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TABLE OF CONTENTS

DEAR READERS,

2020 is the year of the Rat. And its beginning is far from being easy. The first difficulties, however, would not spoil our festive mood.

The winter will bring us the following events: 22 January is the Bloody Sunday, the beginning of the first Russian Revolution (115 years); 27 January is the day when the Soviet Army lifted the siege of Leningrad (76 years); 2 February is the day the Soviet Army defeated the fascists under Stalingrad (77 years); 10 February is the Remembrance day of Aleksandr Pushkin; 19 February is the day when the Emancipation Manifesto concerning peasants leaving serf dependence was issued (159 years); 18 March is the day of reunification of Russia and Crimea (5 years).

As for political events, on 16 January 2020, President of the Russian Federation Vladimir Putin signed the decree on the appointment of Mikhail Mishustin the Chair of the RF Government; on 21 January, a new government was formed; on 31 January, the United Kingdom left the European Union (Brexit); on 9 February, the ruling party of Azerbaijan "New Azerbaijan Party" (Yeni Azərbaycan Partiyası) won parliamentary elections. There are many more events and facts to come!

170 years ago, on 3 January was born Sofia Vasilyevna Kovalevskaya, who became the first female professor of mathematics in the world. 120 years ago, on 9 January was born Sergei Ivanovich Ozhegov, a Russian lexicographer, one of the authors of the explanatory dictionary of the Russian language. 100 years ago, on 21 March was born Georg Ots, a famous Soviet pop and opera (mezzotenore) singer.

In 2020, we celebrate the 75th anniversary of the end of the Second World War and our victory over fascist Germany. First of all, we celebrate 75 years of the Victory of the Soviet people in the Great Patriotic War. By his decree, the Russian President has announced the year of 2020 the Year of Memory and Honour!

Dear readers! Take care of yourselves and your families! Treat your neighbours as you would like to be treated. The most important thing is not to lose yourself in this chaotic world.

Accept our congratulations on the New Year. Let us hope that the year of the Rat will bring us happiness, luck, many smiles and warmth. Let us hope that this year will be bright, full of good impressions, pleasant events and legal facts. I wish you to be physically strong and morally healthy, to look great and be loved!

Editor-in-Chief V.S. Belykh

FORCE MAJEURE AND THE GUILT OF A CREDITOR (A COMPLAINANT) AS THE GROUND TO DISCHARGE FROM LIABILITY

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Abstract
This paper researches the principles of civil liability, the concept of guilt in the Russian civil law and cases of liability application regardless of the guilt. The author examines force majeure and guilty intent of a complainant as the basis for discharge from tort (civil) liability. The paper analyzes the features of force majeure, like extraordinariness and unavoidability, referring to the latest arbitrage practice.
Keywords: civil liability, guilt, liability regardless of the guilt, force majeure, guilty intent of a complainant, discharge from liability.

Two principles have existed in the theory of civil law since the Roman law, namely: the principle of guilt and the principle of infliction. Different states in their different periods declared any of these as the basic principle for property liability. Both Soviet and Russian civil law have been discussing for quite a period of time what civil liability should be based upon. Of the numerous relevant theories, the two primary ones are the following: the theory of "guilt with exception", according to which liability is generally imposed with the existence of the guilt of a debtor (causer), with some exceptions provided by a law or a contract allowing to impose liability without guilt; and the theory of "two principles", according to which liability can be based on both the principle of guilt and the principle of infliction[1]. The legislation, the factual as well as the former one, has always stipulated cases of liability based on both the principle of guilt and the principle of infliction (risk). It is supposed that at present, in the Russian civil law, liability is mainly based on the principle of guilt, with many cases of liability regardless of guilt, the number of which tends to increase with the

[1] Theory Review: V.T. Smirnov, A.A. Sobchak, Obschee uchenie o deliktnykh obiazatel'stvakh v sovetskom grazhdanskom prave. [General Doctrine of Tort Obligations in the Soviet Civil Law]. Leningrad, 1983, pp. 50–53.

development of society and technology. Civil law admits a possible liability regardless of the actual guilt in cases provided for by the law. First of all, this is the liability of individuals not performing or unduly performing an obligation in their business activity. It can be explained by the fact that individuals engaged in the business activity possess, or at least, are to possess, some professional skills, they are given more freedom in making contracts, which causes more liability regardless of the factual guilt for an accidental non-performance of an obligation. Also, liability regardless of guilt includes liability for damage by the source of risk, liability for damage inflicted by illegal actions of the inquiry, preliminary investigation, prosecution and court, and other cases. Due to all these circumstances, it is possible to say that M.K. Suleimenov is right proving that "it is necessary to change the focuses of the principles, still keeping both principles of civil liability, the principle of guilt and the principle of infliction. Gradually extending the principle of infliction we can make it the dominant principle of civil liability, so that the principle of guilt is imposed only when it is stipulated by the legislation"[2]. As the compensatory function is the primary and the only one of civil liability, it is supposed that guilt cannot be a compulsory condition for civil liability.

