Federation in consideration of cases by a commercial court of appellate instance”:

“Admission of additional evidence by the court of appellate instance cannot serve as a ground to reverse the ruling of the appellate court; at the same time, non-admission of new evidence by the appellate court on the grounds stipulated by Part 2, Art. 268 of the Code can be the ground for reversal of the appellate court...”

ruling under Part 3, Art. 288 of the Code if such non-admission has led or could have led to passing an erroneous judgement”.

It seems that the ambiguous solution of the issue of the possible non-admission of evidence submitted with the violation of the established submission deadline reflects the problem of philosophical and legal nature of truth that must be achieved by the court as a result of considering the case (objective and subjective, formal, absolute or relevant)⁶.

Relevance of evidence. According to Art. 67 of the RF Commercial Procedure Code, commercial courts admit only evidence relevant to the case being considered; they do not accept motions to support persons involved in the case or evaluation of their activity, other documents not relevant to establishing circumstances surrounding the case and refuses to admit them as evidence. Such refusal is included in the court records.

To solve the problem of relevance of evidence requires, the following questions to be considered:

1) to determine whether the facts to be established by such evidence are relevant;
2) if the fact is relevant, whether the evidence can confirm or rebut it⁷.

Thus, relevance of evidence implies the connection of evidence with the object of proof.

Here it is important to take into account that Part 2, Art.65 of the RF Commercial Procedure Code means that circumstances relevant to the proper consideration of a case are determined by a commercial court on the basis of demands and objections of persons involved in the case, as well as on the basis of the applicable rules of substantive law, i.e., the court has power to bring up certain circumstances for discussion between parties even if the parties have not referred to them⁸.

Admissibility of evidence. Under Art.68 of the RF Commercial Procedure Code, circumstances surrounding a case that must be confirmed by certain evidence cannot be confirmed by other evidence in commercial courts.

While relevance shows the essence of evidence, admissibility is related to the form of evidence.

Admissibility of evidence can be of general or specific nature. General nature of admissibility means that in all cases, irrespective of their category, there is a require-

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ment to obtain information from sources determined by the law in compliance with the procedure of collecting, submitting and examining evidence. Violation of these requirements results in finding the evidence inadmissible.

The special nature of admissibility is reflected in the rules prescribing the use of certain evidence to establish circumstances of the case (positive admissibility) or prohibiting the use of certain evidence (negative admissibility)\(^9\).

For example, now the right to immovable property is generally confirmed only by information obtained from the Uniform Register of Immovable Property Rights and Related Transactions (positive admissibility). According to para.1, Art. 162 of the RF Civil Procedure Code, failure to observe a simple written form of a transaction deprives parties of the right to refer to witnesses’ testimony (negative admissibility) to confirm the transaction and its terms and conditions if a dispute arises, but this failure does not deprive the parties of the right to submit written and other types of evidence.

Reliability is a quality of evidence characterizing accuracy, adequate reflection of circumstances included in the total object of proof. Reliability of evidence can be confirmed:

1) by obtaining the evidence from a reliable source of information;
2) by comparing several pieces of evidence;
3) by evaluating the total weight of evidence in the case\(^10\).

Sufficiency of evidence. In every particular case, sufficiency of evidence is evaluated individually.

Sufficiency of evidence is a quality of the total weight of evidence necessary to resolve the case. Evidence is sufficient when a court of law can resolve a particular civil case relying on this evidence. Sufficiency is not a quantitative but qualitative attribute of the total weight of evidence collected\(^11\).

The literal interpretation of Part 2, Art.71 of the RF Commercial Procedure Code leads to the conclusion that evidence in a case must also have such a quality as interdependence of evidence.

In contrast to the RF Criminal Procedure Code (Art.73), the RF Code of Administrative Offences (Art.26.1), the RF Commercial Procedure Code does not contain a list of circumstances to be ascertained in each case considered by a commercial court (i.e., the total object of proof is not defined). This is stipulated by a variety of cases considered in the commercial court proceedings. At the same time, in the doctrine of civil procedure there is a model according to which all material facts established in the resolution of the case can be divided into several types.

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1. **Facts of legitimation**, which in their turn are divided into facts of active and passive legitimation. The former confirm the legal connection of the plaintiff with the subject matter of the dispute, while the latter show the legal connection of the defendant with the subject matter of the dispute. For example, in a claim for damage to property caused by a traffic accident, what has to be proved is the fact that the damaged property belongs to the plaintiff (the fact of active legitimation) and that the vehicle that has caused the damage belongs to the defendant (the fact of passive legitimation).

2. **Facts of cause of action** are facts showing that the plaintiff’s right has been violated or challenged and, therefore, needs judicial protection.

Failure to prove at least one of the above mentioned facts must result in the denial of claim. At the same time, what has to be taken into account is that the given classification of facts is conditional, and in a number of cases one and the same legal fact can be classified as relating to several types of the abovementioned facts. Thus, in a claim for contractual damages, the fact of making a contract is both the fact of legitimation and the fact directly generating law.

Defining such concepts as “total object of proof”, “limits of proof” have caused numerous discussions in the procedural doctrine.\(^{12}\)

Circumstances to be proved are believed to be understood as the sum total of all circumstances to be established for the resolution of the case in a court of law. These facts can include not only juridical facts but also the so-called “evidentiary facts”, i.e., facts not stipulated by hypotheses of rules of law, but, nevertheless, relevant to a particular case (e.g., the alibi of a person who is brought to justice for an administrative offence).

It is important to mention that within the framework of court proceedings, not only material, but also procedural legal facts must be proved. For example, the person that has filed the claim for interim measures must prove the grounds for them to be taken within Part 2, Art.90 of the RF Commercial Procedure Code. The person moving for distribution of legal costs in his/her favour must prove that these expenses have been incurred. Prof. V.V.Yarkov has proposed the concept of local objects of proof including facts that must be established in resolving the issue of performing a particular procedural action.\(^{13}\)

One should take into account that the total object of proof includes circumstances of the case but not rules of law applicable in the case. The content of rules of law does not have to be proved by persons involved in the case because in this pro-

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\(^{13}\) Ibid., p. 139.
cess, there is an axiom of law in action — “the court knows the law” (juria novit curia). In the RF Commercial Procedure Code it is found in Part 1, Art 168, based on which, when passing a decision, the commercial court independently determines what laws and other normative legal acts should be applied in the case.

At the same time, a party to the proceedings has the right to propose a certain interpretation of rules of law, to ask the court to apply or not to apply them (Part 1, Art 41 of the RF Commercial Procedure Code). Such an activity undoubtedly has the legal procedural significance, but it is not covered by the concept of judicial proof by evidence.

The general rule of distributing the burden of proof is found in Part 1, Art 65 of the RF Commercial Procedure Code and consists in the obligation for every person involved in the case to prove circumstances to which this person refers as grounds of their demands, objections, arguments.

At the same time, for example, in cases arising from public legal relationships there is another rule protecting a weaker party. According to this rule, the obligation to prove circumstances that constituted a ground for state organs, local self-government bodies, other organs and officers to pass the disputed acts, decisions, to commit actions (or omissions) is laid on the relevant organ or officer.

In commercial procedure there are also circumstances that do not require any proof.

First, facts of common knowledge do not have to be proved. Certain circumstances can be recognized to be common knowledge if they are available to general public, including the court panel considering the case. Such facts are usually divided into world renowned, known on the RF territory, locally known (i.e., fires, floods). Such common knowledge must be included in the court judgement (in case of future appellate, cassational, or supervisory complaint agains the judgement).

Second, pre-judicial facts, i.e., facts established by the judicial act that has entered into legal force, do not need to be proved (Parts 2-4, Art. 69 of the RF Commercial Procedure Code). Under the general rule, pre-judicial facts cannot be refuted if the judgement of court sentence that established them have not been reversed in accordance with the procedure established by the law.

But pre-judicialness has its subjective and objective limits. The subjective limit consists in the fact that prejudice is effective until the same persons or their legal successors act in different cases. Objective limit outlines the sum total of all the facts established by the judicial act that has entered into legal force and not requiring any proof when another case is considered.

For pre-judicialness of judgements and sentences different object limits are determined.
Circumstances established by a judicial act of a commercial court that has entered into legal force are not proved again when another case is considered with the same persons involved. The decision of a court of general jurisdiction on an earlier civil case that has entered into legal force is binding on the commercial court considering a case related to relevant circumstances established by the decision of the court of general jurisdiction. A court sentence in a criminal case is binding on the commercial court only in relation to questions about whether certain actions have been committed and whether they have been committed by a certain person. (Part 2-3, Art. 69 of the RF Commercial Procedure Code).

Of interest is the question about prejudicial significance in commercial procedure of judicial decisions of courts of general jurisdiction in cases of administrative offences. Ruling of the Plenum of the RF Supreme Commercial Court No.10 as of June 02, 2004 (with amendments) seems to lead to the legal view according to which court rulings in cases of administrative offences do not have prejudicial significance, they are only “taken into account by commercial courts”. Another approach is found in para.8 of Ruling of the Plenum of the RF Supreme Court No. 23 (December 19, 2003) “On a judicial decision” according to which judicial acts of commercial courts in cases of administrative offences by analogy have the same prejudicial significance as sentences in criminal cases.

Circumstances recognized by the parties to a dispute. Under Parts 2, 3, Art. 70 of the RF Commercial Procedure Code, circumstances recognized by the parties as a result of an agreement reached between them are accepted by the commercial court as facts not requiring further proof. The agreement reached in court or out of court concerning such circumstances is confirmed by their written statements and included in the court records.

The recognition by a party to a dispute of circumstances which are grounds for the other party’s demands or objections saves the other party the trouble of having to prove these circumstances. The fact of recognition of these circumstances by a party is included in the court records by the commercial court and verified by the party’s signature. The written statement of recognition is deposited into case materials.

A special innovation in commercial proceedings is part 3.1, Art.70 of the RF Commercial Procedure Code. After Part 3.1. was introduced into Art.70 of the RF Commercial Procedure Code, for the first time in the history of domestic civil procedure there appeared a legal rule according to which recognition of circumstances that are part of the total object of proof in a case began to be seen in connection with the passive conduct of a party to a dispute.

Similar rules of civil procedural law used to concern only certain types of evidence. Thus, Art. 444 of the Charter of Civil Proceedings states that if a party refus-
es to submit a required document, when this party does not deny having it, the court can recognize as proved the circumstances to confirm which the reference to the document has been made\textsuperscript{14}. Under Part 3, Art 79 of the current RF Code of Civil Procedure, if a party avoids participating in expert examination, submitting necessary materials and documents for expert examination and in other cases when due to circumstances of the case and without this party the expert examination is impossible, the court (depending on which party avoids expert examination and what it means to this party) has power to recognize the fact to ascertain which the given examination was ordered as established or refuted.

Interestingly enough, according to E.A.Nefedyev, before the October Revolution, courts made the conclusion that a party recognizes facts provided by the opponent in the proceedings because the party does not challenge them, i.e., the courts proceeded from silent recognition of such facts. At the same time, the possibility to classify such conduct did not result from the literal interpretation of general provisions of the Charter of Civil Proceedings and caused principal objections in the doctrine\textsuperscript{15}.

Interpreting Part 3.1, Art. 70 of the RF Commercial Procedure Code, one should note that procedural legal facts with which the relevant norm connects the court’s conclusion about a party’s recognition of factual circumstances of the case belong to procedural (juridical) actions.

A procedural action is believed to the conduct of a subject of procedural law that gives rise to certain consequences \textit{irrespective of the will} (italics mine — R.O.) of the relevant subject\textsuperscript{16}. In this case, the passive conduct of a party to a dispute (non-submission of the answer to a claim, non-submission of evidence) can result in a procedural consequence consisting in the court’s finding certain legal facts recognized by that party. In our opinion, this is the consequence of non-use of procedural rights by the person involved, and this consequence is not connected with the subjective aspect of this passive behaviour (i.e., establishing whether such behaviour was intentional or not).

If one can assume that certain behaviour, by the intention of the law-maker, is viewed as expressing a person's will to recognize factual circumstances in a case (owing to presumption or fiction), it is unclear why, under the current laws, this


behaviour can result in different legal circumstances, depending on the other party’s behaviour and even the court’s discretion.

What is meant here is, among other things, that according to the meaning of Parts 1, 3, Art 156 of the RF Commercial Procedure Code, passive behaviour can result in consideration of the case on its merits in the absence of the defendant who has not shown interest to participation in the process, and the claim will be denied on the basis of the court’s evaluation of evidence as to its admissibility, relevance, reliability and sufficiency. In this case the court will not make any conclusions about the recognition of facts by the defendant.

Therefore, the defendant’s passive behaviour can indicate that he/she regards the claim against him/her as groundless and does not want to spend time and money for protection against such a claim, meaning that the defendant can be ordered to pay legal costs irrespective of the outcome of the case (Part 4, Art. 131 of the RF Commercial Procedure Code)

Such a vision is confirmed by the position reflected in para. 20 of the Minutes of the Roundtable meeting devoted to the issues of applying the RF Commercial Procedure Code with the participation of the Deputy Chair of the RF Supreme Commercial Court T.K. Andreyeva on March 18, 2011, according to which the rule of Part 3.1, Art. 70 of the RF Commercial Procedure Code does not relieve the court of responsibility evaluate the sum total of evidence submitted by the plaintiff. In other words, Part 3.1, Art. 70 does not relieve the party of responsibility to prove circumstances to which it refers as on grounds for its demands and objections (Part 1, Art. 65 of the RF Commercial Procedure Code). At present, in our opinion, one can refute an interpretation of Art. 70 of the RF Commercial Procedure Code consisting in the assertion that after the introduction of Part 3.1 in Art. 70 of the RF Commercial Procedure Code, the general rule of distributing the burden of proof begins to work only after the opposite party, directly or indirectly, challenges a circumstance underlying demands or objections of the opponent.

Here we clearly see the difference of recognition by way of the party’s submitting a written document or making an oral statement about it for the court records from recognition under Part 3.1 in Art. 70 of the RF Commercial Procedure Code. According to Part 4 of the given Article, the court has power not to accept the first kind of recognition only if the court has evidence giving grounds to believe that recognition of factual circumstances by this party was committed in order to con-

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18 See, e.g., O.N. Shemeneva. Neosporennye obstoyatel’stva v arbitrazhnom protsesse.[Uncontested circumstances in commercial litigation.]//Commercial and civil procedure. 2011, No. 2.
ceal certain facts or under the influence of deceit, violence, threat, error, which underlines the willful nature of the relevant recognition. Pursuant to Part 5, Art. 70 of the RF Commercial Procedure Code, circumstances recognized and confirmed by the parties in accordance with the given article, in the case they were accepted by the commercial court, are not checked by the court during further proceedings.

On the contrary, passive behaviour may not lead to the conclusion about the recognition of circumstances constituting the object of proof even when the court does not have any evidence at its disposal proving concealment of certain facts, deceit, violence, threat or error on the part of the party to the dispute unless relevant circumstances are confirmed by the evidence in the case. This is explained by the fact that passive behaviour of a party to a dispute does not relieve the party of obligation to prove its claims and/or objections, and the court is still obliged to check circumstances to which the party refers, i.e., to evaluate relevant circumstances as to their admissibility, relevance, reliability and sufficiency.

Thus, the solution of the problem of classifying passive behaviour as recognition of a fact depends, to a great extent, on the evaluation of the evidence in the case by the court.

The passive behaviour of the respondent can be explained by the fact that he/she knows about the claimant’s losing interest in the factual participation in the case because under para. 9 Part 1 Art. 148 of the Commercial Procedure code of the RF, a commercial court leaves the claim without consideration if after the claim has been accepted by the court, the claimant did not appear in court again, including ignoring the summons by the court, and did not file the motion to hear the case in his/her absence or about postponing the court hearing, and the respondent does not demand to have the case considered on its merits.

Therefore, the conduct stipulated in Part 3.1 Art. 70 of the RF Commercial Procedure Code can be referred to such a kind of legal facts as procedural offences. On the basis of the definition of a procedural offence, the respondent’s failure to appear in court, non-submission by the respondent of the answer to the claim and evidence refuting the claim can lead to the court’s conclusion about the respondent’s recognition of the circumstances to which the claimant is referring, irrespective of the respondent’s will. The respondent’s will in respect to the recognition of the relevant

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circumstances, under part 3.1 Art 70 of the RF Commercial Procedure Code is not ascertained because it does not have any legal significance\textsuperscript{20}.

Such understanding, in our opinion, helps to show real aims of introduction of this legal innovation into the RF Commercial Procedure Code. We believe that in the first place, drafters of the innovation tried to discipline defendants ignoring requirements of the law about preliminary disclosure of evidence, giving an answer to a claim, and not to introduce a new restriction for establishing truth into the modern commercial proceedings\textsuperscript{21}. Non-submission or untimely submission by the respondent of arguments and evidence in the case can now serve as a ground for certain legal consequences. These consequences consist in the court’s conclusion that certain legal facts are recognized by the respondent on condition that relevant facts are confirmed by the evidence in the case.

It is important to note that such a conclusion does not usually have a great practical significance because, in contrast to the procedure in common law countries, in the domestic commercial proceedings there are no full-fledged preliminary proceedings in a civil case with a lot of various detailed procedures within which, before the court starts to consider the case, a range of facts recognized by the parties is determined\textsuperscript{22}. In domestic commercial proceedings, the conclusion about recognition of circumstances by a party will be made on the stage of court proceedings with the account of conclusions that the court has made after examining other evidence in the case. For this reason, the recognition in question can hardly make the court’s procedural activity easier. As a matter of fact, as a rule, the court could have easily considered the case on its merits and satisfied or denied the claim (depending on the quality on evidentiary material submitted by the active party of the dispute), not making any conclusion about recognition of facts by a person that has not undertaken any actions to defend his/her actions in the proceedings.

\textsuperscript{20} It is another matter that if within the framework of the proceedings in the appellate court a party substantiates the impossibility for the party to submit to the trial court the evidence refuting the other party’s evidence, this first party has the right to present such evidence in the court of the appellate instance and thus to refute the conclusion about the recognition by this party of certain legal facts (such a legal view is reflected, e.g., in para.11 of the Recommendations of the Scientific Consultative Council at the Federal Commercial Court of the Ural District after their session on Nov 10-11, 2011 in Yekaterinburg). It should be taken into account that this is a general rule for presenting additional evidence to the appellate court, which is a rule of law applied on the second stage of the commercial litigation procedure, and it is independent from the rule of part 3.1 Art. 70 of the RF Commercial Procedure Code.

\textsuperscript{21} Unfortunately, in the explanatory note to the relevant draft law, the purposes for the introduction of part 3.1. Art. 70 of the RF Commercial Procedure Code were not clarified (see the official site of the RF State Duma http://asozd2.duma.gov.ru/main.nsf/%28Spravka%29?OpenAgent&RN=211568-5&02).

In spite of what has been already said, presence in the current RF Commercial Procedure Code of fictions of proper notification of a person involved in the case (Part 4, Art. 123 of the RF Commercial Procedure Code)\(^2\) has resulted in the formation of rather careful approaches in court practice as to the application of Part 3.1, Art. 70 of the RF Commercial Procedure Code.

Thus, para. 11 of the Recommendations No.2/2011 of the Scientific Consultative Council at the Federal Commercial Court of the Ural District (following the results of the meeting on November 10-11, 2011 in Yekaterinburg) reflects the legal view according to which Part 3.1, Art. 70 of the RF Commercial Procedure Code is applied on conditions of notifying a party about the start of the proceedings (among other things, under the rules in Part 4, Art. 123 of the Code), and the party’s committing certain actions within the framework of the given procedure, with these actions enabling the court to regard circumstances that are included in the object of proof in the case as recognized by the party (e.g., giving an answer not refuting certain circumstances of the case, factual participation in the court proceedings without raising any objections as to particular legal facts).

This cautious and balanced approach is explained, in our opinion, by the necessity to provide a party to a dispute (the respondent in the first place) a real opportunity to challenge and disagree with the arguments, evidence of the opponent in the proceedings.

Only if such an opportunity existed can intentional or indifferent behaviour of a person lead to the court’s making a conclusion that the party has recognized the circumstances constituting the object of proof in the case. This opportunity is obvious when the respondent has participated in the procedure of considering a dispute — if he/she has written an answer or came to the court hearing.

Presumptions are of major importance in distributing the burden of proof in the case, i.e., assumptions about presence or absence of certain legal facts. Presumptions exist to simplify the process of proof by evidence in the court. They are established in the interests of a particular party to a dispute but can be refuted by the opposite party. It is believed that irrefutable presumptions do not exist.

Presumptions can be divided into legal, i.e., directly formulated in the law (e.g., the presumption of innocence is contained in Art. 1.5 of the RF Code of Administrative offences), and factual (e.g., the presumption of legal ability of a person of majority age involved in the case).