The public law traditionally recognizes guilt as a mental attitude of an individual to his/her unlawful behavior and its consequences. The current civil law rejects the definition of guilt as a mental attitude of an individual to his/her behavior and uses another criterion, namely taking measures by a debtor to perform the obligations[3]. The presence or absence of guilt is defined by the rule of Article 401(1) of the Civil Code of the Russian Federation: a person is found not guilty if he/she takes all the measures necessary to perform the obligations in a proper manner considering care and prudence demanded due to the obligation and business practice.

Civil law, as opposed to the public branches of law, stipulates the presumption of innocence for a person not performing or unduly performing an obligation. The guilt of a debtor breaking an obligation is supposed until the opposite is proved. It is up to the debtor to prove the absence of guilt of not performing or unduly performing an obligation (Article 401(2) of the RF Civil Code) (paragraph 5 of Ruling No. 7 of the

[2] Civil Law, General Part, Volume1, edited by M.K. Suleimenov, Almaty, 2013, p. 707.

[3] Sarbash S.V. Elementarnaia dogmatika obiazatel'stv [Elementary Dogmatics of Obligations]. Moscow, 2016, p. 287. Also: G.N. Shevchenko. Vina kak uslovie grazhdansko-pravovoj otvetstvennosti v rossijskom grazhdanskom prave. Sovremennoe pravo. [Guilt as a Ground for Civil Liability in the Russian Civil Law. Contemporary Law], No. 3, 2017, pp. 67–73.

Plenum of the RF Supreme Court of 24 March 2016 "On the Application of Some Provisions of the Civil Code of the Russian Federation by Court for Liability in Case of Violation of Obligations")[4]. Nevertheless, liability in this situation is not unlimited. According to S.V. Sarbash, "nobody can be demanded impossible"[5]. Force majeure (irresistible force) and the guilt of the complainant are these limits of liability.

First, the provision discharging from liability is force majeure, which is defined as extraordinary and unavoidable circumstances under the given conditions (Article 401(3) of the RF Civil Code). Also, the practical application of force majeure is discussed in several paragraphs of Ruling No. 7 of the Plenum of the RF Supreme Court. It is generally accepted that natural disasters and social phenomena, e.g. strikes, military conflicts and wars, are the phenomena of force majeure. It is known that during the Great Patriotic War the courts recognized circumstances connected with the war as force majeure. In 1952, B.S. Antimonov wrote that "the notion 'force majeure' is not an absolute notion which always includes some events and excludes others, to recognize an event as 'force majeure' depends on place, time, and combination of factors"[6].

Extraordinariness implies an exceptional character of the reviewed circumstance, which is not ordinary to occur in a particular situation. Extraordinariness is defined as exceptionalism, a move beyond "normal", common, unusualness for various life situations, which does not refer to life risks and under no circumstances can be taken into consideration. An arbitrage court pointed out in a case that "heavy rainfalls and snowfalls, strong winds and restriction of ship traffic in the ports of Norilsk and Petropavlovsk-Kamchatskij are wide-spread, quite regular, ordinary natural phenomena, typical for these cities in October — February, lacking any features of extraordinariness, thus they cannot be defined as force majeure and discharge from liability for late delivery of coal"[7]. To determine the presence or absence of an extraordinariness feature is possible only considering particular circumstances; it is impossible to determine in advance if any circumstance is of an extraordinary character.

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[4] RF Supreme Court Newsletter No. 5, May, 2016.

[5] Sarbash S.V. Elementarnaia dogmatika obiazatel'stv [Elementary Dogmatics of Obligations]. Moscow, 2016, p. 288.

[6] Antimonov B. S. Grazhdanskaia otvetstvennost' za vred prichinennyj istochnikom povyshennoj opasnosti [Civil Liability for Damage Caused by a Source of Risk] Moscow, 1952, p. 137.