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\(^2\) Thus, under part 4 Art. 123 of the RF Commercial Procedure Code, persons involved in the case and other participants of the commercial proceedings are believed to be properly notified by the commercial court if, in spite of the mail notification, the addressee did not appear to collect the copy of the judicial act that was sent by the commercial court in accordance with the established procedure, and the mail office notified the commercial court about that; if a copy of the judicial act was not delivered because of the addressee’s absence at the said address, stating the source of this information.
ACCESS TO JUSTICE AND THE PROCEDURE OF APPLYING TO FEDERAL COMMERCIAL COURTS FOR JUDICIAL PROTECTION

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The modern legal system of Russia is being constantly developed in terms of both renewing and updating legislation that regulates private law relationships and in terms of modernizing public law mechanisms envisaging procedures for protecting violated rights to one extent or another.

The system of commercial courts of the Russian Federation — its establishment in the early 1990s, its operation and development — is, perhaps, the best example of how one can create a brand new model of considering economical disputes in the shortest time possible, in a difficult political situation, in a country having no experience in resolving disputes between actors in a free economic market.

The Russian Federation commercial courts are state courts considering economical disputes between business entities. And the existing commercial courts system is generally acknowledged as an example of effective justice in the economic sphere within such a large country with numerous geopolitical peculiarities as the Russian Federation. This results from the fact that the commercial court system is “young” and, consequently, progressive. This system is flexible and dynamic enough to perceive the most relevant issues of court practice quickly enough. Besides, for such a large country, the commercial court system is rather small. Commercial courts comprise only 82 courts of first instance (and only half of them can be considered big), 20 courts of appellate instance and 10 federal district commercial courts — courts of cassation.

Thus, virtually, all commercial court practice is centered around 20 appellate and 10 cassational courts, and the Supreme Commercial Court of the Russian Federation. There is a good interaction and electronic document flow among the courts.

In 2011, an opportunity was introduced to apply to a court for judicial protection through an electronic system for filing claims, which is actively and effectively used. By means of the system, one can file not only a claim, but also an appeal against judicial decisions in a dispute. Given the geographical position of Russia, the importance of these innovations can hardly be overestimated, some territories of the country being very remote from regional centers.
The procedure of applying to commercial courts of the Russian Federation is, in fact, as accessible as possible in the existing legal system with account of economic possibilities of the state and society.

In order to file a claim in electronic form, one needs to go through a simple registration procedure in the “Electronic Guard” system available at the site of the Supreme Commercial Court of the Russian Federation. After the registration, a personal account is created, and the person becomes a user of the e-system of filing documents. To register in the system, the following identifying data for an individual or a legal entity should be provided: name, taxpayer identification number (INN), primary state registration number (OGRN), place of registration, place of domicile, detailed contact information.

Any paper documents to be filed to a commercial court in e-format should be converted into electronic format via data scanning devices: all documents, including the signed claim, are scanned black and white or grey in the Adobe PDF format to secure all authenticity features.

Besides, “Commercial Court Electronic Records” database available at the site of the Supreme Commercial Court of the Russian Federation enables any person to become familiar, in real-time mode, with all case-related judicial acts and information about the scheduled court sessions. It contains information on more than 8 million decided cases, and about 50 million judicial acts. Thus, access to judicial protection in the Russian commercial litigation is determined, among other things, by maximum openness of information on cases considered by commercial courts.

The new e-format opportunities of filing documents to the court, getting acquainted with judicial acts, and monitoring case progress are daily used by a large number of people all over the country, which confirms the increased effectiveness of justice in the commercial courts system and access to judicial protection in all regions of Russia.

The introduction and effective use of the mechanism of conducting trials via videoconferencing system has become an important step in tackling the problem of access to judicial protection.

The most striking example in this respect is the personal experience of conducting judicial proceedings by means of videoconferencing: the plaintiff was in Yekaterinburg, the defendant was in Krasnoyarsk, and the cassational complaint proceedings were held by the Federal Commercial Court of the East Siberian District in Irkutsk. Another example of using a videoconferencing system in court proceedings is the case brought before the Commercial Court of the Sverdlovsk Region (in Yekaterinburg) where the plaintiff carrying out entrepreneurial activity in Yuzhno-Sakhalinsk filed a suit against the defendant on the territory of Sverdlovsk Oblast (Region).
A look at the map of Russia gives a chance to see that the litigants would have had to cover the distance of several thousand kilometers to be physically present at the hearing.

The only condition for conducting a court hearing with the use of a videoconferencing system is the necessary equipment in the relevant court. At present, such equipment is installed in all commercial courts of Russia. Failure to conduct a hearing can only result either from some technical problems or ill-timed submission of the petition for such proceedings, when properly equipped courtrooms are being used to hear the cases with parties whose petitions have been approved earlier. Provided a petition to conduct a hearing via videoconferencing system is filed simultaneously with filing a claim, the court, when scheduling its session, will choose the date taking into account the possibility of conducting the hearing in the mode required.

Undoubtedly, one of the most important criteria of access to justice is convenience of a judicial system. What is meant here is that it is not just specific procedural aspects of judicial proceedings that matter, but, in a broad sense, conditions convenient for both litigants and courts. The innovations introduced into the modern commercial litigation (such as submitting documents, including claims, in e-format, creating electronic catalogue of commercial court cases, real-time posting of all passed judicial acts in the Internet, which is a chance for any person to get acquainted with the chronology of a particular case, including all the data about additional case-related documents and interlocutory court orders, mandatory audio recording of court proceedings, hearings through a videoconferencing system) significantly increase the level of access to justice in the economic sphere.

Another criterion of access to justice in the sphere of protection of rights and legal interests in the area of entrepreneurial and other economic activities is rather short time limits for disputes to be considered, relatively small amounts of stamp duties, and a flexible system making it possible to delay a duty payment or to pay it in installments. Thus, the minimum amount of stamp duty for filing property claims is 2,000 roubles, the maximum amount being 200,000 thousand roubles. The amount of stamp duty for filing non-property claims, including claims for recognition of rights, claims for specific performance, lawsuits arising from entering into, amending or terminating agreements, along with disputes over nullifying transactions, is only 4,000 roubles.

As regards promptness of the Russian justice system, the following considerations should be noted. The total duration of a court hearing in a commercial court is three months, and one month is given for lodging an appeal. Thus, the period between filing a claim and receiving a writ of execution is not more than four months. Furthermore, it should be noted that a considerable number of cases are
decided before expiration of the statutory three-months period — as a rule, in 1,5 or 2 months.

Of course, in a complex case involving many participants and a considerable volume of evidentiary material, the time period for the court of first instance to consider the case is extended from four to six month. And the respective appeal, if filed, will be considered within the next two months. However, the majority of cases are decided within much shorter time periods, and the duration of court proceedings in “complex” cases does not normally exceed six months.

In addition, it should be noted that the number of cases considered with violations of statutory time limits is reducing annually, with the violations in question being insignificant.

Obviously, just like in any other court system, in the system of commercial courts there is occasional red-tape, unreasonable delays and so forth, but it should be emphasized once again that the number of such cases is decreasing every year due to, among other things, the enactment of Federal Law of April 30, 2010, No.68-FL “On Compensation for Violation of Right to Judicial Proceedings Within a Reasonable Time Limit Or the Right to Execution of Judicial Act Within a Reasonable Time Limit”.

From a practical standpoint, there can be two conditions for the exercise of the right to apply to a commercial court:

- interest in judicial protection of one’s own (or, if established by law, somebody else’s) rights and legal interests. And the interest of an applicant to the court in receiving judicial protection and in the subject-matter of the dispute (in respect to which this form of protecting a civil right is chosen) is regarded as a sort of legal presumption;
- compliance with the procedure of applying to a commercial court (a claimant should simply file a claim to a commercial court in accordance with the established procedure (Art. 125, 126 of the RF CPC)).

The procedure of applying to a commercial court for protection is not very complicated. A person whose rights or legal interests in the sphere of entrepreneurial activity have been violated should choose the right court to apply to, pay the stamp duty, deliver a copy of the claim and the attached documents to the respondent.

Technically, the procedure of applying to a commercial court is rather simple: a claim with attachments is either mailed to a respective commercial court or submitted directly, as a rule, through the registry or another similar authorized department.

When filing a claim in electronic form, a claimant must fill in all the sections of the e-form correctly and go through all the stages of on-line registration. After the login name and password are entered, all the necessary stages gone through, and all
the fields of electronic document filled in, the claim is considered to be filed to the commercial court and given a registration number.

Generally, a claim is filed to a commercial court of the constituent entity of the Russian Federation at the respondent’s location or residence. As the territorial organization of the system of commercial courts is similar to the division of the Russian Federation into constituent entities (republics, krays, oblasts/regions, etc.), the first instance court is the commercial court of the respective constituent entity of the Russian Federation (the Commercial Court of Sverdlovsk Oblast, the Commercial Court of the Krasnoyarsky Kray, the Commercial Court of the Chechen Republic, Moscow City Commercial Court and so on).

Thus, if a claimant and a respondent carry out entrepreneurial activities on the territory of one and the same constituent entity, their claim will be considered by the court located in the regional (republican) centre. In the case a claimant and a respondent are registered on the territory of different constituent entities of the Russian Federation (for instance, the claimant is registered in Moscow and the respondent — in Krasnoyarsk), the claim will be considered by the court at the location of the respondent (the Commercial Court of the Krasnoyarsky Kray).

The law provides for the cases when the right to choose a court belongs to the claimant. For instance, a claim to the respondent whose location or place of residence is not known can be filed to a commercial court at his property location or at his last known location or place of residence in the Russian Federation; a claim to respondents located or residing on the territories of different constituent entities of the Russian Federation is filed to a commercial court at the location or place of residence of one of respondents; a claim arising from a contract that specifies the place of its execution can also be filed to a commercial court at the place of execution of the contract; claims for damages caused by a collision of vessels, for marine salvage award can be filed to a commercial court at the respondent’s location or the home port of the respondent’s vessel, or at the place where the damage was inflicted, etc., (Art. 36 of the RF Commercial Procedure Code).

Under Art. 36 of the RF Commercial Procedure Code, the right to choose a commercial court competent to hear a case belongs to a claimant.

The law also regulates cases of exclusive jurisdiction where a dispute can be heard by a particular court only. Thus, under Art. 37 of the RF Commercial Procedure Code, claims for title to immovable property are filed to a commercial court at the place where the said property is located; claims for rights to marine vessels and airborne vessels, inland navigation vessels, space objects are filed to commercial courts at the place of their state registration; a claim to a carrier arising from a contract for carriage of goods, passengers and their baggage, including the cases when the carrier is one of respondents, are filed to a commercial court at the loca-
tion of the carrier; a claim to declare a debtor bankrupt is filed to a commercial court at the location of the debtor, etc. (Art. 38 of the RF Commercial Procedure Code).

General or alternative jurisdiction can be changed by mutual agreement of parties. Among the most common issues resolved by courts are the issues of determining jurisdiction where there is an agreement on changing statutory territorial or alternative jurisdiction between the parties. Negotiated jurisdiction is based on the principle of optionality and allows the parties to determine territorial and alternative jurisdiction at their own discretion.

The form of agreement on jurisdiction is not stipulated in the RF Commercial Procedure Code or the RF Civil Procedure Code. (In this connection, an agreement on changing statutory territorial or alternative jurisdiction can be made in any form: either as a separate agreement or as an arbitration clause of the main agreement. An agreement to change general rules of jurisdiction can be made prior to the moment the court accepts a claim for consideration, that is prior to commencement of proceedings, namely, before the date the court rules on accepting a claim for hearing and initiating proceedings on a case. An agreement made after the said dates entails no legal consequences and should not be taken into account by the court when deciding upon the claim's jurisdiction.

If a claimant, when applying to a court for judicial protection, in his/her claim, refers to change of jurisdiction based on an agreement with a respondent, the court, while deciding whether or not to accept the claim for consideration, needs to establish these circumstances, namely, to make sure such an agreement exists, which clearly confirms that the parties have agreed to have their disputes resolved by this particular court. And the court must establish the fact of concluding the said agreement.

The decision on accepting a claim for consideration is made within five workdays. The court ruling on accepting the claim for consideration and scheduling the hearing is posted on the site of the Supreme Commercial Court of the Russian Federation in the commercial courts’ case files not later than on the next day after the judge signs the judicial act.

If a claim does not conform to the established form and content (Art. 125 of the RF Commercial Procedure Code) or the attached documents are lacking (Art. 126 of the RF Commercial Procedure Code), the claim acceptance is deferred until all the defects are eliminated. If the defects are not eliminated within the time limits prescribed by the court, the claim is returned to the claimant.

Apart from the reason mentioned above, in the RF Commercial Procedure Code there are three more grounds for a court to pass the ruling to return the claim:

— a claim is returned if the case is not within the jurisdiction of a particular commercial court;
— if the motion to defer payment of a stamp duty, to pay the stamp duty in installments, or to reduce its amount is denied;
— if a claimant files a motion to withdraw his claim prior to the court’s accepting it for consideration.

It should be noted that the return of a claim is no obstacle for re-applying to the court with the same claim. For instance, a claimant who failed, for a particular reason, to eliminate the defects and provide the necessary documents can apply to the commercial court again after the claim is returned.

If a claim complies with the requirements to form and content established in the RF Commercial Procedure Code, a commercial court is obliged to accept it for consideration and pass the respective ruling for proceedings to be commenced. The court ruling specifies the preparation for court proceedings, actions to be performed by the parties to the dispute and their time limits, the address of the official site of the commercial court in the Internet, telephone numbers, fax numbers and the commercial court’s e-mails to be used to receive information on the case under consideration.

Unlike the Civil Procedure Code, the current Commercial Procedure Code does not provide for such an institution as denial to accept a claim. When accepting a claim for consideration, a commercial court is authorized to pass only three types of rulings: on accepting a claim for hearing and initiating judicial proceedings, on deferring the acceptance of a claim and on returning a claim.

Thus, even if a claim is not within the court’s jurisdiction or if the claim is an identical claim, the commercial court will have to accept it for consideration, provided it meets the requirements to form and content of a claim stipulated in the RF Commercial Procedure Code and there are no grounds to return it.

Under Art. 125 of the RF Commercial Procedure Code a claim must contain information on:

1) the name of the commercial court to which the claim is filed;
2) the name of the claimant, his/her location; for a citizen, the place of residence, date and place of birth, place of employment or date and place of registering as a sole proprietor; telephone numbers, fax numbers, e-mail addresses;
3) the respondent’s name, location or place of residence;
4) the claimant’s demands against the respondent with reference to relevant laws and other statutory acts, and, when filing a claim to multiple respondents, demands against each of them;
5) the circumstances on which the claim is based and the proof of the said circumstances;
6) the value of claim if it is subject to evaluation;
7) calculation of the amount to be recovered or contested;
8) information about the claimant’s complying with the complaint procedure or any other pre-trial procedure for settlement of claims if such a procedure is envisaged by the federal law or an agreement;

9) any measures taken by a commercial court to protect proprietary interests before the claim was filed;

10) the list of attached documents.

It is a legal requirement that a claim should contain minimum information on, for instance, the respondent and the respondent’s location. Applying to a court, one should give detailed contact information about both the claimant and the respondent. For instance, postal addresses, telephone numbers, fax numbers, e-mail addresses, telephone numbers of the claimant’s representative, and telephone numbers of the respondent’s representative, if available.

This will enable the court to duly issue court summons and provide prompt communication with the parties to the case, to solve, if necessary, any issues arising during the proceedings, for instance, those related to some technical aspects of ordering expert examination and its payment, correcting some technical errors and clearing out misunderstandings.

The Commercial Procedure Code makes it mandatory, when applying to a court, to attach to the claim a set of documents specifically enumerated in Art. 126 of the RF Commercial Procedure Code. In accordance with this rule, the attachments should contain:

1) a return of service or other documents confirming service upon other parties to litigation of copies of the claim and a set of attached documents that other parties to litigation lacked;

2) a document confirming payment of stamp duty in the established amount and under established procedure or the right to duty payment relief, or the motion to defer payment of a stamp duty, to pay the stamp duty in installments or to reduce its amount;

3) documents confirming circumstances serving as the ground for the claimant’s demands;

4) copies of the certificate of State Registration as a legal entity or sole proprietor;

5) a power of attorney or other documents confirming the authority to sign the claim;

6) copies of a commercial court’s ruling on protection of proprietary interests before filing the claim;

7) documents confirming the claimant’s compliance with the complaint procedure or any other pre-trial procedure for settlement of claims if stipulated by the federal law or an agreement;
8) a draft agreement if there is a claim to compel a party to enter into an agreement;

9) extracts from the Union State Register of Legal Entities or the Uniform State Register of Individual Entrepreneurs (Sole Proprietors) stating the location or the place of residence of the claimant and the respondent, and (or) confirming the status of an individual as a sole proprietor, or a document confirming termination of his activity as an individual entrepreneur, or any other document confirming the said information or its absence. These documents should be obtained no sooner than 30 days prior to the claimant’s application to the commercial court.

Thus, the list of requirements to a claim and the attached documents is rather short. A person applying to a commercial court for judicial protection is informed as to the date of the hearing in five days after filing the claim. As a rule, a court holds a hearing within one month (give or take two weeks depending on the judge’s workload), and from this point forward, the parties exercise their right to judicial protection while their case is considered in court.
The institution of judicial acts review dates back to the Roman law. However, any state or any international organizations consider the possibility to challenge judicial acts as one of the guarantees, a constituent component of the right to judicial protection; it is stipulated by the necessity to eliminate a judicial error which may occur during court proceedings\(^1\).

Unlike other countries, including those with the continental system of law, Russia has three separate judicial subsystems\(^2\), each having its own, independent from others, procedures of judicial acts review. Although there is a lot of debate over the necessity to merge all these types of courts into a single judicial system, we should agree that these three judicial subsystems reflect the global trend of dividing courts into courts

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The Constitutional Court has repeatedly stated that the right to judicial protection presupposes the protection of rights and legitimate interests of the citizen not only from the arbitrariness of legislative and executive bodies but also from erroneous judgments; the possibility of review by higher courts in some form (taking into account the peculiarities of each type of proceedings) serves as an effective guarantee of the protection and should be provided by the state (see, for example, Ruling No.1-I dated January 17, 2008).

\(^2\) This is about the system of courts of general jurisdiction with the Supreme Court of the Russian Federation as its highest judicial body, state commercial courts (taking into account the rules of the Russian legislation which use this term and refer such a type of courts to the state courts) with the Supreme Commercial Court of the Russian Federation as its highest judicial body and judicial bod-ies of the constitutional control and charter (constitutional) courts of the RF constituent entities and the Constitutional Court of the Russian Federation.
of general jurisdiction and courts of special jurisdiction. Of utmost importance, as we see it, are the issues of coordinating the work of courts of general jurisdiction and commercial courts, the highest judicial bodies of these subsystems.

The contemporary stage of the development of commercial courts in Russia which handle economic disputes dates back to 1991; it is connected with the adoption of three Commercial Procedure Codes of the Russian Federation in 1992, 1995, and 2002. The current procedure of judicial acts review in this system is unique, and it is the outcome of the judicial reform in Russia which was conducted considering global judicial standards and information technologies. The major trends in the conception of development of commercial procedure legislation concerning judicial acts review were defined by the Federal Special-Purpose Program “The Development of the Russian Judicial System” for 2002-2006 and 2007-2012, which have been implemented through the Commercial Procedure Code of the Russian Federation. For example, Russia has created appellate commercial courts, adopted the rules of considering a cassation complaint only after appellate proceedings, and has significantly modernized supervisory proceedings.


Thus, the Russian commercial procedure has four types of judicial acts review. A judicial act which has not entered into legal force yet can be challenged only

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4 Despite certain trends to uniformity due to the adopted Federal Law No.353-FA dated December 9, 2010, the procedure of judicial acts review in courts of general jurisdiction and commercial courts is significantly different and to some extent it is accounted for by the historically developed structure of these judicial subsystems and the questions of generic jurisdiction. These differences concern both the number of review forms and their content. In particular, unlike the commercial procedure, the RF Civil Procedure Code provides for several instances of cassation (p. 1 Part 2 Art. 377, p. 3 Part 2 Art. 377 of the said Code), the right of a person involved in the proceedings to appeal by way of cassation depends on the opinion of the judge in cassational proceedings concerning the grounds (or the lack thereof) for challenging judicial acts by way of cassation (Art. 381 of the said Code).

5 The unique character means the four-tier model of the instance structure while the generally recognized is the three-tier system. Its main provisions are stipulated in Recommendation No. R (95)5 on the introduction and improvement of appellate proceedings in civil and commercial cases which was adopted by the Committee of Ministers of the member-states of the Council of Europe dated February 7, 1995.
through the appellate procedure. The judicial acts review by the cassational procedure, the supervisory procedure and the review of judicial acts due to newly discovered circumstances are acceptable only in respect to judicial acts which have come into force.

The judicial acts review in appellate and cassational proceedings is considered to be a simple (ordinary) procedure of review.

The peculiarities of supervisory proceedings determined by their aims as well as by the role and functions of the RF Supreme Commercial Court in the system of commercial courts enable scholars to consider supervisory proceedings as an exclusive method of judicial acts review. The introduction of a preliminary procedure of reviewing supervisory complaints (reports) which is not covered by some obligatory procedural rules, and a certain degree of motivation of an interested party to review judicial acts through supervisory proceedings are aimed to prevent the court of supervisory instance from becoming an ordinary judicial instance and to guarantee that the legal certainty requirements of the review procedure through supervisory proceedings are observed.

The procedure of judicial acts review due to new or newly discovered circumstances is an out-of-instance method of review. Legal scholars consider this type of review to be a separate function of courts to control their judicial acts, and generally this type of review is not connected with a judicial error.

The increased role and significance of interpretation of rules of law by the RF Supreme Commercial Court for commercial courts proceedings has led to the necessity to essentially reform this method of judicial acts review. Along with the notion of “newly discovered circumstances” introduced in 2010, grounds to review cases “due to new circumstances” have been established. In particular, among the new circumstances, the law distinguishes decisions or amendments to the Rulings of the Plenum of the RF Supreme Commercial Court (further — the RF SCC) or to the Rulings of the Presidium of the RF SCC in the practice of application of a rule of law if a corresponding judicial act of the RF SCC provides that judicial acts having entered into legal force can be reviewed on the basis of such a circumstance.

Thus, when the institution of “new circumstances” was introduced, it became clear that

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6 The decision of the court of first instance, awards of appellate and cassational courts as well as Rulings of the Presidium of the RF SCC may be challenged due to new or newly discovered circumstances provided there is a complaint of the interested person. In this case when the court of appellate or cassational instance or the Presidium of the RF SCC left the disputed judicial act without any changes or left one of the previously passed judicial acts in force, the review of the act which was left unchanged or in force due to new or newly discovered circumstances is made by the court which passed the disputed act.

7 This article does not cover methods (types) of the court control over judicial acts (to correct spelling or arithmetic errors, to take additional decisions or awards). It should be said that some form of self-control may be exercised by commercial courts of any instance.
this type of review would be directed at eliminating errors in interpretation of rules of law that were made by the court which passed the judicial act. Meanwhile, it is worth mentioning that legal views of the RF SCC may be a ground for reversing judicial acts by inspecting bodies. In this connection, if by the day when the RF SCC publishes (on its official site) its act containing legal views that may give grounds for the review of a judicial act due to new circumstances, the claimant still has the possibility to file a complaint against this judicial act to the appellate and (or) cassational court (considering the given time limit for such complaints), the complaint to review the judicial act due to the stated new circumstance is returned to the claimant.

The analysis of the legal regulation of issues concerning the correlation of methods of eliminating judicial errors, subjects initiating review proceedings, time limits for complaints, and the procedure of initiating appellate, cassational, and supervisory review gives a general impression of how the domestic system of review operates as well as how the right to judicial protection is guaranteed.

One of the latest significant reforms of judicial acts review proceedings in the commercial procedure in Russia was the prohibition to resort to a court of cassation without any preliminary appellate complaint. This prohibition was introduced in 2010. In particular, the RF SCC stipulates that any interested party may file a cassational complaint only if the decision of the commercial court of first instance that has entered into legal force has been considered in the commercial court of appellate instance or if the commercial court of appellate instance has refused to extend the time limit for filing an appellate complaint that the party has missed.

The provisions of the RF CPC on supervisory proceedings (Part 3 Art.292 of the RF CPC) also state that all existing opportunities to check the legality of judicial acts should be exhausted. At the same time, the interested party has the right to file a

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* See also Postanovlenie Plenuma Vysshego Arbitrazhnogo Suda RF “O primenenii arbitrazhnogo protsessual’nogo kodeksa RF pri rasmmotrenii del v arbitrazhnom sude apellyatsionnoi instantsii No. 36 [Ruling of the Plenum of the RF SCC “On the Application of the RF Commercial Procedure Code in Considering Cases in the Commercial Court of Appellate Instance” No. 36]. dated May 28, 2009, para. 23.

* As to decisions of the court of first instance which in accordance with the current procedural legislation may be challenged separately from challenging the judicial act that is the outcome of considering the merits of the case, the cassational examination is possible only if the court of appellate instance passed a judgment following the results of considering the appellate complaint against the decision of the commercial court of first instance (Art. 188 of the RF CPC).
supervisory complaint without resorting to the appellate or cassational method of review. If, in the process of consideration of the interested party’s complaint, no grounds for supervisory review of judicial acts have been established but some other grounds for checking the correct application of substantive and procedural rules have been found, the RF SCC may refer the case to the commercial court of cassational instance provided that this judicial act has not been considered by way of cassation (Part 6, Art.295 of the RF CPC).

It should be mentioned that the domestic legislation also provides for certain peculiarities of correlation of methods of judicial acts review depending on the category of cases considered by the commercial court of first instance. Thus, there are some categories of cases which permit neither appeals nor cassations. In particular, the following judicial acts may be challenged in cassation proceedings (but there is no appellate review procedure for decisions and holdings mentioned below): decisions of courts of first instance concerning the cases to challenge normative legal acts (Parts 4, 7 Art.195 of the RF CPC), rulings to reverse decisions of the non-state arbitration courts or to deny the claim to reverse such a decision (Part 5 Art. 234 of the RF CPC), decisions either to issue a writ of execution to enforce the decision of the non-state arbitration instance or to refuse to issue a writ of execution (Part 5, Art.240 of the RF CPC), rulings to recognize and enforce a decision of a foreign court or a foreign arbitration decision, as well as a decision to refuse to recognize and enforce the corresponding decision (Part 3, Art.245 of the RF CPC), rulings to adopt out-of-court settlement (Art.141 of the RF CPC).

On the contrary, decisions taken in summary proceedings, in cases concerning administrative responsibility, in cases to challenge decisions of administrative bodies imposing an administrative penalty — a certain amount of the fine for an administrative offense, as well as decisions of the appellate commercial court in these cases may be challenged in the cassational commercial court only if the courts of first instance and appellate instance violated the rules of procedural law which serve as grounds for their reversal in any case (Part 4, Art.288 of the RF CPC).

Besides, it should be noted that decisions and awards made by the RF SCC as the court of first instance which have come into force, in particular when the court considers claims challenging normative legal acts referred to the generic jurisdiction of the RF SCC, may not be challenged in cassation proceedings. Such a procedure corresponds to the position of the RF SCC in the system of commercial courts and to the significance of cases under its jurisdiction. The enforcement of the provisions of Article 46 of the RF Constitution is guaranteed by the possibility of supervisory review of the mentioned judicial acts by the Presidium of the RF SCC if the court ascertains that the judicial error has led to serious violations of rights and legitimate
interests and that they can be restored only by abolishing or changing the erroneous judicial act\textsuperscript{11}.

The right to appeal for judicial acts review by any of the mentioned methods is guaranteed to any person, a party to court proceedings (engaged in the proceedings or involved in the proceedings in the court of first instance or the court of appeal if the court of appeal considers the case by the rules of the court of first instance), irrespective of their procedural status.

Besides, the RF CPC stipulates that persons who are not involved in the proceedings but whose rights and obligations are affected by the judicial act of the commercial court (Art.42) have the right to appeal against this judicial act, to challenge it by way of supervisory proceedings, and file a complaint to review the case due to new or newly discovered circumstances, according to the rules established by the Code. Such persons enjoy rights and bear obligations similar to those of parties to the case. It should be said that if an inspecting court concludes that the decision really affected the rights and obligations of the person who is not a party to the dispute, then the inspecting court should reverse the judicial act. Taking into account the powers of each inspecting court, the case in the appellate commercial court is subject to consideration in accordance with the rules of the court of first instance; courts of cassational and supervisory instances refer the case for reconsideration to the commercial court of first instance. If after accepting the appellate complaint the court finds out that the claimant has no right to challenge the judicial act, then the review proceedings are to be terminated.

The domestic legislation regulates the procedure of filing a complaint in the commercial court and requirements to its form and content in details. Appellate complaints and cassational complaints are filed through the commercial court of first instance which has passed the disputed judicial act because the case materials are kept in that court. The court of first instance only deals with referring the complaint and the case materials\textsuperscript{12} to the appellate commercial court or to the cassational commercial court, depending on the type of complaint, and does not take any other procedural actions.

The judge of an inspecting commercial court makes an independent decision about whether the appellate complaint or the cassational complaint conforms to the requirements to its form and content and passes the corresponding judicial act to dismiss the complaint or return it to the claimant.


\textsuperscript{12} If a party challenges the awards made during the proceedings and which are not final yet, the original of the disputed judicial act and copies of documents related to the complaint and verified by the commercial court are to be presented.

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As to supervisory proceedings, there is a different procedure of filing a complaint. The complaint is submitted straight to the RF Supreme Commercial Court since the question whether there are grounds or not to refer the case to the Presidium of this court is to be considered by three judges of this court primarily on the basis of the materials of the supervisory complaint; they can request the case from the court of first instance only if it is necessary.

An important guarantee of the right to judicial protection is the opportunity established by the RF CPC to challenge the decision to return the appellate or cassational complaint, and a claim to reconsider the case due to newly discovered circumstances. Decisions to return the complaint or review judicial acts by way of supervision, made by the RF SCC judges independently, or decisions to refuse to refer the case to the Presidium of the RF SCC are not to be challenged due to the legal character of this method of judicial acts review.

An appellate, cassational, or supervisory complaint should contain sufficient arguments to challenge the disputed judicial acts; they are to be presented to other parties to the dispute by the claimant before presenting them to court. Despite the fact that the domestic legislation has no institution of notice of intent to appeal against a judicial decision, the practice shows that parties to the dispute often file additional appeals or cassations with a wider range of arguments to challenge the disputed judicial act when appellate or cassational proceedings have already started. In this case, the inspecting court has to take measures to guarantee the adversarial character of the proceedings and to make sure that all the procedural rights of all parties to the dispute concerning their objections to the new arguments are not violated.

As a major guarantee of the right to challenge judicial acts, a new procedure of filing a complaint against a judicial act was introduced in 2010. Since then, for instance, it has been possible to file a complaint by filling in an application form on the official website of a commercial court in the Internet, i.e., in the electronic form.

The commercial procedural legislation of Russia, as well as any foreign legislation, specifies certain time limits within which, depending upon the type of proceedings, an interested person can exercise the right to challenge the judicial act.

The general rule is that the time limit to file a complaint against a judicial act passed by the court of first instance by way of appeal is one month. The specified period starts with the date of completing the judicial act by the court of first instance.

13 The legislation of some foreign countries provides for a possibility of filing a notice (a declaration) of intention, and there are special time limits to file a legally well-grounded complaint. See, for example, the procedural legislation of Germany, France (E.A. Borisova. Proverka sudebnikh postanovlenii v grazhdanskom protsesse stran ES i SNG [Checking Judicial Decisions in the Civil Process of the EU and CIS Countries]. Moscow, 2007, pp. 146, 333).
Some categories of cases have special time limits to file an appellate complaint. **Thus**, for example, an appellate complaint against the decision of the commercial court of first instance in the case of challenging the decision of an administrative body to impose an administrative penalty may be filed within ten days, virtually in all cases of insolvency (bankruptcy); there is also a ten-day time limit for filing an appellate complaint against the judicial acts that have been passed.

Generally, the cassational complaint against a decision of the court of first instance and against the decision of the appellate commercial court may be filed within the time limit not exceeding two months since the day the disputed judicial acts entered into force unless the RF CPC states otherwise for some categories of cases.

If a party missed the time limit specified for filing an appellate or cassational complaint against the judicial act due to the reasons outside its control, this time limit can be extended by the corresponding commercial court, provided that the motion is filed within six months after the beginning of the specified time limits for appellate and cassational complaints. The time limit cannot be extended after the expiration of six months if the party which files a motion has been duly notified about the proceedings in the court of first instance. If the motion is filed either by a person who is not a party to the dispute or by a person who did not take part in the proceedings because he/she had not been duly notified about the time and the place of the proceedings, the six-month time limit to file a corresponding motion starts with the day when the person learnt or should have learnt about the violation of his/her rights and legitimate interests by the disputed judicial act\(^\text{14}\).

It should be mentioned that taking into account the introduction of a compulsory procedure of placing all judicial acts on the RF SCC official website in the Records of Arbitral Awards, access to information concerning the results of judicial acts review has increased.

There are also special time limits to appeal to a court of supervisory instance. Pursuant to Part 3 Art.292 of the RF CPC, a complaint or submission for a judicial act review by way of supervision may be filed to the RF SCC within three months since the last disputed judicial act enters into legal force if all other means to check the legality of the mentioned act have been exhausted. The time limit which was missed by the party may be extended by a judge of the Supreme Commercial Court of the Russian Federation. If this time limit was missed due to the reasons beyond the control of the party that filed such a complaint or submission, including the

\(^{14}\) See: Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii No. 11-II [the Ruling of the Constitutional Court of the Russian Federation No. 11-II]. dated November 17, 2005; p. 13 of the said Postanovlenie Plenuma Vysshego Arbitrazhnogo Suda RF No. 36 [Ruling of the Plenum of the RF SCC No. 36]. dated May 28, 2009.
situation when the party had no information about the disputed judicial act, a RF SCC judge may extend the time limit if the motion is filed within six months since the last disputed judicial act came into force or if the motion is filed by a person who is not a party of the proceedings or since the day when the person learnt or should have learnt about the violation of his/her rights and legitimate interests by the disputed judicial act.

Thus, the specified time limit of six months for filing a motion and the rules of its calculation in the domestic legislation are aimed to meet international standards to ensure legal certainty, on the one hand, and to guarantee the right to judicial protection on the other hand.

Traditionally, the distinctive features of ways of judicial acts review are the subject matter of a dispute, the limits of jurisdiction of inspecting courts, the powers of appellate, cassational, and supervisory courts, depending on their tasks and objectives.

Judicial acts review proceedings in the appellate commercial court are the proceedings of second instance.

Twenty appellate commercial courts were established in Russia in 2005\(^{15}\). The system of commercial courts of the RF constituent entities was reorganized, and since 1995 there has been an appellate instance in this system. The jurisdiction of these courts includes several constituent entities of the Russian Federation to ensure the opportunity to exercise the right to judicial protection to the fullest degree.

The appellate proceedings in commercial courts are the only method to review judicial acts which have not entered into legal force. The appeal concerns decisions of commercial courts of first instance which have not entered into legal force yet as well as judgments passed by the court of first instance if the commercial procedural legislation provides for an opportunity to file an appeal against them independently from appeals against judicial acts that are passed after considering the case on its merits and if these decisions hamper the progress of the case.

Appellate commercial courts check the legality and reasonableness of judicial acts. Proceedings in the appellate commercial court are essentially a re-consideration of the case with the detailed study of all the evidence brought before the court. The main task of the appellate instance is to eliminate a judicial error both in the points of law and in the matters of ascertaining circumstances of the case in order to ensure that rights and legitimate interests of the parties are guaranteed.

Appellate complaints against one and the same judicial act may be filed by a few participants in the case either jointly or separately within an entire time limit spec-

ified for filing such a complaint\textsuperscript{16}. But all the appellate complaints filed against judicial acts with regard to one case\textsuperscript{17} are to be considered jointly. If appellate complaints are filed after the consideration of the case by an appellate instance asking to extend the missed time limit, such appellate complaints are to be returned to the claimant. The only exception is a complaint of a person who was not involved in the proceedings, but whose rights and obligations have been affected by the disputed judicial act (Art.42 of the RF CPC). In this case, such a complaint is considered by the court of appellate instance by the rules of considering the complaint to review a judicial act due to newly discovered circumstances\textsuperscript{18}.

Analyzing provisions of the current legislation and the powers of the court of appellate instance, Art.269 of the RF CPC in particular, one can come to the conclusion that appellate proceedings in commercial courts in Russia are more likely to be complete appellate proceedings\textsuperscript{19}.

The court of appellate instance checks the legality and reasonableness of judicial acts only in the disputed part, taking into account the will of the participants and on the basis of evidence presented to the court of first instance. Given that for appellate proceedings the inspecting character of its activity is of primary importance, when the claimant files a complaint concerning a part of a judicial act, the court of appellate instance finds out whether all people present at the hearing have any objections concerning the examination of the disputed part only. The court cannot exceed the limits of an appellate complaint at its own discretion. If the explanation to the appellate complaint or objections to the arguments contain reasons for challenging the judicial act in the part different from the part mentioned in the appellate complaint, then the court of appellate instance checks the judicial act within the limits defined by the appellate complaint and arguments stated in the explanation and objections to the complaint. After considering the appellate complaint against some part of the decision of the court of first instance, the court of appellate instance passes a judicial act, and its concluding part states only those conclusions which concern the disputed part of the judicial act.

\textsuperscript{16} The Russian legislation does not use the term “counter appellate complaint”. Besides, the national legislation has no such institutions as “permission to file a complaint” (that is provided for by the legislation of England), “the admissibility of the appellate complaint” (that is provided for by the legislation of Germany). The right to file and consider a complaint by the appellate instance is not restricted by the discretion of a commercial court in Russia.

\textsuperscript{17} An appellate complaint can be filed against one or several judicial acts in one case, while each of them can be challenged separately. One complaint may contain claims to challenge the decision or award to return the counter claim or rulings to leave the counter claim without consideration, or to terminate the proceedings concerning the counter claim.

\textsuperscript{18} See the comments of the RF SCC p. 22 of the said Postanovlenie Plenuma Vysshego Arbitrazhnogo Suda RF No. 36 [Ruling of the Plenum of the RF SCC No. 36]. dated May 28, 2009.

\textsuperscript{19} The restriction of the right to present additional evidence to the appellate court which exists in the commercial procedural legislation of Russia is not typical of complete appeal.
Irrespective of the arguments stated in the appellate complaint, the appellate commercial court checks whether the court of first instance violated the rules of procedural law, which, in accordance with Part 4 Art.270 of the RF CPC, is the ground to reverse judicial acts of the commercial court of first instance.

Judicial acts review proceedings by the appellate instance are usually conducted under the rules set forth for courts of first instance, taking into account some peculiarities (exceptions) stipulated by the law. The restrictions concern the possibility to present additional evidence to the court of appellate instance (only if the participants can prove the impossibility of presenting evidence to the court of first instance due to the reasons beyond their control, in particular when the court of first instance groundlessly denied motions of the parties to the dispute to obtain the evidence or requests for expert examination of evidence), to make claims which were not considered by the commercial court of first instance (for example, claims to reduce penalties, penal damages and fines cannot be accepted and considered if such claims were not made in the court of first instance). The appellate procedure also does not apply the rules which permit to combine or separate several claims, to change the subject matter of the dispute or the cause of action and the extent of the claim, to make a counter claim, to replace an undue defendant or engage third parties in the proceedings. Commercial court assessors are not involved in the appellate proceedings.

In exceptional cases, if a court of first instance violates the rules of procedural law, and the appellate court in appellate proceedings establishes violations which in any case lead to the reversal of the judicial act (unconditional grounds for the reversal of judicial acts, Part 4 Art.270 of the RF CPC, namely, there is a judicial act concerning rights and obligations of a person who was not involved in the case), the appellate commercial court considers the case following the rules established for a commercial court of first instance, without the above mentioned restrictions concerning the application of separate institutions of the commercial procedure in the court of appellate instance. There must be a special ruling on transition to the procedure of considering the case according to the rules for a court of first instance. The reversal of the decision of a commercial court of first instance is specified in the ruling of the appellate commercial court, based on the results of appellate proceedings. A similar procedure in the court of appellate instance is applied when the court of appellate instance finds out that in the court of first instance the person moved to change the subject matter or the cause of action, to reduce or increase the extent of the claim, but the court wrongfully denied the motion or considered the claim ignoring the motion for changes, or did not take any decision on a request of another person involved in the proceedings, and thus the possibility to pass an additional decision was lost.
While checking the legality and reasonableness of the final judicial act in a case, the court of appellate instance in commercial proceedings is not authorized to refer the case for re-consideration. If there are grounds to reverse the judicial act, the court of appellate instance can reverse or change the decision of the court of first instance in full or just in part and to pass a new judicial act, or to reverse the decision in full or in part and to terminate the proceedings on the case or to leave the claim without consideration in full or in part.

Alongside with the above mentioned functions, the court of appellate instance has the right to refer a particular question for re-consideration to the court of first instance (para. 2 Part 4 Art. 272 of the RF CPC). This concerns only issues within the jurisdiction of the court of first instance which the court has not considered on their merits because the claim has been returned for no reason, left without consideration, the proceedings have been terminated or the judicial act review due to newly discovered circumstances has been denied, while a court of appellate instance is competent to re-hear the case. In these cases, since the court of first instance has not considered the case on its merits and has not determined the circumstances important for the case to be resolved properly, the court of appellate instance has no possibility to re-consider the case.