[7] Ruling of the Arbitrage Court of the Far-Eastern District of 11 September 2018, case No.F03-3721/2018.

The **second** feature of force majeure is unavoidability. A circumstance is defined as unavoidable if any participant of business practice exercising an activity similar to the debtor's one, would not be able to avoid this very circumstance or its consequences (paragraph 8 of Ruling No. 7 of the Plenum of the RF Supreme Court). The Arbitrage Court of the Ural District found ground subsidence (uneven settlement) as force majeure; buried in 1970, a lake caused regular flooding of the building bed thus leading to impermissible weakening of pile capacity[8]. At the same time the Arbitrage Court of the Far-East District rejected the reason of the defendant that the loss of goods resulted from force majeure (bad weather conditions, storm), which the defendant could not prevent and eliminate, i.e. the court admitted that the circumstances did not possess the features of unavoidability. Referring to paragraph 4 of the RF Supreme Arbitrage Court Newsletter No.81 of 13 August 2004, the court noted that the storm itself cannot be a circumstance of force majeure considering the availability of the weather forecast, the possibility to take measures to provide safe vessel anchor and other measures; the court did not find causal connection between the storm and the loss of goods as the deliverer is obliged to take measures to provide maritime security[9]. It should be admitted that unavoidability must be defined not as an abstract category but as a circumstance unpreventable for a particular person by all the means available at a particular time.

The *relationship between force majeure and a casualty* means that the former is always an external event to the activity of an obligee, whereas the latter is an internal circumstance against the wrongdoing activity. In one of the actual cases the Presidium of the RF Supreme Arbitrage Court noted that force majeure is different from a casualty because it is based on an objective, not subjective, unavoidability.

Determining the notion of force majeure, the RF Civil Code has fixed an open-ended list of what is not defined as that. These are: violation of an obligation by the debtor's counterparties; market lack of goods necessary for performing an obligation; the debtor's lack of the necessary money, etc. The following is not defined as force majeure in the legal practice: theft, bankruptcy of the debtor, bank software failure causing an undue service for a client, busy access routes and considerable backup of tankers on not public routes, suspension of transactions with accounts, property seizure, etc.

[8] Ruling of the Arbitrage Court of the Ural District of 7 June 2019, case No. F09-2745/2018.
[9] Ruling of the Arbitrage Court of the Far-Eastern District of 17 July 2019, case No. F03-2841/2019.

If the debtor is liable for violation of an obligation or for causing damage regardless of the guilt, he/she bears the burden to prove the circumstances which can be the ground for discharge from this liability, e.g., force majeure (paragraph 5 of Ruling No. 7 of the Plenum of the RF Supreme Court). Hearing a case about a compensation for the damage inflicted during the repairing works of a living building, where the roof was pulled down due to a strong wind, the arbitrage court highlighted serious violations performed by the defendant during the construction of the roof (deviation from the project, improper quality of the works, absence of details ensuring the rigidity of the structure of the roof), all these being the causes for the damage of the roof. Also, the court noted that the defendant did not prove that the damage of the roof resulted from force majeure, i.e., a strong wind (storm)[10].

Non-performance of an obligation and damage must be the result of force majeure and have causal connection. **Thus**, the arbitrage court pointed out that the company (a defendant) failed to prove that the international sanctions, referred to as force majeure circumstances, directly affected the non-performance of the contract obligations[11].

It has become widely spread to stipulate the circumstances recognized as force majeure in contracts. It is supposed that to define if a particular circumstance is force majeure or not is the duty of the court, which, according to the law and the evidence produced by the parties, decides the presence or absence of force majeure. **So**, the Arbitrage Court of the North Caucasian District defined as force majeure (unavoidable circumstances) the effect of the squall, which hindered unloading of the wagons, noting that labor protection rules, concerning the works at height, prohibit loading and unloading operations at the pointed intensity of the wind, thus, it dismissed the complaints of the railway[12].