Judicial acts review proceedings in the cassational commercial court are proceedings in the third instance.

Russia has 10 federal commercial courts of federal districts established in 1995. Each district has two appellate commercial courts.

Cassational commercial courts check the legality of decisions (awards) made by commercial courts of first and appellate instances. They check whether the rules of substantive law and the rules of procedural law were correctly applied in court proceedings and in the passing of the disputed judicial act. The court of cassation also checks whether the conclusions of commercial courts of first and appellate instances concerning the application of rules of law are consistent with the circumstances established and the evidence presented in the proceedings.

Besides, courts of cassational instance consider cassational complaints against decisions of the same commercial court to award compensation for the violation of the right to court hearings within a reasonable time limit or the right to execution of the judicial act within a reasonable time limit (Part 4 Art. 222.9 of the RF CPC) as well as against the rulings of the cassational instance.

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21 The instruction of the RF SCC to cassational instances to check the conclusions of the court concerning the established circumstances is a part of the reasonableness of the judicial act. It predetermines the powers of the cassational instance and causes debates over the limits of judicial act review in the court of appellate and cassational instances.
Thus, the competence of the cassational instance in the system of judicial act review is limited by the power to check whether the courts apply the rules of law correctly, which determines the procedure for considering cassation complaints.

Cassational commercial courts consider cases by a panel of judges. The rules established by the RF CPC solely for judicial proceedings in a commercial court of first instance are not applied in judicial proceedings in the commercial court of cassation instance.

Unlike the appellate instance, the cassational instance has narrower limits in judicial proceedings. The court of cassational instance reviews judicial acts strictly based on arguments stated in the cassational complaint and objections to the complaint. Submitting additional evidence to the court of cassational instance is prohibited. The commercial court which considers a case as the cassational instance has no right to establish circumstances or to find them proven if these circumstances were not ascertained in the court decision or its ruling or rejected by the court of first instance or appellate instance.

Irrespective of arguments in a cassational complaint, the commercial court of cassational instance, like the court of appellate instance, checks whether commercial courts of first and appellate instances violated rules of procedural law, which under Part 4 Art.288 of the RF CPC considered to be the grounds for reversing the decision of the court of first instance or the ruling of the commercial court of appellate instance.

The procedure of checking one and the same judicial act in the court of cassational instance may be conducted only once. Consequently, if complaints to extend the missed time limit for a cassational complaint are submitted after the case was heard in the court of cassational instance, they are returned to the claimant.

The court of cassational instance has wider powers than the court of appellate instance. The list of powers is given in Art.287 of the RF CPC. Since the court of cassational instance does not consider the case on its merits, the case is to be referred for re-consideration to the appropriate court of first or appellate instance the decision.

The analysis of the legal literature (for example, A.M. Gubin. Kassatsiya v sudebno-arbitrazhnom protsesse [Cassation in the Commercial Court Procedure]. Moscow, 2005) as well as the practice of commercial courts of federal districts demonstrate the priority of strict limits of cassational control by arguments of the appellate complaint (irrespective of the error with the exception of unconditional grounds for reversal) which in our view may be viewed as the right interpretation of the current legislation. At the same time there are other approaches that the court of cassational instance cannot ignore the violations of law by lower courts even if the appellate complaint has no relevant arguments (See, for example, L.A. Terekhova. Sistema peresmotra sudebnykh aktov v mekhanizme sudebnoy zashchity [Judicial Acts Review in the Mechanism of Judicial Protection]. Moscow, 2010, p. 215).

It should be said that Part 1 Art.279 of the RF CPC stipulates that the recalling of the cassational complaint may be accompanied by documents which confirm the objections to the complaint.
(the award) of which has been either reversed or changed provided there are sufficient grounds (violations of rules of procedural law which result in unconditional reversal of judicial acts, the necessity for courts to establish circumstances that have to be proved). At the same time, the court of cassational instance has no right to predetermine questions of reliability or unreliability of a particular piece of evidence, of priority of one piece of evidence over another, of rules of substantive law to be applied, and of decisions or rulings to be passed while re-considering the case.

Of great importance for the timely protection of rights and legitimate interests of parties to a dispute is the fact that the commercial court of cassational instance has the power to pass a new judicial act without referring the case for re-consideration provided that the factual circumstances vital for the case were established by courts of first and appellate instances on the basis of complete and comprehensive examination of evidence in the case, but these courts (or one of them) wrongly applied a rule of law.

One of the most important tasks before the court of cassational instance is to exercise its powers rightly in order to ensure the balance of interests between parties to a dispute, to guarantee the proper judicial protection, and to perform typical functions of the cassational method of judicial acts review.

It should be noted that commercial courts of federal districts also exercise the function of guaranteeing the uniformity of judicial practice in their districts.

First and foremost, the judicial practice as to application of the current legislation is formed by the process of considering cassational complaints and passing relevant rulings. Thus, according to Part 2 Art.288 of the RF CPC, instructions of the commercial court of cassational instance, including those on interpretation of laws stated in its ruling to reverse the decision or the ruling of the court of first and appellate instances, are binding upon the commercial court re-considering the case.

Besides, the federal district commercial courts have various non-procedural types of work to ensure the uniform interpretation of rules of law. In particular, this work includes scientific and advisory councils of commercial courts of corresponding districts engaging scientists and experts in their work, the creation and operation of working groups in various branches of law discussing difficult questions of law application, and the work of presidiums of the federal district commercial courts. The legal regulation of this work is of major significance for the courts of cassational instance.

*Judicial acts review proceedings by way of supervision are proceedings in the fourth instance.*

Supervisory proceedings are the final proceedings on judicial acts review in the system of review of judicial acts which are functioning in the commercial procedure in Russia nowadays and which are aimed at eliminating a judicial error.
As it has repeatedly been said in legal literature, supervisory proceedings, including the term itself and its initial meaning, are a unique form of review which has no equivalents in foreign legislation. The review by way of supervision is conducted only by the Presidium of the Supreme Commercial Court of the Russian Federation, which is also determined by the tasks of the supreme judicial body in the system of commercial courts.

Meanwhile, the analysis of contemporary procedural rules governing the review by way of supervision, and the right of parties to the disputes to independently apply to the Supreme Commercial Court of the Russian Federation, i.e., to initiate the review procedure personally, bring us to the conclusion about the new content of this method of review that reflects the impossibility of endless review of judicial acts, as well as international standards of ensuring legal certainty. At the same time, many scholars speak about the evolution of the institution of judicial supervision and its gradual transformation into a type of cassation — “extracassation”.

There are three grounds for review of a case by way of supervision, so we can speak about a unique method of eliminating essential errors connected, for example, with the violation of the principle of uniformity of judicial practice and the necessity to form legal views of the supreme judicial instance for commercial courts.

Unlike mandatory proceedings in the appellate and cassational instances, which must review cases upon the claim of a party to the dispute on a mandatory basis (which serves as some sort of procedural guarantee of passing a legal and well-grounded judicial act), the review of the case by way of supervision is not connected with the subjective right to review the case by way of supervision.

Proceedings in the court of supervisory instance are divided into stages.

Persons involved in the proceedings and any above mentioned interested persons have the right to challenge a judicial act by way of supervision if they believe that the act in question has essentially violated their rights and legitimate interests in the sphere of entrepreneurial activity or any other type of economic activity as a result of violation or wrong application of substantive or procedural rules by the commercial court that passed the disputed judicial act (Part 2 Art.292 of the RF CPC). In the commercial procedure of Russia, unlike in the civil process in courts of general jurisdiction, officials of the RF SCC have no right to initiate supervisory proceedings.

As it has been noted before, a complaint to review judicial acts by way of supervision must be sent directly to the RF SCC. The judge of this court personally checks whether the complaint conforms to the form and content requirements and whether the procedural time limits for filing such a complaint have been observed, and then makes a decision either to accept the complaint and start supervisory proceedings or to return the claim to the claimant.

At the first (preliminary) stage, when a complaint has been accepted, it is considered by a panel of judges of the RF SCC without notifying persons involved in the proceedings. To decide whether there are grounds for the judicial act review by way of supervision, the court may request the case materials from the commercial court and then passes a corresponding ruling. Based on the results of the proceedings, within one-month time limit from the day of receiving this claim or the case materials if they have been requested by the RF SCC, the panel of judges makes the decision either to refer the case for the review of the disputed judicial act by way of supervision, or to refuse the review, or send the case to the court of cassational instance when there are necessary grounds unless the judicial act has been reviewed by way of cassation. Resubmission by one and the same person of an application or claim to review a judicial act by way of supervision is not allowed.

The second stage is the review of the judicial act by way of supervision in itself. This stage starts when a court makes the decision to review the disputed judicial act by way of supervision if there are grounds stated in Art.304 of the RF CPC.

It should be said that the grounds mentioned in the Article also determine the necessity to review a case by way of supervision and serve as the basis for changing or reversing the judicial act. Thus, judicial acts of commercial courts that have come into force are subject to change or reversal if during the supervisory judicial proceedings the court establishes that the disputed judicial act violates the uniformity in the interpretation and application of rules of law by commercial courts; violates rights and freedoms of man and citizen according to the generally recognized principles and rules of international law, international treaties of the Russian Federation; violates rights and legitimate interests of an indefinite group of people or other public interests.

The persons involved in the proceedings are notified as to the time and the place of supervisory proceedings of the judicial act review by the Presidium of the RF SCC. The case is subject to consideration by the Presidium of the RF SCC within the three-month time limit from the date of the decision to refer the case to the Presidium. The RF Presidium is empowered to consider the case by way of supervision if the majority of the Presidium is present.

The RF CPC does not directly regulate the issue of the limits for court proceedings by way of supervision, unlike appellate and cassational instances. The court of
supervisory instance is not empowered to examine additional evidence, to establish additional circumstances that were not established or proved in the lower court decision or ruling, considering all the materials of the case. If the case is referred to the Presidium of the RF SCC, there must be comprehensive examination of all judicial acts irrespective of the arguments of the claimant and the content of the ruling passed by three judges at the preliminary stage of supervisory proceedings.

Based on the results of the judicial act review by way of supervision, the Presidium of the Supreme Commercial Court of the Russian Federation passes a ruling. It should be said that the powers of the supervisory instance are consistent with the powers of cassational instance, for example, judicial acts may be left without any changes or may be reversed, and the case may be referred for reconsideration, or a new judicial act may be passed.

The increased role of judicial practice in the Russian legal system has required legal regulation of interpretation of rules of law contained in the rulings of the RF SCC passed on the basis of the results of supervisory complaint proceedings in similar cases. In connection with this challenge, in 2010 the RF CPC was amended. In accordance with the amendments, a decision or a change in the Ruling of the RF SCC concerning the practice of application of a rule of law may be seen as a ground for reversal, change or review of judicial acts due to new circumstances on condition that the corresponding act of the RF SCC contains the possibility of judicial acts review owing to this circumstance if these acts have entered into legal force. It is the instruction of the court of supervisory instance concerning the significance of their interpretation of rules of law that is of primary importance. Thus, to give a retroactive effect to the legal view stated in the Ruling of the Presidium of the RF SCC, this Ruling should contain the following:

“Judicial acts of commercial courts (which have entered into force) with similar factual circumstances passed on the basis of legal rules in the interpretation different from the interpretation contained in the current Ruling may be reviewed pursuant to para. 5 Part 3 Art.311 of the RF CPC if there are no other obstacles”

Legal views of the RF SCC stated in a Ruling not containing such an instruction may not serve as the basis for judicial acts review due to new circumstances: however, pursuant to Part 4 Art.170 of the RF CPC, courts should take into account the legal views of the RF SCC from the date of publishing this Ruling when considering similar cases, including judicial acts review in courts of appellate and cassational instances.

Given that, we may conclude that the current procedure of judicial acts review in Russia in the system of commercial courts ensures the implementation of pur-

37 By other obstacles we mean inexhaustible opportunities for resorting to courts of appellate or cassational instances.
poses and objectives put before courts of inspecting instances, and generally this procedure conforms to international standards in the sphere of procedural law. The increased number of cases in courts of supervisory instance and the increased role of cassational courts in ensuring the uniform application of rules of law and some other reasons determined by the dynamic development of procedural law confirm the necessity to determine directions of further development of legal regulation in this sphere.

Only if courts of all instances coordinate their efforts in performing their functions in strict accordance with clearly defined powers, can we guarantee procedural rights of all parties to a dispute stipulated by the domestic legislation and a fair outcome of court proceedings.
The judicial form of protecting one's rights and settling disputes through the activity of state commercial courts and courts of general jurisdiction is the most traditional for the legal system of Russia.

However, judicial protection is not the only way of protecting and restoring violated rights. In Russia, like in most countries, there is an opportunity for entities carrying out entrepreneurial activities to resort to conciliation procedures to settle disputes. In recent years, attention to conciliation procedures has been growing.

Classification of conciliation procedures

The Russian Federation legislation makes it possible for parties to a dispute to settle their differences amicably at any stage of conflict development: before going to court, during the court proceedings or after the case is decided.

According to the stage of conflict resolution at which parties turn to a particular dispute resolution procedure, all conciliation procedures can be classified into 5 groups.

1. Pre-trial conciliation procedures can be used by the parties only before applying to the state court for protection of one's interests and violated rights. These ways of resolving conflicts do not depend on the state judicial system and are not subject

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to judicial control. Conciliation procedures within the given category are very flexible. They can result in entering into an agreement — a novation in the legal relationship.

2. **Out-of-court conciliation** procedures are the procedures used after applying to the court in order to resolve the dispute amicably without the court’s decision. The procedures of the said group do not differ from the pre-trial procedures in the essence, ways and means, yet they still require certain procedural steps made by the court (recess, adjournment or suspension of legal proceedings). This is why these procedures are less flexible compared to pre-trial procedures. The possibility of resorting to these procedures is envisaged by the provisions of the Commercial Procedure Code of the Russian Federation (hereinafter referred to as the RF CPC) (Art. 15). Subsequent to the results of such procedures, the parties can sign an out-of-court settlement agreement which is validated by the court. The said agreement is enforceable.

3. **Judicial conciliation** procedures are the procedures of resolving a dispute that are used, just like out-of-court procedures, after applying to the court and before the judicial decision is rendered. Their peculiarity lies in the status of the third party facilitating amicable conciliation of the parties to the dispute. The court assists the parties in resolution of their dispute. Being strictly formal, in this case the activities of the court and the parties are regulated by the procedural legislation.

4. **Postjudicial conciliation** procedures are the procedures resorted to after the dispute has been resolved, judicial procedures are over, a writ of execution has been issued, but enforcement proceedings have not been initiated. At this stage, the parties can also settle differences arising between them amicably. These procedures are viewed as a separate group because the parties can come to an agreement about the procedure of executing the court decision before the court bailiff initiates enforcement proceedings. As a general rule, a writ of execution can be submitted for execution within 3 years after the decision entered into legal force (Art. 321 of the RF CPC), so the parties can voluntarily execute the court decision without initiating enforcement proceedings, and, consequently, with no additional expenses on executing the judicial act.

5. **Conciliation procedures during enforcement proceedings.** Under Art. 139 of the CPC of the RF, an amicable settlement agreement can be made between parties during the execution of a judicial act. With the help of conciliation procedures in enforcement proceedings, the parties can agree upon the procedure and time limits for the execution of the judicial act, which is to the advantage of the party that has lost the case.

It should be noted that conciliation procedures (except for compliance with the complaint procedure) are universal, which makes them applicable at any time. In addition, pretrial conciliation procedures are more flexible, compared to other procedures, in dispute settlement. By resorting to them, the parties can settle their
dispute not being bound by strictly established time limits or procedures. When opting for an amicable settlement after the proceedings have been commenced, the parties cannot enjoy that much freedom. Judicial proceedings have a strictly defined procedural form, and the parties must comply with the established restrictions. Thus, resorting to out-of-court conciliation procedures, the parties will be faced with time limits stipulated in the CPC of the RF, because for the parties to use them the court will have to either recess or adjourn the proceedings. And under the existing CPC of the RF, there are no other opportunities to do it. Moreover, even if the parties have reached an agreement, they must return to the court either to have their settlement agreement validated or to withdraw the claim, and so forth. Otherwise, the court has nothing to do but pass a judgment, there being no ground to terminate the proceedings.

**Separate Types Of Conciliation Procedures**

**Pre-trial complaint procedure**

A traditional Russian conciliation procedure specified in different periods by rules of substantive law and permanently related to judicial proceedings is settling disputes through the pre-trial complaint procedure.

In law books, the said procedure is compared to the procedure of disclosing case materials known in Great Britain, Ireland, Japan, and the USA as discovery, as the party not only demands proper timely performance of contract obligations, but also substantiates the facts on which they are based by appropriate evidence. The opposite party thus becomes aware of the subject-matter of the dispute and evidence that will be presented as the cause of action for a further potential claim.

The procedure of settling disputes through the pre-trial complaint procedure has a number of distinctive features, making it possible to sever it from other alternative dispute resolution procedures. **First**, it is submitted in an obligatory written (documentary) form. Conciliation is exercised through delivering a complaint to the respondent who writes an answer to it, i.e., the parties communicate to settle differences not in the oral form typical of conciliation procedures. **Second**, the said procedure can be voluntary or mandatory (if stipulated by federal laws and an

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4 Ibid. p. 222.

5 The necessity of complying with the pre-trial complaint procedure is envisaged by the following norm-setting regulations: the Civil Code of the Russian Federation (p. 797), the Inland Water Transport Code of the Russian Federation (Art. 114 Chapter. 18), the Merchant Shipping Code of the Russian Federation (Chapter. 25, § 1), the Air Code of the Russian Federation (p. 124-127), Rules for the railway transport of the Russian Federation (pp. 119-124), Rules for the mechanical road transport and city overland electrical transport (Chapter. 7), etc.
agreement). Third, the given dispute resolution procedure pertains to prejudicial dispute resolution procedures because the parties can use it only before applying to the court. Fourth, when disputes are resolved through the pre-trial complaint procedure, the principle of confidentiality does not apply. Compliance with statutory or contractual requirements to the said dispute resolution procedure is one of the prerequisites for initiating a legal action. Consequently, the pre-trial complaint and the answer stating the parties’ positions serve as evidence in court. Fifth, under the CPC of the RF, failure to comply with the statutory or contractual requirements to the given dispute resolution procedure entails certain procedural consequences for the parties: provisional deferment of acceptance of a claim (Art. 128 of the RF CPC), leaving of a claim without consideration (Art. 148 of the RF CPC), the court’s obligation to hold the party that has failed to comply with the said dispute resolution procedures (including the requirements to answer a pre-trial complaint within the statutory time period and not to leave the complaint unanswered) responsible for paying legal costs (Part. 1 Art. 111 of the RF CPC).

Negotiation

Negotiation is the most common way of resolving disputes in the economic sphere, as this type of conciliation procedures is the most universal. The parties can resort to it at any stage of conflict development due to the key features of negotiation procedure. The parties themselves or via their representatives turn to this procedure voluntarily, that is, they realize the necessity of this way of conflict resolution.

In the course of the procedure, the parties exchange the conflict-related information. The parties give their arguments, exchange opinions, provide evidence to support their arguments, receive the opportunity to get acquainted with each other’s arguments, which is of utmost importance in developing a further strategy of conflict resolution. Besides, when negotiations result in no agreement, the parties, possessing the information at the contractor’s disposal, knowing each other’s strengths and weaknesses, can choose not to apply to the court of law and try to settle the dispute by using other out-of-court procedures. Should the parties apply to the court, this will help reduce the time period for considering their case.

In law books, one can come across the opinion that a court hearing is a form of negotiations⁶.

“When the judge is discussing the possibility for the parties to come to an amicable settlement agreement, he/she inevitably points to the weaknesses of the par-

ties’ arguments in cases, thus evaluating some particular circumstances of the case. Provided the negotiation fails to result in settlement of the dispute between the parties, the same judge must adjudicate the case”.

In international practice, there are different approaches to judges’ participation in negotiations between parties. In the USA, a similar procedure is known as pre-trial settlement conference. Parties can turn to a judge or a neutral person. Parties come to a settlement agreement, the court validates it. If the parties have refused to settle the case amicably, the case will be adjudicated. The situation is different in Holland. The judge who conducted negotiations is not allowed to consider the case on its merits if the parties failed to settle the case amicably.

**Mediation (agency)**

In modern Russia, the opportunity to turn to such a conciliation procedure as mediation is relatively new. It should be noted that the right of the parties to a dispute to use conciliation procedures, mediation in particular, is established in the rules of procedural law (Para. 2 Part. 1 Art. 135, Art. 138, Part. 2 Art. 158 of the RF CPC).

At present in Russia, the use of mediation is voluntary. In international practice (for instance, in Argentina), mandatory participation of the parties to a dispute in mediation is established by law.

Since 2011, the procedure of resolving conflicts with the help of a mediator is regulated by the Federal law “On the alternative procedure of dispute resolution with the involvement of a mediator (mediation procedure)” (hereinafter — the Law). The provisions of the mentioned law establish general principles relevant

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for the mediation procedure, major conditions for its application, the order and
time limits for conducting the procedure, the procedure of selecting and appointing
a mediator, requirements to mediators and self-regulating organizations of medi-
tors, and so forth.

The Law contains provisions with more detailed rules for mediation procedure.
Article 2 of the Law defines mediation as the way of resolving a dispute with the
assistance of a mediator on the basis of the voluntary consent of the parties in order
to reach a mutually acceptable decision.

The Law regulates relationships connected with applying the mediation proce-
dure to disputes arising from civil, labor, and family legal relationships. Meanwhile,
the Law specifies that the mediation procedure is not applicable to collective labor
disputes as well as to disputes that affect or may affect rights and legal interests of
the third parties not participating in the mediation process, or public interests. In
addition, the Law is not applicable to relationships connected with the judge's or
arbitrator's facilitating the parties' conciliation in the course of judicial or arbitra-
tion procedure.

It should be noted that Article 4 of the said Law governs the mediation proce-
dure for disputes considered in court or in arbitration procedure. Under this article,
if the parties have agreed to use mediation without applying to the court of law or
arbitration for resolution of the case that has arisen or may arise between the par-
ties within the agreed time limits, the court or arbitration recognizes this obligation
valid until all the conditions of the obligation are fulfilled, except when a party
needs, in its opinion, to protect its rights. If the dispute is referred to the court of
law or arbitration, the parties can use mediation at any moment before the respec-
tive court or tribunal passes a judgment. Adjournment of consideration of a dis-
pute-based case by the court or arbitration instance, as well as performance of oth-
er procedural actions, is governed by procedural rules.

The Law envisages the possibility for the parties to apply to both professional
and non-professional mediators, and requirements to persons acting as mediators
are established by the law\(^\text{12}\). A person can act as a non-professional mediator if he/
she is over eighteen years of age, with full legal capacity, and has no criminal record

\(^{12}\) It should be noted that in foreign countries, legislation also envisages requirements for persons
exercising mediators' functions. Ref. to: I.N. Galushina. Posrednichestvo za granits{\textprime} [Mediation
Al'ternativnoe razreshenie sporov v SSHA [Alternative dispute resolution in the USA], pp. 90-91.
N. Podolskaya, V. Mikhalchenkova. Novyi' federal'nyi' zakon Avstrii „O posrednichestve po gra-
zhdanskim delam” [The new federal law of Austria „On mediation for civil cases”] // Tretei'skii' sud
[Arbitral tribunal]. 2004, No. 4, p. 37. V.M. Tolkunov. Pravovoe regulirovanie posrednichest-
va v Bolgarii [Legal regulation of mediation in Bulgaria] // Izdatel'stvo Zakon [Zakon Publishing
A professional mediator can act as such provided he/she is over twenty-five years of age, has higher professional education and has completed the mediator skills training program approved in the procedure established by the Government of the Russian Federation (Art. 16 of the Law).

The mediator skills training program providing the framework for the development and approval of specialized syllabi for institutions training mediators was approved by the decree of the Ministry of Education and Science of the Russian Federation in February 2010.

It should be noted that due to judges’ large workload, the development of conciliation procedures, mediation in particular, is of great interest to state judicial bodies.

Thus, for instance, in 2012, in order to acquaint the parties with mediation procedure and the possibilities to settle a part of disputes, referred to the court, amicably in the Commercial Court of the Sverdlovsk Region, as an experiment, “reconciliation rooms” were established. In these rooms, the parties can meet with mediators who explain the essence of the procedure, its pros and cons. The parties can try, if they prefer, to settle their dispute. It should be noted that, within the framework of the experiment, mediation in the “reconciliation rooms” is conducted on a free-of-charge basis.

Furthermore, the parties unwilling to mediate their conflict can hold negotiations in the “reconciliation rooms”.

**Amicable Settlement Agreement**

Amicable settlement agreement belongs to the group of conciliation procedures governed by the provisions of the CPC of the RF and court proceedings.

Thus, the sequence of actions to be performed by the subjects of an amicable settlement agreement is governed by the provisions of Chapter 15 and other articles of the CPC of the RF, which makes it possible to divide the procedure into the following stages:

1) the court explains the right to make an amicable settlement agreement to the parties;

2) the parties resort to the procedure of an amicable settlement agreement (the court recesses or adjourns a hearing; the parties agree upon the text of their agreement — this can be done with the help of the mediator);

3) amicable settlement agreement is affirmed and validated by the court;

4) the amicable settlement agreement is executed.

The main subjects capable of entering into an amicable settlement agreement are the parties: the claimant and the respondent. The CPC of the RF also envisages

13 URL: www.ekaterinburg.arbitr.ru
third persons as parties to the process. Under Art. 50 of the CPC of the RF, third persons submitting independent claims in respect to the subject-matter of the case enjoy the rights and incur the obligations of a respondent, except for the obligation to comply with the pre-trial procedure of submitting a complaint to the respondent or any other pre-trial dispute resolution procedure envisaged for this category of disputes or agreements by the federal law.

In addition, Art. 51 of the CPC of the RF stipulates that a third party submitting no claims in respect to the subject-matter of a case can participate in the case if the judicial act to be passed may affect the third party’s rights or obligations in relation to one of the parties to the dispute. However, third parties asserting no independent claims in respect to the subject-matter of the case are not entitled to enter into an amicable settlement agreement (Part. 2 Art. 51 of the RF CPC).

Under Art. 59 of the CPC of the RF, the parties have the right to participate in commercial court proceedings by themselves or through their representatives. The right to make an amicable settlement agreement is a special right of the parties, hence, this right must be spelled out in the power of attorney given to a party’s representative (Part. 2 Art. 62 of the RF CPC). Failure to include this clause in the power of attorney entails the court’s refusal to approve the amicable settlement agreement.

Another subject of importance in making an amicable settlement agreement is a commercial court.

A court is a subject vested with powers of authority. In accordance with the provisions of the CPC of the RF, no amicable settlement agreement can be made without the court’s participation, and the court is obliged to perform a control function and observe rights and legal interests of the parties and other persons. Thus, an agreement made between the parties after a claim is filed to the court is invalid until the commercial court reviews it for compliance with the law, confirms that it violates no other persons’ rights, and validates it.

Parties can enter into an amicable settlement agreement at any stage of commercial litigation procedure and during execution of a judicial act (Part. 1 Art. 139 of the RF CPC).

Thus, the parties can sign an amicable settlement agreement at any stage of considering a case in the trial court as well as in an appellate, cassational, supervisory instance and at the stage of enforcement proceedings.

Any case can be settled amicably, unless otherwise is provided by the CPC of the RF and other federal laws (Part. 2 Art. 139 of the RF CPC).

Meanwhile, in practice, amicable settlement agreements are more common between parties to cases arising from civil legal relationships. Furthermore, judges point out that amicable settlement agreements are not likely to be made in disputes
related to immovable property and disputes over holding a transaction invalid. An amicable settlement agreement is made in writing and signed by the parties or their representatives, provided the latter have the authority to enter into an amicable settlement agreement, which is specifically stipulated in the power of attorney or other document confirming the representative’s power and authority (Part. 1 Art. 140 of the RF CPC).

An amicable settlement agreement contains the information upon which the parties agreed (Part. 2 Art. 140 of the RF CPC).

Part 2 of Art. 140 of the CPC of the RF contains the information to be included in an amicable settlement agreement, and this information is divided into two types: mandatory and optional.

Mandatory information includes information on terms and conditions, amount and deadlines for the fulfillment of mutual obligations or of an obligation of one party to the other. Unless this information is provided, the amicable settlement agreement must not be validated by the court.

Optional information is set out in the agreement at the parties’ discretion. It includes provisions on deferred payments by the defendant or payment in installments, on assignment of rights to demand, on the whole or partial forgiveness or acknowledgement of a debt, on distribution of litigation costs and other terms and conditions not contradicting the federal law.

An amicable settlement agreement is validated by the commercial court (Part. 4 Art. 139 of the RF CPC).

When validating an amicable settlement agreement, the court exercises the controlling function and holds the amicable settlement agreement valid.

When checking the amicable settlement agreement, the court must establish whether it meets the following special statutory requirements:

1) it does not contradict the law;
2) it does not violate rights and legal interests of other persons.

When checking an amicable settlement agreement for compliance with law, the court finds out whether such an agreement violates the law. Moreover, the court checks the following:

1) whether the agreement was made between the proper parties;
2) whether the parties representatives having entered into the agreement were authorized to do it;
3) whether the agreement is made in relation to the controversy in dispute;
4) whether the form of the agreement meets statutory requirements;
5) whether the issue of distribution of litigation costs has been settled.

The court also checks whether the agreement affects rights and legal interests of other persons not involved in it.
Subsequent to the results of considering the validation of the amicable settlement agreement, the court issues a ruling (Part. 5 Art. 141 of the RF CPC). After the court issues the ruling validating the amicable settlement agreement, the case-related judicial proceedings are terminated.

Here it should be noted that an amicable settlement agreement is not a pure civil-law agreement, as its legal nature is of a mixed type. The parties having decided to make an amicable agreement refer to substantive legislation and, in fact, draw up a new agreement (agree upon new time limits or deadlines, on execution procedure, etc.) to perform the obligations that have arisen. At this stage, the agreement is substantive in nature. For example, in many foreign states, parties enter into a new civil agreement in order to discontinue the litigation. When turning to the court to have the amicable settlement agreement validated, the parties shift from civil relationships to procedural relationships with a new subject vested with the authority to validate such an agreement — the court. Once validated, the amicable settlement agreement can be enforced. Validation of an amicable settlement agreement by the court entails consequences of both substantive and procedural nature.

Legal consequences of substantive nature include resolving a disputed substantive legal relationship by transforming rights and obligations of parties to the disputed legal relationship into new rights and obligations agreed upon by the parties.

The court terminates the proceedings in the case, therefore, procedural legal relationships are also terminated. A consequence motivating the parties is envisaged in Art. 333.40 of the Tax Code of the Russian Federation: if an amicable settlement agreement was signed before the commercial court passed a judgment, the claimant is entitled to get 50% of the amount of stamp duty back. Another consequence is the impossibility to file a similar claim to the commercial court (arising from the dispute between the same parties and with the same subject-matter and cause of action).

Once validated, the amicable settlement agreement is subject to voluntary execution following the procedure and observing deadlines stipulated in the agreement. If the agreement is not executed voluntarily, the commercial court, upon the recoverer’s motion, issues a writ of execution for the agreement to be enforced.

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In conclusion, it should be noted that the conciliation procedures in Russia are not as common as in foreign countries so far. However, there are some prerequisites for their growth. The development of economic relations and the existing practice of applying conciliation procedures possible make them more common and help work out new ways of conciliation.
THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE AS A DISPUTE RESOLUTION FORUM

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Since 1917, the Stockholm Chamber of Commerce has provided business to business dispute resolution services through its independent body, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), sometimes referred to by parties (although not entirely correctly) as “Stockholm arbitration”. Established first as a commission for the settlement of trade disputes in the Stockholm region, the SCC has developed into one of the major international arbitral institutions in the world. In particular, its international recognition came in the 1970’s when Stockholm was chosen by the United States and the Soviet Union as a neutral venue for the resolution of disputes arising out of American-Soviet trade relations. The SCC acted as appointing authority in such disputes.

Today, the SCC attracts parties and arbitrators from countries all over the world to resolve a broad-range of disputes. It also remains a dispute resolution centre preferred by Russian parties, which traditionally have been one of the most represented in SCC arbitrations, second in numbers only to Swedish parties.

At the same time, being well-known as a neutral international forum, the SCC has a compact organisation and recently revised rules that are less familiar to the Russian and CIS parties. The purpose of this article is to give a more detailed picture of its structure and dispute resolution procedures.

Organisation

At the initial stage of the arbitration proceedings, a party filing for an SCC arbitration will correspond with the Secretariat.

The SCC Secretariat is headed by a Secretary General and has a multilingual staff of nine people. The staff administers cases at three divisions, each consisting of one lawyer and one assistant. The staff administers cases in English, Swedish, Russian, French or German. Any other agreed language may of course be used in the arbitral proceedings before the tribunal once it has been constituted.
The Secretariat handles the SCC’s day-to-day operations, the daily case management and other tasks required for the functioning of the SCC. Case management implies responsibilities and services such as notifying the respondent party, determining time limits for initial submissions, clarifying the contents of the procedural rules for the parties and drafting proposals for the procedural decisions to be taken by the Board.

These procedural decisions, as delineated in the SCC Rules, include the Board’s decisions regarding prima facie jurisdiction, appointment of arbitrators, challenge to arbitrators and the arbitration costs.

The SCC Board is composed of one chairperson, two or three vice chairpersons and a maximum of 12 additional members. Members are appointed for a period of three years. The Board includes both Swedish and non-Swedish nationals, all of whom are distinguished and highly qualified experts in international commercial dispute resolution. Board members are not employed by the SCC, nor do they receive compensation for their work. Rather, they serve as independent, internationally recognised arbitration experts.

The Board meets once per month to take decisions required under the SCC Rules. These meetings take place in Stockholm, with many of the international members calling into the meetings from all over the world. Once per year, the entire Board travels to Stockholm to meet in person for the annual meeting and takes decisions on SCC cases and discusses SCC practices. In addition to these regular meetings, the Chairman or a Vice Chairman of the Board may take decisions on behalf of the Board in urgent matters.

**The SCC’s Caseload**

Today the SCC’s caseload includes both domestic and international arbitration cases. About 50 per cent of the cases are international in the sense that they involve at least one non-Swedish party.

The SCC’s caseload continues to grow. In 2011, 199 new cases were registered with the SCC. Under Swedish law, a wide-range of subject matters are arbitrable, which is reflected in a vast variety of disputed agreements. The disputes include not only delivery, co-operation and service contracts, which are traditional for international trade, but also sale of companies and investment treaty protection.

Additionally, Swedish law allows private persons to arbitrate their disputes, for instance, those arising out of employment relations.

The caseload also reflects a diverse range of SCC users. Each year, parties come to the SCC from nearly fifty countries to resolve their disputes. Russian parties are frequently among those that choose the SCC to administer their arbitrations and often select Sweden as the seat of arbitration.
The SCC Rules and Procedures

Neither the SCC’s Secretariat nor the Board decides the cases on the merits, as this task belongs to the tribunal. The SCC, however, organises and monitors the proceedings. It sets a framework for the procedure on important issues, such as the deadline for the award and the fees and costs of the arbitrators.

A particular feature of the SCC, different from many institutions, is that it has several sets of rules under which a case may be managed, subject to the parties’ agreement. Thus, when agreeing on SCC arbitration, the parties may choose between standard and expedited arbitrations. The SCC also offers mediations services and serves as an appointing authority in UNCITRAL arbitrations, providing parties with many flexible and efficient means to resolve their disputes.

The current versions of the SCC Rules and SCC Expedited Rules entered into force on 1 January 2012 and apply to any arbitration commenced on or after 1 January 2010. The rules are modern and flexible and give the parties and arbitrators the means to form an effective procedure adapted for the individual case. The rules provide for a procedure in line with the best practices in international arbitration.

English is the original drafting language of the rules, but the SCC Rules have been translated into several other languages, including Russian.

One of the new features of the 2010 SCC Rules was the establishment of the Emergency Arbitrator procedure, which allow a party to request that an Emergency Arbitrator order interim measures before the case is referred to an arbitral tribunal or a sole arbitrator. Typically, interim measures are only available to a party after the constitution of the arbitral tribunal. The Emergency Arbitrator procedure resolves this problem by offering parties a means to obtain urgent relief at an earlier stage. The procedure was adopted in response to user demand and has already proven to be a useful tool for parties. In the two years this procedure has been available to users, parties have already requested an Emergency Arbitrator seven times.

The SCC Expedited Rules provide the same flexibility and efficiency to parties as the SCC Rules but are designed specifically for minor disputes involving less complex issues and smaller amounts. Under these rules, the arbitral tribunal is always comprised of a sole arbitrator and an award should be rendered within three months of the dispute being referred to the arbitrator, making this “fast track arbitration” a speedy and cost-efficient dispute resolution means.

In addition to the SCC Rules, the SCC has Mediation Rules and Procedures and Services under the UNCITRAL Arbitration Rules. The SCC Mediation Rules offer a quick and cost-effective alternative for parties wishing to avoid litigation and arbitral proceedings. The rules provide for a confidential and enforceable outcome, empowering a mediator to confirm any settlement agreement in an arbitral award. The Procedures and Services under the UNCITRAL Arbitration Rules establish the
services that the SCC offers when requested to act as an appointing authority or conduct other administrative services in UNCITRAL Arbitrations. These services include forwarding written communications, scheduling and planning hearings, providing or arranging for hearing rooms, arranging for transcripts of hearings, assisting for the legalization of documents, and providing secretarial or clerical assistance and providing a depository service. The SCC is currently reviewing these procedures and anticipates that updated Procedures and Services under the UNCITRAL Arbitration Rules will be available in the first half of 2012.

**Arbitration Procedure Under the SCC Rules**

A party wishing to initiate arbitration under the SCC Rules must first file a Request for Arbitration with the SCC, appoint an arbitrator and provide the Registration Fee to the SCC. The SCC will then notify the respondent of the Request for Arbitration, commencing the arbitration. The respondent next submits its Answer to the Request for Arbitration and appoints an arbitrator. The chair is then appointed by either the SCC or by party agreement.

The SCC determines the amount of the Advance on Costs to be shared by the parties. The fees are based on the amount in dispute. The SCC provides parties a fee calculator, available on its website, to allow users to approximate the costs in advance. Once the Advance on Costs is paid, the SCC refers the case to the arbitral tribunal.

Once the arbitral tribunal receives the case, it will conduct the proceeding in accordance with the SCC Rules, establishing time tables for written submissions, evidence, hearings and meetings, as necessary. The claimant shall first submit its Statement of Claim, which includes the relief sought, material facts and circumstances and a preliminary statement of evidence. The respondent will then submit its Statement of Defence, which includes a statement as to whether the respondent admits or denies the relief sought by the claimant, the material facts and circumstances, any counterclaim or set-off claim and the grounds on which it is based and a preliminary statement of evidence.

Upon party request or if the arbitral tribunal considers it appropriate, the tribunal will summon the parties to a hearing. Following the hearing, the arbitral tribunal shall render an award no later than six months from the date when the case was referred to the tribunal. The award is final and binding on the parties.

**Appointment Of Arbitrators**

If not agreed otherwise by the parties, three arbitrators comprise the arbitral tribunal. In some cases, however, the SCC Board may decide that the arbitral tribunal should consist of a sole arbitrator.
Each party appoints one arbitrator. The chairperson, unless otherwise agreed by the parties, is appointed by the SCC Board.

A sole arbitrator is appointed either jointly by the parties in the course of a ten day period, as set by SCC order, or failing such joint appointment, by the SCC Board.

The SCC does not employ a list of arbitrators, and the parties may appoint any person of any nationality as arbitrator, as long as he or she is impartial and independent. Should a party wish, it may request the Board to make an appointment on the party’s behalf.

When the SCC Board appoints an arbitrator, it considers a number of factors. The Board will ensure that its appointments adhere to any agreement between the parties, but it also considers the complexity of the case, the subject matter of the dispute, required language skills and the necessity of expertise in specific areas of law. When considering specific arbitrators, the Board also considers, among other things, a candidate’s previous appointments and experiences as an arbitrator, nationality, availability and legal background.

In recent years, arbitrators have come from dozens of countries, with many of those appointed by both parties and the SCC coming from Russia and CIS countries.

The Arbitral Award

Under the SCC Rules, the final award shall be made within six months from the date the case was referred to the tribunal. Under the SCC Expedited Rules, a final award is to be made within three months from the date the case was referred to the sole arbitrator. Statistically, arbitrations under the standard SCC Rules are completed within eight to eleven months from the day the claimant files the Request for Arbitration until the day the tribunal issues the final award. Investment treaty arbitrations, given their complexity, average 2.5 years from start to finish.

Awards enter into force as final and binding from the day that they are given. This means that, while awards may be corrected, they cannot be challenged or appealed on the merits. Moreover, as Sweden is a signatory to the New York Convention, parties that select Sweden as the seat of their arbitrations also benefit from a judiciary that is modern and supportive of arbitration when seeking enforcement of foreign arbitral awards.

Conclusion

This article presents a brief overview of SCC practice and arbitration under the SCC Rules and is offered as part of the SCC’s mission to provide general legal information on SCC arbitration to the public. Additional information regarding SCC
arbitrations and arbitration generally is available on the SCC’s, www.sccinstitute.com, where a collection of articles, Swedish and foreign court decisions, rules, laws and practice guidelines are available in four languages, available as a quick reference for the diverse users of SCC arbitration.