Violation of an obligation as well as damage due to force majeure is a good and sufficient reason for discharge from liability. Earlier the Soviet legislation (Article 101 of the Air Code of the Russian Federation) stipulated liability for causing injury to a passenger during the take-off, flight and landing of a plane, as well as during passengers' unloading, even if it was the result of force majeure. At present, it is not

[10] Ruling of the Federal West-Siberian District of 29 April 2010, case No. A67-3912/2007.
[11] Ruling of the Arbitrage Court of the North-Western District of 18 November 2019, case No. A21-2045/2019.
[12] Ruling of the Arbitrage Court of the North-Caucasian District of 24 October 2019, case No. A32-36944/2017.

necessary to determine such unlimited liability because of mandatory insurance of the shipper's civil liability. The only occasion of liability to compensate damage due to force majeure is currently fixed in the Consumer Protection Law, Article 14(4) of which determines that a producer (a performer) is liable for life, health or property damage, connected with misuse of materials, equipment, tools or other means of production (performing works, service) regardless of whether the actual level of science and technology knowledge allowed to expose their specific harmful properties or not. In this situation, it is clear that liability is based on the principle of infliction.

The range of force majeure circumstances changes with the development of the society and technical progress. Even in the 1940s, D.M. Genkin aptly pointed out that "thank to the development of human knowledge about the nature and active human influence on the nature….what used to be thought as force majeure can afterwards be considered as the notion of a casualty or even of guilt"[13].

Therefore, it can be admitted that force majeure means exclusion of liability for violation of obligations or infliction of damage.

The *second occasion of discharge* from liability is the guilt of a creditor (a complainant). In civil law, which considers guilt as a failure to take possible actions to eliminate or avoid negative results of one's activity, the form and the degree of the defendant's guilt do not matter, as a rule. However, if the creditor's (complainant) guilt contributed to arising or increasing the damage, the only criterion to be used to distribute the losses is the form and the degree of the guilt. Thus, civil law referring to an objective criterion to define the debtor's (a causer) guilt in case of mixed guilt uses one more, subjective criterion, i.e. a mental attitude of a person to his/her behavior and its consequences. Tort obligations clearly demonstrate how the complainant's guilt is taken into consideration. The guilty intent of the complainant always discharges the debtor from liability for damage. The guilt in the form of intent and an inflictor of damage is quite rare in civil law. As for negligence, the law distinguishes consequences depending on the principle the causer's liability is based on. With the debtor's liability due to only his/her guilt, the guilt of the complainant in the form of gross negligence results in the decrease of the compensation for the damage. If the causer's liability arises regardless of his/her guilt, the gross negligence of the claimant, without the causer's guilt, either results in the discharge from liability

[13] Obzor zasedanij sektora grazhdanskogo prava. Sovetskoe gosudarstvo i pravo [The Review of the Conference of the Civil Law Sector. Soviet State and Law]. No. 11, 1949, p. 73.

or the decrease of its extent. In case of life and health damage to the claimant, who admitted the gross negligence, in order to protect his/her rights and interests, it is possible only to decrease the extent of the causer's liability but not to discharge from it. It should be noted that only gross negligence of the complainant is taken into consideration; negligence as it is does not affect the compensation of the damage.

The creditor's guilt in any form, including negligence, is taken into consideration in case of non-performing or undue performing of contracts as the negative consequences are the result of the actions of both the debtor and the creditor. The court decreases the extent of the debtor's liability in case the non-performance or undue performance of a contract was caused by the guilt of both parties; thus, the Arbitrage Court of the East-Siberian District determined the guilt of the claimant (creditor) of improper storage of goods, which led to the damage of goods by the leak committed by the defendant, and decreased the amount of the compensation. This rule is also applied when the debtor is liable for non-performance or undue performance of an obligation due to the law or a contract regardless of the guilt.

Thus, in obligations from infliction of damage the negligence of the claimant is not taken into consideration and does not affect the amount of compensation. In cases of breach of contracts (non-performance or undue performance) the creditor's negligence is taken into consideration and causes the application of mixed liability, which is the ground to decrease the debtor's liability.

APPLICATION OF THE PRINCIPLES OF CONSCIENTIOUSNESS AND NON-CONSUMPTION OF LAW WHEN CONSIDERING DISPUTES IN THE FIELD OF INTELLECTUAL PROPERTY

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Abstract
Based on the analysis of legislation and judicial practice, the article considers the principle of fair conduct of civil turnover participants in a market economy and concludes that this principle will be increasingly applied in practice.

Keywords: intellectual property, exclusive rights, trademark, copyright holder, good faith, abuse of rights, unfair competition.

Federal Law No. 302-FZ of 30 December 2012 "On Amendments to Chapters 1, 2, 3 and 4 of Part One of the Civil Code of the Russian Federation"[1] amended the Civil Code of the Russian Federation in terms of provisions on conscientiousness.