Through its nearly 100 years of experience, the SCC has developed flexible and modern rules and practices that make it one of the world's leading arbitral institutions, chosen by parties from all over the world.
SUBORDINATION OF THE INTERNATIONAL PUBLIC LAW PRINCIPLES OF FREE SELF-DETERMINATION OF NATIONS AND TERRITORIAL INTEGRITY (IN THE PRACTICE OF RESOLVING THE NAGORNO-KARABAKH PROBLEM)

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I have expressed my scholarly position on the international legal settlement of the NKAO (the former Nagorno — Karabakhskaya Autonomous Oblast, now the Republic of Arstakh) problem in my relevant published article more than 20 years ago. In order not to repeat myself, I would like to focus the attention of all honest and good-thinking people on the key guideline for resolution of such problems: the perpetual idea of the law should define any lawful, reasonable and long-term local, regional or global policy of the people, temporarily in power, with their own preferences and opinions, and not the self-seeking and lustful policy of changing interests should define the content and direction of the effect of the universally recognized international and legal values, goals, principles and functions.

The proper, undisputed and final settlement of the problem of Artsakh's independent existence and development requires a preliminary precise scientific-legal

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3 It is necessary to remind that the all-national movement of the Karabakh people for freedom started in February 1988, and a referendum took place in the NKAO on December 10, 1991, where more than 99 percents of the people, living on the territory of this state-territorial entity expressed their free will and long-term aspiration for the full national and state independence from the Republic of Azerbaijan.
definition and settlement of the issue of correlation of the principles of the free self-determination of nations and peoples and the territorial integrity of the states. It is well-known that the universal peace and stable international law and order are seen as the ultimate ideal of the United Nations Organization, which is impossible to implement without the necessary and voluntary recognition by all states and international organizations the existing fact and inalienable right of the nations and peoples, and of each human being, as an integral person. The point is that the principle of the legitimate self-determination first of all refers to the human person and only after to the generalized “person” of each nation and or people, ethnic group or national minority. That is why the universally recognized and most frequently violated principle—right to free self-determination of each human and people should always and everywhere serve as the fundamental right-guidance for understanding of the meaning of all other rights and freedoms of a person and people, which are a necessary means for realization of their spiritual vocation and historical mission⁴.

Para. 4 of the UN Declaration on the Granting of Independence to Colonial Countries and Peoples says that creation of obstacles on the way of realization of such rights “poses a serious threat to the global peace”. The main responsibility of the UN is related to it in the tangible assistance to independence movement of the peoples, combating for freedom, in adoption of urgent measures to hand the entire state-organized political power over to the peoples, living on their historical territories in accordance with their will and aspirations, freely expressed in referendum, as well as preservation of their national and territorial unity and integrity. That is why any inaction or connivance by the UN and other international governmental and non-governmental organizations⁵ in the issue of subordination of one people to another one is nothing but a premeditated disregard or involuntary denial of each human being’s and people’s right to self-determination, as well as other fundamental rights and freedoms of the people and its representatives as its derivative.

Such an unlawful and irresponsible attitude of the world community to the unshakeable legal realities are in direct contradiction to the UN Charter and a substantial obstacle to the normal development of the international trust and cooperation, establishment of peace and stability in the whole world. The absolute right to the free self-determination of each human and people should be encouraged by the

⁵ First of all we mean the OSCE Minsk Group, the Co-chairs of which are the USA, Russia and France, The Committee of Ministers of the Council of Europe, PACE Commission for the settlement of the Karabakh issue. As the Armenian officials fairly noted, “the restoration of the PACE Interim Commission on Karabakh cannot be considered as an effective step, as long as the talks are held within the frameworks of the OSCE Minsk Group”.

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mankind by all means, even if it is connected with the forced armed struggle and if such a struggle is local. Otherwise, as the history and practice of international and legal relations, the local conflict can escalate, which quite often happens, into a regional conflict or is even transformed into a long-term global crisis.

It is quite reasonable that the right of humans and peoples to self-determination by its spiritual vocation and historical mission does not exhaust and is to determine, in the conditions of freedom, when and how they wish to change their internal and external political status without foreign interference. This absolute right cannot be reserved or conditioned by any derivative rights and situations or momentary contractual arrangements. In other words, this right is incomparable, irrelative, absolute, universal, beyond-the-time and endless, and individual situations or actions, limiting its perpetual rights, are always unlawful, ultimately and unreasonably, and that is why they cannot be recognized by the UN member states as well-grounded and legal in any way.

In this light and context, such key international law principles as the sovereign equality and territorial integrity of states are just derivatives of the fundamental principle for self-determination and are nothing but a means for the free and unpimpered realization. This implies that the sovereign right of nations and peoples and the integrity of national territories as a means are necessary to provide these nations and peoples with the opportunity to live and develop themselves according to their vocation and destined role among other peoples of the single humanity, and not be in sub-ordinance to any other nation, international or regional organization or, moreover, to any political party. Life clearly shows that any premeditated or careless, especially, systematic and persistent violation of the inexorable effect of this objective law in the end leads to shattering of the established balance-mobile condition both with a concrete country and in the regions of the whole world.

The history of various peoples and mankind knows of numerous cases of the lawful drop-out of national-state entities from a greater suppressor — state (by population and territory), caused the permanent effect of the objective law of the self-determination of the suppressed nations, peoples and nationalities, if they, despite the effect of that law, have been subjected to the malicious and cruel annihilation by the ruling human predators — leaders of the suppressor — people or any international conspirational organization.

The recent events on the life of many European peoples are the evidence of the appropriateness of the effect of the right of nations and peoples to self-determination: they formed independent states on the territories of former federative states or

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*Here it is necessary to remember the Genocide of the Armenian people, organized by Young Turks in the Ottoman Empire in 1915, as a result of which more than 1.5 million Armenians were brutally annihilated on the basis of their ethnic origin and religion.*
empires, i.e., Czechoslovakia, Yugoslavia, Soviet Union. The same natural law has led to the appropriate reunification of the German people, which was for some time militarily and politically divided. Speaking about the unequivocal priority of the right to free self-determination of nations and peoples over the principle of the territorial integrity, B. N. Chicherin made the following correct statement:

“By the patrimonial law, the land was recognized as the main object of power, and the people was its belonging; by the state law, vice versa, the people as a whole is the subject of the state, and the territory is its belonging. That is why belonging to the state should also be defined by belonging to the people, i.e., personal principle (*jus sanguinus*), not the territorial principle”.

However, in such states where the population is not a single ethnic group or a religiously united people, the political and legal belonging can be also defined by the pure territorial principle as well, i.e., the right of the soil (*jus soli*), however, as an exception, not as a rule.

The mentioned idea can sound stronger and more convincing if we try to give a precise scientific and legal definition of the correlation of the right of nations and people to self-determination, fundamental human rights, the main goal of the UN Charter, as well as the principle of preservation of the territorial integrity of a state. This correlation can clearly display itself in the system of answers to the following rhetoric questions given in a certain sequence: 1. Can a man, living on the historical land of his ancestors, speaking the native language, recognizing the religion, national customs and cultural traditions of his people, his fate and system of values, successfully follow his vocation, given by God, and mission of his life, if he is by any reason or circumstances spiritually and thoughtfully separated from the life of his people? 2. Can a man normally and freely develop if his people is under the yoke of the so-called “progressive” leadership of the other people? 3. Can he live quietly if his people is in the state of the extreme need and fear of each coming day? 4. Can he stay aside if his people is in the state of physical survival and self-defense from the external enemy? 5. Can he be considered a decent man and fulfill the purport of his life if he himself and his people would not know and remember where they come from and where they should go? One thing is clear: only a free and highly responsible man, having in his personal and individual possession all elements of the national-ethnic self, people’s spirituality and conscience, originality, the feeling and belief in the sacristy, truth and incorruptible virtue of his terrestrial motherland, given by God, is able to confidently follow his lifelong vocation and supreme mission. A man cannot freely and responsibly determine himself according to his moral and spiritual vocation and life predestination without preliminary and simultaneous-

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ous creation of appropriate conditions for self-determination of his people and his close and, if possible, distant relatives.

For the appropriate and legitimate, undisputed and final settlement of the problem of the Nagorno-Karabakh Republic it is necessary to include the appropriate amendment into Art. 3 of the Universal Declaration of Human Rights (1948), adding the right of human beings to free self-determination in accordance with their personal vocation and mission in this earthly life to the human rights to “life, freedom and personal immunity”. The state of the universal peace begins from the proper state of the spirit of each human being who feels responsible for participation in the everyday life and ultimate fate of his/her people and humankind as a whole.

According to Art. 1 of the Facultative Protocol of 1976 to the International Pact of Civil and Political Rights of 1966, the member states recognize the competence of the UN Committee for Human Rights in acceptance and consideration of reports from persons under their jurisdiction, claiming that they are victims to infringement of any of their human rights mentioned in the human rights pacts, and these rights are violated by their states. Based on Art. 5 of the mentioned Protocol, each person can apply for protection of his/her fundamental rights to the Committee for Human Rights if all other means of legal protection in his/her own country have been exhausted.

However, strangely enough, in contrast to human beings, whole nations and peoples living on the territories of the UN member states are deprived of such an inalienable right, and due to the lack of any support from the international community, at the cost of the selfless struggle and the blood they shed in the struggle against their suppressors, have freed themselves from the legalized yoke of the more numerous peoples and achieved their de facto political independence. For example, on September 2, 1991 after years of national liberation movement, Nagorny Karabakh (Artsakh) proclaimed itself as an independent state, based on the adopted Declaration of independence. However, the so-called international community so far has not even officially recognized the de facto independence and the proper political and legal status of Artsakh as an equal party in the negotiations process with the Republic of Azerbaijan, which substantially hampers the appropriate legal resolution of this problem up to now*.

Besides other difficulties, the inner discrepancy of international norms and acts adopted by the UN in various periods of time also poses a serious obstacle to the

* For reference, it is necessary to note that the full-scale military actions started by Azerbaijan to suppress the free will of the Karabakh people for independence finally resulted in the complete loss of the military and administrative control not only over Nagorno-Karabakh, but also seven adjacent regions. The tripartite ceasefire agreement took effect on May 12, 1994. As a result of the Nagorno Karabakh conflict, nearly 30 thousand people died and one million became displaced persons.
settlement of such conflicts. For example, para. 5 and 10 of the Preamble of the Declaration of the Granting of Independence to Colonial peoples, and part 2 of Art. 1 of the UN Charter mention the duty of the states and international organizations to assist the national independence movement and encourage the respect to the equality of rights and the right of nations and peoples to self-determination. At the same time, this unshakeable right is uneconomically reserved by its derivative principle of non-interference into the internal affairs of the states. In other words, the principle of non-interference prohibits the UN and other international governmental organizations to have a timely and active engagement in the settlement of the international conflicts without appropriate statement of the UN member states.

As a result, a paradox situation has been shaped: if a UN member state violating the international law of any people does not worry the UN in relation to its own infringements of the law or is not a member of the UN, then this state-transgressor, by the norms of the international law, cannot be called to international legal responsibility and be subject to the sanctions stipulated by the UN.

The international legal practice increasingly proves that the contents of the mentioned provisions of the UN Charter do not correspond to the creative spirit and concrete requirements of the contemporary and proper arrangement of actual international disputes and armed conflicts. No one, including such a universal organization as the UN, has the right, with its unjustified sluggishness or criminal inaction, to bring the international confrontations to such a scale and development when the transgressor state, a member of the UN, would be forced to apply to it with the statement on interference “in its internal affairs” in order to continue its abuses within the frameworks of its own “state sovereignty” and claimed territorial integrity. For example, such a statement has been made by Azerbaijan with the aim of forcible settlement of the problem of the Nagorno-Karabakh Republic, which has actually achieved its national and political independence.

In order to timely and practically settle such issues, it is necessary to substitute para. 7, Art. 2 of the UN Charter for a provision, which, on the one hand, implies the right of nations and peoples to self-determination according to their own vocation, and the right to immediate application to the UN to acquire a timely and organizational-financial support. On the other hand, the legal provision proposed by us imposes on the UN member states the direct responsibility for urgent adoption of appropriate legitimate decisions and effective measures to overcome the crisis situation on the basis of the perpetual idea of the law, as well as the universally recognized and effective principles of the international law. Such a legal provision is not only legitimate and initially in harmony with the law, but also indisputably purpose-

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* For example, the harsh violations of the fundamental rights of small peoples, having national-state and territorial entities on the territory of that state.
ful and efficient for prevention and proper settlement of similar international legal conflicts. The main reason for the efficiency of such a legal provision lies in the supposition that the UN official member-states will find it very disadvantageous to give up the UN membership for the arbitrary and bloody settlement of the international problems that such states consider to be just domestic issues.

Thus, the perpetual idea of law, the hierarchy of universally recognized principles and norms of the international law as well as life itself obviously have already given the answer to the question whether to be or not to be the *de facto* and *de jure* independence of the Nagorno-Karabakh Republic. And only time will show how open or behind-the-scenes answer will be given to this question by the politically organized international community.
RELEVANCE OF RELIGION IN RUSSIAN PUBLIC SCHOOLS: CONSTITUTIONAL PROBLEMS FROM COMPARATIVE PERSPECTIVE

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Religion has become a topic of increasing importance in the world over the past decade as an important constituent of understanding and supporting of intercultural education and citizenship education in schools.

On 1 April, 2010 in Russia, an experiment in teaching a new school subject “Principles of Religious Cultures And Secular Ethics” began after several years of debates and disputes. According to the Government order, the experiment was to be conducted in 19 regions of Russia from 2010 to 2011, involving school students aged 10-11 years. of The students’ parents were to choose one of six modules grouped in three blocks: Block 1: “Foundations of Orthodox Culture”, “Foundations of Islamic Culture”, “Foundations of Jewish Culture”, “Foundations of Buddhist Culture”; Block 2: “Foundations of World Religions” and Block 3: “Secular Ethics.” It is compulsory for pupils to choose a course from one of these three modules.

There are a number of important legal factors that have to be taken into account in teaching about religions and beliefs in order to ensure that the freedom of thought, conscience and religion of all those affected by the process is properly respected. These factors include the protection of rights of the parents and children, teachers, as well as the more general interests of minority and religious communities and of the society as a whole. The experiment with introducing classes on religion and secular ethics in the curriculum of Russian schools got a lot of criticism.

I. Legal Framework and the Circumstances of the Experiment
According to the Russian Constitution,

“The Russian Federation shall be a secular state. No religion may be established as the State religion or as an obligatory one. Religious associations shall be separate from the State and shall be equal before the law” (Art. 14).

1 The article is prepared within the framework of the multi-year cooperative academic project (2009 — 2012) — HESP ReSET Project “Comparative Constitutional Law: Theory and Methodology of Constitutional Reform” organized by the Russian Institute of Law and Public Policy.
Besides, under the Russian Constitution the State guarantees the equality of human and civil rights and freedoms regardless [...] of religion or convictions. “All forms of limitations of human rights on [...] religious grounds shall be prohibited” (Art. 19).

Freedom of conscience and religion is on the list of fundamental human rights provided by the Russian Constitution:
“Everyone shall be guaranteed freedom of conscience and religion, including the right to profess individually or collectively any religion or not to profess any religion, and freely to choose, possess and disseminate religious and other convictions and act in accordance with them (Art. 28).

The 1997 Federal Law No 125-FZ “On the Freedom of Conscience and Religious Associations” declares all religions equal before the law, prohibits government interference in religion, and establishes simple registration procedures for religious groups. The country is by law a secular state without a state religion. The preamble to the 1997 Law, however, acknowledges Christianity, Islam, Buddhism, Judaism, and other religions as constituting an inseparable part of the country’s historical heritage and also recognizes the “special contribution” of the Orthodox Church to the country’s history and to the establishment and development of its spirituality and culture. The 1997 Law also creates three categories of religious communities (groups, local organizations, and centralized organizations) with different levels of legal status and privileges.

According to the Law on Freedom of Conscience and Religious Associations and the 1992 Federal Law “On Education” (Art.1, p.5, Art.2), religious education is not the task of the state, but of the family with the support of the comprehensive confession. The main principle of the state policy in the education area is the secular character of education in public schools, accompanied by freedom and pluralism in education.

However, despite of the constitutional principle of secular state, in the field of education national legislature does not prohibit religious education in public schools in Russia.

On 2 August 2009, a meeting was held between President D. Medvedev and the main religious leaders of the RF. As a result, President issued an order on 2 August, 2009, to start the experiment in Russian public schools. 19 regions were selected to implement the experiment in teaching a new school subject “Principles of Religious Cultures and Secular Ethics” (but from 2012 the subject is to be taught in all Russian schools).

This course has a complex character and allows parents to select mandatory instruction from any of the following three emphases:

1. The basics of Orthodox Culture, the basics of Islamic culture, the basics of Buddhism culture, the basics of Jewish culture.
2. The basics of world religious cultures.
3. The basics of secular ethics.

All the modules of the new course have a secular and culturological character and aim at developing conceptions of moral ideals and values, composing the basis of religious and secular traditions of the multinational culture of Russia, in children of 10-11 years old; they also aim at understanding the importance of these values and traditions in the life of the modern society and their complexity. The contents and methods of teaching the course will be approved during 2 years.

One of the modules is studied by a pupil with his/her accord and by choice of his/her parents (legal representatives). The course is now taught in 21 constituent entities of the Russian Federation as experimental in 4th term of Grade 4 and in the 1st term of Grade 5.

Religious and non-religious representatives took part in developing the course syllabus. According to the information provided by the constituent entities of the Russian Federation, a little more than 15,000 teachers from 10,000 institutions participated in the approbation of the course. A publishing house planned to print 123,000 school-books on the basics of secular ethics, 83,000 — on the basics of Orthodox culture, 58,000 — on the basics of world religious cultures, 37,000 — on the basics of Islamic culture, 14,000 — on the basics of the Buddhist culture, and 12,000 — on the basis of the Judaic culture. In addition to the school-books, a brochure for parents has been prepared.

It is quite obvious that the Russian Orthodox church has gained more than the others from the introduction of the new discipline since the promotion of “Foundations of Orthodox Culture” had become its initiative and prerogative direction of activity. Many Muslims and Jews have cast doubt on the necessity of teaching religion in schools; they express concern over the secularity of the teachers (which is one of the principles of the new discipline) and the potential marginalization of their children being taught, possible inter-religious conflicts in the schools, the quality of the academic course and the textbooks. It is not fully clear whether there will be a demand for “Foundations of Secular Ethics” (atheists and agnostics would be quite satisfied with the History of World Religions).

If the experiment proves to be a success, starting from 2012, religious education could be added to the school program. Criteria for evaluating the success or, on the other hand, failure of the experiment have still not been defined. Also, it is not completely clear who will teach the new discipline and how. It is proposed that one teacher (most often a teacher of history or social studies) should be able to teach all three modules adequately. Will a teacher who has taught “Foundations of Orthodox Culture...”

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Culture” for several years in a Sunday school be able to teach the principles of secular ethics properly? Will a teacher who has been trained for several years to teach the History of Religion in schools be able to deal with the defense of religion? There is still no answer to these questions.

II. International Standards and Principles of Teaching Religion in Public Schools

A new course is aimed at teaching school kids respect for other cultures and religions. However, it raised a lot of debates within the field of religious education in Russia which describes tensions between multiculturalism and intercultural learning, between learning about religion and learning from religion, between pedagogy and theology, context and tradition, initiation and critical thinking, universal human rights and particular religious convictions.

There are a number of important legal factors that have to be taken into account when teaching about religions and beliefs in order to ensure that the freedom of thought, conscience and religion of all those touched by the process is properly respected. These factors include the rights of the parent, the child, and the teacher, as well as the more general interests of minority and religious communities and of the society as a whole, and also the obligation of the State not only to refrain from interfering with beliefs, but also to take steps to protect the enjoyment of the freedom of religion and belief by all individuals and groups.

International norms of freedom of religion or belief and tolerance education are enshrined in the documents of the Council of Europe, such as Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms (EHCR) and Article 12 of the Framework Convention for the Protection of National Minorities.

In 2005, the Parliamentary Assembly of the Council of Europe also adopted Recommendation 1720 on education and religion, which recommended that the Committee of Ministers encourage the governments of member states to ensure that religious studies are taught at the primary and secondary levels of public education. According to this Recommendation, education is essential for combating ignorance, stereotypes and misunderstanding of religions. Governments should

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also do more to guarantee freedom of conscience and of religious expression, to foster education on religions, to encourage dialogue with and between religions and to promote the cultural and social expression of religions.

As human rights treaties make clear, “everyone has an absolute right to hold to the pattern of thought, conscience or religion of their choice, free from any interference from the state under any circumstances. In consequence, no one must be subjected by the state to any form of coercion that would impair their freedom to have or to adopt a religion or belief of their choice or to change their religion or belief”.

It is also worth noting the publication of the Toledo Guiding Principles on Teaching about Religions and Beliefs (OSCE/ODIHR 2007) developed by the Advisory Council on Freedom of Religion or Belief, a consulting body to the Office for Democratic Institutions and Human Rights of the OSCE. The Toledo Guiding Principles offers recommendations and guidance for preparing curricula in public schools so they can fall within the framework of respect for the parents’ and pupils’ religious freedom and be in accordance with the international documents on human rights.

According to the international standards, a State shall comply with following principles in the field of education:

— **principle of religious neutrality, impartiality and pluralism**

We can observe a broad range of teaching models and systems of education, including the use of both religious or non-religious schools within the public-school system. It is not possible to conclude in the abstract whether one model will necessarily have more adverse consequences for the freedom of religion or belief than another. Compliance with human rights commitments can only be assessed through a careful analysis of the competing interests that need to be respected in the delivery of education and the manner in which they are in fact respected within the particular model in question. It is clear that when considering these questions, the particular historical, political, religious, and sociological factors will operate so as to preclude the emergence of a standard approach.

That is why state authorities generally have broad discretion in designing, selecting, and implementing curriculum decisions in their countries. As international norms do not rule out various forms of co-operation with religions and belief systems, they do require neutrality and impartiality in the sense of ensuring the tolerance that is vital to pluralism, and in the sense of protecting freedom of religion or belief for all individuals and groups on an equal basis.

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6 Toledo. Guiding Principles on Teaching about Religions and Beliefs in Public Schools, prepared by the ODIHR Advisory Council of experts on freedom of religion or belief// URL: http://www.osce.org/search/apachesolr_search/Toledo.

7 Ibid.

8 Ibid.
Regardless of the particular model of church-state relations within a country, the state has important responsibilities in the field of education and a duty to act in a neutral and impartial fashion where matters of religion and belief are concerned.

— principle of equality and non-discrimination

Russia is a multi-religious and pluralistic society. Religious organizations are an important and active part of the modern Russian society. There are currently religious organizations of over 66 denominations registered and functioning in the country. At least 10,000 religious associations, traditional and new, can now be found in Russia⁹. Religion is getting a new status nowadays; it is becoming a sign of national and cultural identity, both for the main population and for immigrants.

According to the information from the nongovernmental sociological institution Levada-Center, in 2008 71% of Russians said they were Orthodox, 5% — Muslims, 1% — Catholics, 1% — Protestants, less than 1% — Jews and Buddhists, and 5% — atheists¹⁰.

There are also believers of not-included non-traditional religions, including Seventh-day Adventists, Pentecostals, the Old Believers, Baptists, and various Islamic groups, who are deprived of the possibility to teach courses about their own faith and may potentially raise the question of discrimination and claim that the religious minorities should also be provided with a special course so that all religious associations can be equal in accordance with the Russian Constitution. It seems that registered traditional religious organizations, which represent the majority of the population, are the recipients of special government privileges.

The compulsory character of religious education in public schools is not the main way to foster respect for religion and morality. Teaching children one religion is the main risk of the family itself and the people’s chosen religions. Examples of such discriminatory effects of religious education include the following: some pupils feel alienated from the curriculum or face discrimination because they claim exemptions from taking religious subjects; some parents feel that the schools system treats their religion or belief as less worthy than other religions and beliefs; or some teachers are unable to teach particular subjects because of their religion or belief.

There is also a danger that a certain religion may be identified with a certain ethnic group, especially in regions dominated by one religion but inhabited by religious minorities. It may potentially lead to growth of conflicts among pupils and to possible religious segregation.

¹⁰ URL: http://www.levada.ru.
— prohibition of indoctrination

The State,

“in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious and philosophical convictions. This is the limit that must not be exceeded. Such an interpretation is also consistent with the first sentence of Article 2 of Protocol No. 1, with Articles 8, 9 and 10 of the Convention and with the general spirit of the Convention itself, an instrument designated to maintain and promote the ideals and values of a democratic society. Thus, neither the curriculum (as set in general regulations and as implemented in particular schools) nor the general operation and discipline within the public school system must not transgress limits resulting from the prohibition of indoctrination”.

Every piece of information that may have religious or philosophical connotations must be conveyed in an objective, critical and pluralistic manner; the failure to observe this requirements transforms legitimate education into the process of indoctrination, by definition constituting violation of parents’ rights.

It is important to treat education about religion as a phenomenon of the world culture. As for the public schools, they should provide knowledge about the history of the main world religions, but not give preferential treatment to one religion over others. It is necessary to promote the idea of tolerance toward other traditions and cultures when one lives in a pluralistic society like Russia.

III. Constitutional Problems of the Current Stage of the Experiment: Case-Study

The religious education within the system of public education is a rather new issue in Russia, but many other European countries have experienced (and many still face) serious difficulties in this matter; the European Court of Human Rights (ECHR) had to deal with quite a few cases on this topic. Case-study helps to identify the most important problems of teaching religion in public schools.

1) the problem of religious education consistency with parental religious and moral convictions and the State’s duties.

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11 Kjeldsen, Busk Madsen and Pedersen v. Denmark. It should be recalled that this case did not deal directly with the problem of whether a public school is allowed to include religious instruction into its curriculum. In this case the Court addressed the compatibility of the sex education with parents’ rights under Article 2 of Protocol no. 1. The applicants claimed that integrated and compulsory sex education, as introduced into State schools, was contrary to the beliefs they hold as Christian parents. The question, therefore, was not whether and how religion can be taught in public schools, but — rather — what are the limitations in teaching non-religious subjects that may offend religious convictions of the parents.
The State’s obligation to provide public education implies that the State has a competence to organize the system. Under the case-law of the Strasbourg Court:

— the State has a wide discretion in determining its educational system: the right to education [...] by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of community and individuals; the right to education refers to the educational institutions actually existing in the material time; this right cannot be, in principle, understood as enhancing the State’s obligations to establish new schools of a particular type, e.g., schools with a particular language of instruction;

— setting and planning the curriculum fall in principle within the competence of the States;

— the State has competence to organize the operation of public schools also in respect to the internal rules of behavior (including common manifestations, dress codes, etc.) and to apply disciplinary sanctions to enforce those rules

Parents and legal guardians have the right to have their children educated in accordance with their religious or philosophical convictions. And the State’s powers must, however, remain consistent with the parents’ rights to have their religious and philosophical convictions respected.

While the child is the beneficiary, she does not have an independent right. According to Art. 2 of Protocol No. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms,

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions. It should be stressed that children, as autonomous individuals, enjoy the freedom of religion or belief in their own right, as do adults. However, given the special status of the rights of parents and legal guardians regarding the religious and philosophical upbringing of their children, the rights of the child in the sphere of education are often exercised by parents in their own right rather than in the name of the child.

This does not mean that the state is bound to provide a system of education that accords with parental beliefs, but it does mean that parents can object to the nature

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14 Toledo. Guiding principles on teaching about religions and beliefs in public schools, prepared by the ODIHR Advisory Council of experts on freedom of religion or belief// URL: http://www.osce.org/search/apachesolr_search/Toledo.
and content of the education and teaching given to their children where religious instruction is predicated upon, is intended to or has the effect of projecting the truth (or falsity) of a particular set of beliefs. In consequence, parents must have the right to withdraw their children from such forms of teaching.\footnote{Ibid.}

A different and more complex issue arises when parents object to educational programs that are aimed at teaching about religions and beliefs.

In \textit{Folgerø and others v. Norway} and \textit{Zengin v. Turkey} cases, the European Court of Human Rights (ECHR) analyzed the delicate balance between the state’s obligation to ensure a pluralist and neutral education directed at forming tolerant and critical citizens with regard to religious matters, and the right of parents to raise their children according to their own convictions. In these cases, the Court asserts that students should be exempted from compulsory courses on religion or from courses that are not conveyed in an objective, critical, and pluralist manner in order to protect the rights of parents to raise their children in accordance with their beliefs and to protect the child’s religious freedom.

In \textit{Folgerø and others v. Norway} case, four Norwegian families, all members of the Norwegian Humanist Association, brought a complaint before the European Court against the Kingdom of Norway on 15 February, 2002, in response to the competent domestic authorities’ refusal to grant their children full exemption from the KRL subject (“Christianity, Religion, and Philosophy”). The applicants maintained that the KRL subject was not taught in an objective, critical or pluralist manner, and was, therefore, not consistent with the interpretive criteria embodied in Article 2 of Protocol No. 1 of the European Convention on Human Rights. They declared that the subject’s main objective was to reinforce a specific religious identity through the use of textbooks that contained Christian sermons and Christian teachings. Since the possibility for total exemption which existed before the 1997 reforms was eliminated, the parents were left only with the partial exemption, which forced them to study the syllabus in detail in order to determine how beneficial exemption would be for their children.

In its defence, the Norwegian government used the criteria established by the European Court in its judgment of \textit{Kjeldsen, Busk Madsen and Pedersen v. Denmark}, maintaining that a right to full exemption as demanded by the applicants would make impracticable all compulsory and institutionalised instruction in which different religions, ethical questions or philosophies of life are studied. As the European Court upheld in \textit{Kjeldsen}, the European Convention protects against indoctrination, not against the acquisition of knowledge about religions and philosophies of life presented in the form of objective, critical and pluralistic information.
For these reasons, the conditions imposed on parents in the exemption clause could not be considered disproportionate, nor did they create an unreasonable burden that warrants the creation of a right to full exemption. Parents who consider the religious instruction, as provided by the school system, to be incompatible with their convictions must have a possibility to be exempted from instruction. The Court noted that the system of (only) a partial exemption imposed too heavy a burden on the parents involved: parents were required regularly to analyze the content of upcoming lessons, and exemption can be granted only if they were able to prove that subjects to be taught are irreconcilable with their conviction. In addition, the requirement of written justification of every exemption request could easily amount to parents’ obligation to disclose their intimate convictions to the school authorities. The case was decided by the 17-member Grand Chamber by nine votes to eight, in favour of the Norwegian parents.

In the Zengin v. Turkey case, the plaintiffs maintained that compulsory classes in “religious culture and ethics” violated the rights as guaranteed by the second sentence in Article 2 of Protocol No. 1, and those present in Article 9 of the Convention. The Zengin family belonged to the Alevi faith, a branch of Islam which has deep roots in the Turkish society and history. On 23 February, 2001, Mr. Zengin contacted the Provincial Directorate of National Education at the Istanbul Governor’s Office, requesting to have his daughter exempted from the aforementioned subject. While a possibility of exemption was provided for adherents of certain religions, it did not apply to some others, in particular to the Alevitic faith that represented one of Islamic denominations. The request was dismissed. Since 1990, the only exemptions allowed by the Supreme Council for Education have been directed at students of the Jewish faith, the Christian faith or atheism.

The Zengins argued that the teaching programme and the manuals for the class had as their main objective the reinforcement of students’ Islamic culture in its Sunni conception. In response, the Turkish government argued that

“There were legitimate grounds in contemporary Turkish society for granting more time to the study of Islam than to other religions and philosophies of life. This was particularly so given that Turkey was a secular State and that schools were therefore the most appropriate institution for transmitting such knowledge.”

The government emphasised that the compulsory nature of the course stemmed from the need to protect children from the myths that incite and promote fanaticism. Furthermore, the Turkish government stressed that its position, in compliance with the constitutional principle of secularism, is supported by the European Court’s jurisprudence, which has extended a margin of appreciation to states with regard to the public school curriculum.
The Court noticed that the procedure of exemption, being limited only to adherents of certain religions, does not provide sufficient protection for other religious minorities. This procedure was shaped in a manner that was “likely to subject them to a heavy burden and to necessity of disclosing their religious or philosophical convictions in order to have children exempted from the lessons in religion”. Unlike Folgerø, Zengin was decided unanimously by a chamber of seven judges who considered that the system of religious instruction of Islam taught in the public schools violated the provisions of the Convention.

In Russia, the system of religious education differs from Norwegian and Turkish models since each parent has a right to choose one of the offered courses on four main religions, and, for those students who do not identify themselves with any of those religions (that includes also agnostics and atheists), an alternative course of basics of world religious cultures or secular ethics must be provided.

However, there is a problem of the absence of a legal mechanism that will ensure freedom of parental choice for the particular course that most closely reflects the wishes of a family. Parents of the students should choose one of the six modules in Russia, but in practice their choice can be restricted because of the lack of qualified teachers at school or reluctance of the school administration to organize courses for a couple of pupils whose parents have chosen unpopular modules. It is a widespread situation when the only choice is available for parents\(^{16}\).

There must be sufficiently effective procedural guarantees of the freedom of choice; undue restriction of the exemption may constitute a violation of the Convention. Pupils and parents should be free from any undue pressure or influence when opting for one of the courses on religion or ethics. The State must ensure the fair and proper treatment of minorities and avoid any abuse of dominant position of any particular group (religion).

As long as those courses remain optional and as long as the choice depends on the wish of parents and pupils, it may be assumed that such a system of teaching — in its model application — falls within the margin of appreciation as to the planning and setting of the curriculum accorded to States\(^{17}\).

2) problem of curriculum development

The State’s duty to respect the parents’ convictions implies some positive obligations on the part of the state, including ensuring that any information or knowledge included in the curriculum is conveyed in an objective, critical and pluralist manner.

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The state's obligation to impartiality and neutrality towards different religions, faiths and beliefs is incompatible with whatever assessment the state makes about the legitimacy of beliefs or their forms of expression.

It is the duty of the state to determine the school curriculum, which may include information of a religious/philosophical kind, but must assure that it is conveyed in an objective, critical and pluralistic manner.

In the above-mentioned Norwegian case, the Court summarised its previous case-law in such a way:

“The setting and planning of the curriculum fall in principle within the competence of the Contracting States. This mainly involves questions of expediency on which it is not for the Court to rule and whose solution may legitimately vary according to the country and the era ... In particular, the second sentence of Article 2 of Protocol No. 1 does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable ...”

As the Court stated in the Zengin v. Turkey case, teaching is an integral part of the process whereby a school strives to achieve the objective for which it was established: the development and formation of the students’ character and spirit and their personal independence. In this case, the Court found that an examination of the curriculum and textbooks indicated that the subject was not confined to neutral information about different religions and philosophies. Not only did they dedicate more time to the knowledge of Islam in comparison with other religions or philosophies, the subject also included texts intended to instill the principles of Muslim religion into the students, even memorizing suras from the Koran. Consequently, the Court concluded that the classes did not meet the criteria for objectivity and pluralism.

Similarly, in the Folgerø and others v. Norway case, students were not only instructed about religion, they also engaged in activities to do with religion, for example, singing religious songs, participating in dramatisations of religious scenes and attending religious celebrations and ceremonies. The Court stated:

“The fact that knowledge about Christianity represented a greater part of the curriculum [...] than knowledge about other religions and philosophies, cannot [...] of its own be viewed as a departure from the principles of pluralism and objectivity amounting to indoctrination”.

However, the State’s margin of appreciation becomes more limited as to the content of the instruction: since pupils were also invited to engage in different religious activities “which would in particular include prayers, psalms, the learning of reli-
gious texts by heart and the participation in plays of a religious nature”, and since those activities offered some priority to the Christian religion, there emerged a situation of imbalance. This situation “would be capable of affecting pupils’ minds in a manner giving rise to an issue under Article of Protocol No. 1 of the Convention”.

One of the most controversial issues are possible claims that the inclusion of grades (marks) for religion into school reports raises problems under Art. 9 and 14 of the Convention as it happened in Grzelak v. Poland.

Under the Polish system, there are separate classes for each denomination represented by more than 3 pupils of a particular school. Parents choose one of the courses by submitting the so-called „positive declarations”. For pupils who do not wish to follow any of the religion courses, alternative course of ethics must be provided. A grade (mark) for those courses is included into the yearly school reports as well as into the final reports confirming the conclusion of a given level. Grades (marks) obtained for religious instruction or ethics are counted towards the „average mark” obtained by a pupil in a given school year.

It is provided that school reports contain a separate rubric Religion/Ethics; therefore, it is not possible to determine whether a pupil followed one of the courses on religion or the course of ethics. The problem is that, in some schools, the course of ethics is not provided (due to a very limited number of interested pupils) and, in consequence, the yearly school report of pupils who did not attend the available course on Catholic religion may contain a straight line in the rubric Religion/Ethics. This leaves a message that a pupil did not follow a course on Catholic religion, and — most probably — was not member of the Roman-Catholic Church.

The applicants complained that their son, from the age of seven, suffered from the failure of school authorities to organize courses in ethics for him as an alternative to the religious studies courses attended by all other students in his class. The Grzelaks complained that their son suffered discrimination and physical and psychological harassment that resulted in his parents’ needing to change schools for him twice during primary school. They complained, moreover, that he was not properly supervised or cared for, while other pupils were receiving religious instruction and that teachers failed to give him a mark in his school report in the place reserved for „Religion/Ethics.”

It was further alleged that since the mark obtained for Religion/Ethics is included into the calculation of the yearly average mark, inaccessibility of ethics classes may have an adverse impact on pupils. In conclusion, they maintained that “the fact of having no mark for Religion/Ethics inevitably has a specific connotation and distinguishes the persons concerned from those who have a mark for the subject”.

In a country like Poland, it “may amount to a form of unwarranted stigmatization” of such persons. In consequence, the Court was invited to decide whether
such difference in treatment “between non-believers who wished to follow ethics classes and pupils who opted for religion classes was objectively and reasonably justified and [whether] there existed a reasonable relationship of proportionality between the means used and the aim pursued”.

The Court stated that the lack of factual access to ethics classes in Polish schools constitutes a violation by the authorities of the right to cultivate religion beliefs and is of discriminatory character. The Court found by six votes to one a violation of ECHR Article 14 (prohibition of discrimination) in conjunction with Art. 9 but unanimously held that the finding of a violation constitutes just satisfaction for non-pecuniary damage and dismissed further claims for just satisfaction.

3) problems of teachers’ education

Even the best curriculum ideas will have little effect on students if teachers are incapable, for whatever reason, of using the curriculum in an appropriate way in their work with students. This applies with extra force to teaching about religions and beliefs because of the high demands that a curriculum places on a teacher’s knowledge, attitudes, and competences.

Teachers as individuals enjoy the freedom of thought, conscience and religion, and may manifest their religion or belief in accordance with the general human rights framework. However, it is true that by virtue of their having chosen to work in an educational environment, a range of restrictions may legitimately be placed upon teachers when they are working in the school in order to ensure that an educational environment appropriate to the school in question is maintained — taking into account, when applicable, the particular ethos of the school — and that the human rights of parents and children are respected. In this regard, it is axiomatic that when teaching about religions and beliefs — or, indeed, when teaching about any subject — teachers must approach their task in a balanced and professional fashion, and may not exploit their position as teachers to influence the beliefs of their pupils.\(^{18}\)

The importance of teachers’ qualifications and adequate initial and continuing teacher education should be stressed in Russia. One of the most essential questions arises: who should teach about religions and beliefs? In the Russian case, there are the so-called “universal” teachers — teachers of history who by tradition are asked to teach new additional humanitarian subjects. Moreover, every school must have teachers who will be ready to teach all 6 modules of the course. However, many teachers feel ill-prepared to address the cultural and religious diversity they encounter in their classrooms. They often lack the training to discuss different religions and

\(^{18}\) Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools, prepared by the ODIHR Advisory Council of experts on freedom of religion or belief// URL: http://www.osce.org/search/apachesolr_search/Toledo.
philosophies in a fair and balanced way and do not always have an adequate understanding of how issues relating to religions and beliefs relate to human rights.

Since a system of oversight does not already exist, the Russian government is encouraged to set up such a system to monitor and evaluate the manner in which teachers are presently selected and trained to educate on teaching about religions and beliefs.

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Russian government has chosen the model of parallel (denominational) religious instruction, in which religion is taught not only as a separate subject but is also separately for each of the denominations represented among students of a particular school. In other words, each of the primary traditional religions is invited to take care of instruction of its principles and beliefs; it is the responsibility of the school to arrange for parallel, denominationally-oriented classes in religion; parents must have the right to choose a religion class that corresponds to their convictions or, alternatively, a religion-neutral course on world religious cultures or general secular ethics.

The substantive problem in the Russian case is the absolute lack of adequate legal regulation of issues of religious education (including procedural regulation). And the main recommendation to improve this situation is to pass amendments to the current Law “On education” or to adopt the specialized Law “On Religious Education in Public Schools”, which must provide the legal mechanism that will ensure freedom for parents to choose a particular course most closely reflecting the wishes of a family, and control over the educational environment in this field.
NO FEAR TO BREAK LAW IN RUSSIA

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In the legal context, the term “law” is a legal act adopted by the supreme representative (legislative) body of the state or by the population via the referendum as a special procedure of passing a law that has the supreme legal force and regulates the most important social relationships in favour of the population's interests and needs. The laws are considered to be the foundation of the whole system of law.

The sense of justice that comprises methodical, piecewise or even distorted knowledge of law, its rules and principles, defines the choice between the respectful or disparaging attitude to the law. It also includes habits, sentiments and emotions of the people to the statutory rules. Besides, the sense of justice is determined by the socio-economic and cultural conditions, administrative traditions and the level of development of either democratic or authoritative power institutions.

Legal nihilism (from the Latin nihil, nothing) is presented as one of the forms of the sense of justice and personal or group social behavior, deemed to be negative (disparaging, skeptical) attitude to the law as such and to values of law. In administrative practice and everyday life, this nihilism is demonstrated by deliberate over-riding of rules and regulations, thus providing a basis for unlawful conduct and crime.

The bending of rules to take personal advantages gives rise to the illegal methods of state and municipal administration, including corruption, excessive bureaucracy both in the state and local bodies, deformation in the officials’ minds who think they possess an unlimited power to rule and correct the citizens in the case of breach the law.

The lack of respect for the law in Russia led to the non-official phenomenon of the breach of law hierarchy. The higher position the official holds, the fewer laws he/she complies with. Along with the power, the official seems to get a kind of special permission to break, distort the law and exploit his/her position only for the personal benefit.

The administrative lawlessness can serve as the most striking example of such officials' behavior, when administrators disregard many core elements in the legal relations, including any conflict situations. Essentially, the administrative resource, as well as the coercion and disregard for the rights and guarantees of citizens, trig-

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ger off a mechanism which is based on deforming legal facts, evaluating actions and ignoring the law. Mostly originated in the system of state administration, a propagative “virus” of disparagement to the law has been widely spread among the population by such administrative lawlessness.

According to the experts’ viewpoint, one of the effective means to stop such administrative lawlessness is to create administrative courts where citizens’ complaints against illegal actions of officials could be considered². Many European countries have already introduced this effective system of specialized courts, providing the Europeans with certain remedies in the case of human rights abuse by the government³.

One of the aims and, at the same time, one of the trends of the administrative reform in Russia is to reduce the administrative discretion when the official may, contrary to all the rules, decide in favour of certain interests. However, to make it possible we need appropriate procedural (formal) rules⁴. These rules are mainly stipulated in the Concept of the Administrative Reform⁵, and they are aimed at the elaboration and implementation of the state service standards, administrative bylaws, e-Government concept and free information access to the public services.

After Federal Law 273-FZ “On Counteracting Corruption”⁶ (December 25, 2008) set forth the anti-corruption measures that are being applied now, many cases of the official power abuse were disclosed.

Both the mercenary interests and the abuse of official powers (Art. 285 Criminal Code of the RF) always have one goal in common — to get personal profits or benefits and in favor of other certain persons⁷.

⁵ Sobranie Zakonodatelstva Rossiiskoi Federatsii [Russian Federation Collection of legislation], No. 46, p. 4720. Here and after SZ RF [RF CL].
⁶ SZ RF [RF CL]. 2008, No. 52 (part 1), p. 6228

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Having analyzed the corruption reasons that were revealed by some researchers, the New Scientist Journal makes the conclusion that power abuse to a certain extent does exist in every country regardless of the fact whether the country is developed or not. The system of punishment alone is not enough to counteract the enormous desire of those in power to get illegally enriched.

The corrupt influence of power was illustrated by the US Tilburg University research during the experimental game among an organization’s officials concerning the share of profits. The outcome was incredible: a high-ranking official, who wants to get as much profit as he can, believes that with many counterfeit schemes he is able to circumvent the law. However, one of the major factors contributing to corruption is the question of its approval in the society.

The point is that inadequate activities of enforcement organs or anti-corruption commissions, poor anti-corruption examination of legislative acts, inefficient cooperation of investigative organs and security services are only the external reasons for corruption. As a matter of fact, in the popular mind all the anti-corruption measures are regarded as a usual political campaign: the one to be soon forgotten without any results. Moreover, the exploding raw material economy, uneven resource and property distribution affect the rate of corruption-related crimes, thus leading to the loss of values and legal cynicism among the population. Only very few people are ready to become involved in innovative and creative processes. Advantages that corruption brings in the Russian immature economy make even law-abiding citizens consider the idea of quick though illegal, enrichment.

Originating in the economy, the values of shadow economy relations begin to affect other sectors of the social life: politics, law enforcement organs, officials, state and local organs, the mass media and etc

Nowadays the living standards and the needs are not very high, and people feel their own insufficiency to cover these basic needs. Besides, the level of anxiety among the population has been increasing. Business irresponsibility, stealing and corruption have become commonplace in our everyday life. With the inflation rising, more and more people are becoming underprivileged.

Fear as the motivation can be felt on the perceptual level. It is the fear to fall victim to lawlessness or to a crime simultaneously with the hope to protect yourself and your family against power abuse. Fear makes people weak and distorts the reality. Fear may be defined as the unmotivated level of anxiety among the population.

However, depending upon the world outlook, certain convictions, false assessment of possible consequences and a misconception about the legality of his/her

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actions, a person does not develop the feeling of fear in response and consciously breaks the law.

When a person chooses a certain course of actions and the behavior model, he/she feels positive, therefore, there is no doubt and fear at all. The fear is far away because there is a naïve hope that nobody will notice his or her unlawful behavior.

Generally, all these attitudes distort the reality. People in power are likely to develop such attitudes since they repeat similar procedures every day: they make decisions on behalf of others, manage other people’s actions and evaluate their performance. Moreover, ambitions that add to the work’s passion strengthen the delusive sets, making them more emotional and imperative. That is the personal illusion of one’s own abilities which unconsciously transform into the idea that the boss seems to be always right. Accepting one’s own actions and at the same time ignoring the opinion of others creates inconsistent standards. The inadequate use of power, including the law evasion, leads to impunity and permissiveness within the country.

Only the “vaccination of culture” is an efficient means to bring back the lost fear to break the law. A man is regarded to be the highest value in democratic societies. And the society, as a general rule, follows the liberal principle: “everything is permitted that is not forbidden”. Therefore, the law is like an instrument for actions to protect human rights that are limited by the moral. The law as a cultural value is widely recognized by the overwhelming majority. If people obey the law, they protect and ensure their rights, including their rights in the interaction with political, national, municipal and public institutions. The court has to establish whether the law has been violated or not.

The law serves and protects public officials’ rights equally with those of ordinary people. Moreover, since political structures are rather competitive and open to the public, politicians are even less protected. Hence, illegal enrichment at the expense of taxpayers would be easily revealed. But the Russian society possesses, so to say, weak resistance of “civilian body” to the healthy “vaccination of culture”, probably because of the extensive Russian territory and low population density. People who live distantly from each other have difficulty in exchanging their cultural values and their behavior. Therefore, since times immemorial the idea of universal law has been disputed. Now in Russia, the law has acquired some personal character, and its implementation depends on who you are, and what your social status is. This deformation resulted in the counterculture phenomenon based on legal nihilism. Once the campaigns to observe the law are launched to punish offenders, the law seems to be restored for a while as a temporary phenomenon. It turns out that the law is followed only with regard to ties and the social status of a person in certain situations.

In the challenge of the counterculture based on the legal nihilism, people with different social backgrounds seem to be hoping to act against the law with complete
impunity: to break traffic rules if they have a special official license; to decide a land allotment question in favor of your “friend” after having received a bribe; to pass the Commercial Court’s resolution on a case with the high price, having negotiated your personal profits in advance; to grant privileges for those who will stand by you later, and so on. Those who are not afraid to break the law often try to demonstrate their superiority, their advantages, pursuing the idea that a man has almost unlimited powers which he may exercise, pretending to be good and abusing powers and exploiting the state authority. But as soon as the offender is caught and punished, all the self-admiration instantly disappears.

As a rule, democratic societies use the words “people” or “nations” in respect to human rights and freedoms, and words “government” and “state elite” — with reference to the state machinery staff. Thus, the law as a means for the human rights and freedoms protection is perceived to be necessary in the national protection of citizens’ interests during the state evolution.

What happens in the Russian society has always been in the interests of the state. The value of the “strong state” has been placed in the center of the culture, with the law serving as an instrument for restrictions imposed by the system of values. As a result, the law puts human rights aside, and the court delivers justice in the light of dominant system of values whether the person is right or not. The system as such reminds the following statement: to put the cart before the horse.

Over the years of reform in Russia, the political elite was composed by means of the success “conversion” through appointments in one administrative sphere and through privileges in another sphere. The dominant elite recruited the most successful entrepreneurs, military and public men. Therefore, political elite was becoming more incompetent and mercenary but fully realizing the distinctive hierarchy of values in the state. Some of them were influenced by some abstract market economy theories; others knew the taste of quick money. Thus, there were no borders between the business and the power; conversely, mostly the business and the power were inseparable. So the power became involved in business and the business began to control and to even modify the power.

The attempt to create “social lifts” through a reserve of the administrative personnel for domestic economy, state and municipal services has not been successful. Money can be converted into public offices, and the power — into ranks and privileges. The bending of rules and regulations in the elite’s interests and the sacralization of the “strong state” idea enables to control the entrepreneurship and increase the officials’ wealth.

But the process of building up the administrative reserve undoubtedly must go on. First, it will enable to increase the economic, political and administrative competition. Second, as a result of the professional training, the new elite’s generation
will be more competent to solve the problems that the country faces. Third, the process of stagnation of the administrative elite will definitely slow down.

The solution of the problem requires some innovative treatment. The new generation will not put up with the retarded state development; they will not lose their social status; they will change the administrative system using progressive information and knowledge. But they will have to accept the supremacy of law, tight restrictions imposed by laws and regulations that cannot be arbitrarily changed.

By the end of the XX century, most European countries and the USA already built a lot of autonomous “social lifting” institutions in their administrative systems, having drawn a clear line between the lifetime government service and the business, the politics and the bureaucracy, through a strict selection mechanism among the officials. This system of the “social lifting” has laid the foundation for the fight against corruption.

The absence of fear to break the law firmly penetrates into the citizens’ minds through mass media and literary works. These mass media channels are popularized; many Russian drama TV series, such as “Glukhar”, show that both criminals and human rights defenders constantly violate the law. However, the series do not make conclusions that the illegal way of life is dangerous, and the people who have picked this way ruin their own life and their families’ life. But in spite of this fact, the unlawful behavior model is getting accumulated on the genetic level, and many decent, clever and talented people are unconsciously being sucked down in the “bog” of wrongdoings.

Nowadays legal education in Russia is being reformed again. The standards, stages, levels of lawyers’ training are being altered, but few experts, having approved the institution reform as in general, speak about the necessity to form a solid sense of justice, i.e., values, sets of purposes that display what is legal and illegal in the opinion of citizens. Every value is known to be the core of every culture. When the law and the sense of justice come apart, the government is to fight against the counterculture that is founded on legal nihilism. It is possible to draw the following parallel: will the state annual efforts to get rid of the cannabis plants be efficient if the state itself has earlier distributed the cannabis seeds among the population?

The curriculum and educational programmes with the comprehensive and interdisciplinary approach will be more convincing as lawyers’ sense of justice would be based not on the wrong dogma of the “inborn legal nihilism”, but on legal and social values, legal cooperation and creativity declared in modern Russia.

The source of the respectful attitude to the law is rooted in the inherited and acquired capabilities of a person. A person learns about permissions, bans, the

sense of safety and justice — the most important social values — in the very first years of his or her life; following the example of older generations, a person “creates” his own personal social values.

Mass legal nihilism causes the “all-society infection” and the objective indicators of the crime rate measured by means of criminological methods within the country prove this effect.

The foreign experts analyzing the peculiarities of the Russian law system notice that there is a huge gap between the law and its implementation. Kathryn Handley, an American lawyer, states the following:

“The reality is that all legal systems have their own flaws, more or less serious, and yet they are not plagued by such levels of apathy and doubt in regard to the law that is too commonplace in Russia”\(^{10}\).

In fact, this attitude to the formal law leads to the application of informal norms almost with no fear to break the law. The legal dualism demonstrates the permanent estrangement of the population from the government and makes the business people seek criminal ways to overcome the obstacles that have been created by corrupt officials pursuing their own interests.

Another reason for the disparaging attitude to the law is the gigantic system of privileges for government officials. For example, there are lots of normative acts, such as the Government decrees (postanovleniia), and even court decisions concerning the housing programmes for the military men, orphans, and disabled people, but these decisions have not been fulfilled. To overcome these obstacles, it is necessary to increase the local activities to construct municipal housing according to the people’s needs, to demonopolize the building sector and to take other organizational and economic measures. This process is said to be lasting and unprofitable.

Meanwhile, those who are entitled to participating in government housing programmes and have been waiting for the new housing for a long time seek to protect their values (health, steady job, family, children) and to satisfy their vital needs, resorting to dishonest or illegal means and applying informal norms. Eventually, the government itself gives rise to the disparaging attitude to the law.

Needless to say that it is necessary to know the laws in order to overcome these obstacles and protect the rights and freedoms without violating the law. Every Russian family should have such basic law books as the Constitution of the RF, the Criminal Code, the Criminal Procedure Code, the Code of Administrative Offences, the Civil Code, the Civil Procedure Code, the Housing Code and the Labour Code. A person ought to be aware of his/her fundamental rights and obligations

and to get to know the culture of the law implementation with the help of professional lawyers. Only then the implementation of laws or legal rules will be the rule rather than the exception, although a person has to know about the existing system of “illegality” and to be able to survive in it. As to judicial mistakes, they are unlikely to be corrected.

Recent years have brought a lot of suggestions to reform the political course concerning legal competence and the sense of justice. The suggestions reflect such topical issues of the current society as the disparaging attitude to the law and the legal nihilism among lawyers as the most outrageous cynicism.

Nevertheless, there is no single universal recommendation about how to eliminate these “infections” since they are long-lasting and have never been properly treated; education and respect for the law are to be cultivated in the family and everywhere since the very birth of a child. But respect for the law will take place only if we trust and respect the government. Unfortunately, the latter often applies the law just to solve momentary problems.

A. Konovalov, the Minister of Justice whose materials were published for the “Yuridicheskaya nedelya” (Juridical Week) event, said that

“the difficult but important process of the law implementation has successful prospects because its participants consider it to be useful and beneficial. The law will not be operational if we continue to rashly apply laws within the framework of the “big stick” policy, and if people do not realize that living according to the law provides more security and prestige than living according to customs. It is necessary to demonstrate to people that complying with the law is useful, and the other choice is dangerous”\(^{11}\).

Naturally, the law prescribes certain behavior and comprises the known requirements. Otherwise, the legislation (like any other ordinary form of law-making) would make no sense. Even the most perfect law works only if it is obeyed.

The modernization of the country depends directly on the quality of legislation. 

**First,** without a significant financial support, the law will not be respected.

**Second,** while a bill is prepared, the law-making process should provide an opportunity to eliminate all the possible collisions and contradictions. In comparison with the German Parliament, where not more than 100 drafts are considered a year, the Russian State Duma (Gosudarstvennaya Duma) passes about 600 draft laws every session; it demonstrates that the quality of the Russian legislation leaves much to be desired.

**Third,** the interpretation of the law as one of the necessary methods to avoid collisions often leads to new and more daunting collisions, since some events and

laws may be differently interpreted by official or non-official organs, by the organizations, public leaders and by everyone. It reveals the conflict of interests and eventually the split within the society.

Fourth, the more rules of legal techniques are ignored, the more violations of the law occur: the lack of the unified structure and style; contradictions between draft laws and the current legislation; the lack of uniform terminology, cumbersome sentences and specialized acts relating to insignificant matters.

Fifth, the level of the respect for law depends on the people in power. For instance, if the government officials consistently violate entrepreneurs’ rights, and the police detain people without a warrant, or raw materials are illegally distributed, etc., then lawful actions of courts of law, investigating organs or prosecutors will not change the people’s attitude toward the state. It is just like small islands of justice in the open sea of “lawlessness”.

It is obvious that the laws will continue to be violated in the country. But a person who has committed a wrong must know that everyone shall be guaranteed judicial protection of his/her rights and freedoms. And if the overwhelming majority jealously guards the observance of the law, there will be no need to make the legislation more severe, and consequently, the criminal legislation will gradually become democratized. The inevitability of punishment, rather than its severity, is of the high value.

Nowadays researchers point out that Russia runs to two dangerous extremes: legal nihilism and legal fetishism, both being equally dangerous. The legal nihilism discredits the law, and the legal fetishism is the process when the laws are passed to regulate every step, thus undermining the respect for the law and creating the illusion of the legislature’s inefficiency.

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CALL FOR CANDIDATES FOR THE DOCTORAL PROGRAMME IN CONTEMPORARY RUSSIAN, CHINESE AND INDIAN LAW IN A GLOBAL ECONOMY (RUCHIN)

The RUCHIN project offers a doctoral programme leading to a PhD in Law degree, to students wishing to combine academic studies with practical business experience. At a time of growing need for such expertise, this innovative programme provides students with access to expert knowledge on contemporary Russian, Chinese and Indian economic law (widely defined) from an international and comparative perspective with a cross-disciplinary methodology. Students follow personalised study plans and professional placements within an overall framework that involves taught courses, original research, and experience in businesses.

The innovative character of the programme lies in the integration of doctoral research with elements of the market, by working closely with business organisations and companies. The ability to understand legal issues in different legal cultures provides a unique opportunity for international and transnational business cooperation.

The programme welcomes Russian students holding a Higher Education degree from both legal and non-legal backgrounds with an interest in the changing legal environment of a globalised world, in particular the growing matrix of the EU, Russia, China and India business environment.

RUCHIN was founded under the Lifelong Learning Programme project by four EU universities, University of Lapland (Finland), Vrije Universiteit Brussel (Belgium), Maribor University (Slovenia) and Mykolas Romeris University (Lithuania), working in partnership with the Ural State Law Academy in Russia and Renmin University — School of Law in China. Since its inception further partners have joined the initiative including the Centre for Contemporary India Research and Studies of the University of Warsaw and the Shanghai Institute of Foreign Trade.

The Ural State Law Academy is bringing its expertise in the fields of entrepreneurial, insurance, bankruptcy, transport and stock exchange law to the syllabus as well as its contemporary experience with regional industries. The significance of Ekaterinburg as an industrial centre of Russia since the period of Peter the Great provides a historic regional crucible for research to be undertaken by local and visiting academics and researchers.

The first students will be able to enter the programme from October 2012.

Further information can be obtained at www.ruchin.eu and from Dr Vladimir S. Belykh, http://www.usla.ru/

“This project has been funded with support from the European Commission. This publication [communication] reflects the views only of the author, and the Commission cannot be held responsible for any use which may be made of the information contained therein.”
IN MEMORY OF V. V. LAPTEV


V.V. Laptev was born on 28 April, 1924 in Moscow, Russia. He took part in the Great Patriotic War and was one of the longest-serving staff members in the Institute of State and Law. V.V. Laptev held offices of the Head of Business Law Sector, the Director of the Entrepreneurial Law Center, and the Chief Research Scientist. Until his last days, V.V. Laptev was the member of Academic Council of the Institute of State and Law of the Russian Academy of Sciences, two dissertation councils, and expert boards.

V.V. Laptev’s scientific activities were connected with fundamental issues of business (entrepreneurial) law. He was the first to introduce the concept of business law as an independent branch of law, to define the subject of this branch and the methods of legal regulation.

V.V. Laptev is the author of more than 360 scientific publications including 15 monographs and textbooks. In his papers, V.V. Laptev laid the foundations of scientific notions concerning the correlation of economy and law, and the legal status of enterprises and associations. The draft of the Business (Entrepreneurial) Code was worked out under the direction of Professor V.V. Laptev.

In 1984, V.V. Laptev was awarded the Order of Red Banner of Labor for services in the development of legal science. In 2005, he was awarded the Order of Honor. Professor V.V. Laptev was awarded military orders and medals.

His memory will live on, cherished in our hearts.

The staff of the Institute of State and Law of the Russian Academy of Sciences.

Editorial Board of “Jurist”Publishing Group”.

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PUBLICITY

The Bar Association of Sverdlovsk Region “Belykh and Partners”, hereafter referred to as “Bar Association” was set up and exercises its activities in accordance with the RF legislative acts and the Charter of the Bar Association.

The Chairman of the Bar Association is Vladimir Belykh, Doctor of Laws, Professor, Honored Worker of Science of the Russian Federation, Director of the Institute of Law and Entrepreneurship of the Ural State law Academy, Head of Entrepreneurial Law Subdepartment, Honored Advocate of Russia, Arbitrator of International Commercial Arbitration Court at the RF Chamber of Commerce and Industry, Arbitrator of Arbitration Court at the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic, Bar member since 2003.

In 1985–1986 V.S. Belykh participated in a research programme in the Centre for Commercial Law Studies at Queen Mary School of Law, University of London.

The specialization: Entrepreneurial (Commercial) Law; Banking Law; Bankruptcy (Insolvency) Law; Contract Law; Investment activities; Equity market; Insurance Law; International and Comparative Law; International Arbitration.

Mission of the Bar Association: comprehensive legal support of business at all stages of the “life-cycle” of a production process: from the project to operation.

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