Conscientiousness can be characterized as the desire of a civil turnover participant to exclude the possibility of violation of the subjective rights and legitimate interests of other persons by his behavior, and to exercise his rights in strict accordance with their content, scope and purpose. The proximity of the category of conscientiousness to moral standards does not mean that the concepts are identical. Although

[1] Federal Law No. 302-FZ of 30 December 2012 "On Amendments to Chapters 1, 2, 3 and 4 of Part One of the Civil Code of the Russian Federation"// Collection of Legislation of the RF. 2012. No. 53 (Part I). Article 7627.

conscientiousness in the sense of the civil law principle has an ethical component, like moral norms, it is provided, in contrast to the latter, with a very specific pragmatic content, which is extremely important for the stability of the civil turnover[2].

The new principle of conscientiousness is also applicable when resolving disputes with unscrupulous copyright holders — persons who patent an invention, utility model, industrial design, or register a trademark with clear violations of the rights of the rightful copyright holder.

If we briefly state the essence of the changes made, the most accurate and succinct is the wording used by the legal community — "transformation of the principle of presumption of good faith behavior of an economic entity into the obligation to act in good faith". First of all, this applies to the novelties of Article 1 of the Civil Code of the Russian Federation: when establishing, implementing and protecting civil rights and performing civil duties, participants in civil relations must act in good faith. No one has the right to take advantage of their illegal or unfair behavior (Article 1 (3, 4) of the RF Civil Code).

In the field of intellectual property rights, the greatest interest is the impact of this transformation of the principle of conscientiousness on copyright holders, since everything was more or less clear with violators of exclusive rights before. The rules of good faith have been applied to copyright holders relatively recently.

With the adoption of Part Four of the Civil Code of the Russian Federation, there has been a gradual shift in the judicial practice towards more active application of Article 10 of the Civil Code of the Russian Federation in the sphere of intellectual property rights, which is reflected primarily in Information Letter of the Presidium of the RF SAC[3] of 25 November 2008 No. 127 (p. 8). However, in general, the judicial practice of this "five-year plan" (2008-2012) can hardly be called consistent. On many issues, it was very heterogeneous and contradictory.

It would be unfair to say that Article 10 of the Civil Code of the Russian Federation on abuse of rights in the absence of special rules in the field of intellectual rights was not applied by the courts in cases of unfair behavior of rights holders. At the same

[2] Konovalov A.V. Printsip dobrosovestnosti v novoj redaktsii grazhdanskogo kodeksa rossijskoj federatsii i v sudebnoj praktike [The Principle of Good Faith in the New Version of the Civil Code of the Russian Federation and in Judicial Practice]// Law. Journal of the Higher School of Economics. 2016. No. 4. p. 6.

[3] Information Letter of the Presidium of the RF SAC No. 127 of 25 November 2008 "Review of the Practice of Application by Arbitration Courts of Article 10 of the Civil Code of the Russian Federation" // Bulletin of the RF SAC. 2009. No. 2.

time, such decisions were rarely made by the courts (for example, the decision of the FAC of the North-Western district of 23 April 2001 in case No. A56-26978/00[4]).

Of course, a new approach to the principle of conscientiousness of civil turnover participants, combined with the needs of the market and the emergence of a specialized court that deals exclusively with disputes in the field of intellectual rights[5], should lead to the formation of a uniform law enforcement practice, without which it is impossible to ensure stability of relations in the field of intellectual property. And the decisions currently being taken by key courts give a hope for such a development.

There are three cases that most clearly illustrate this fact. The first of them is a case for collecting compensation under subparagraph 2 of paragraph 4 of Article 1515 of the RF Civil Code in the amount of more than 1.3 billion rubles. The claim was made by the right holder, *TELEROSS LLC*, to its subsidiary company, *Murmansk Multiservice Networks*. It is noteworthy that the defendant used the trademarks to provide services under the control of the plaintiff, a contract was concluded for the assignment of trademarks by the plaintiff to the defendant, but the contract did not pass state registration in the Federal Service for Intellectual Property (*Rospatent*). After some time, the main company quarreled with the subsidiary company and filed a lawsuit against it in the amount of twice the cost of services for three and a half years. The output of the Presidium of the RF SAC was natural: "the actions of the plaintiff, by which it became possible to use by the respondent of the disputed designations and subsequent presentation to a previously dependent person in the amount, exceeding the annual profit and the value of its assets may indicate abuse granted the plaintiff the right to judicial protection" (Resolution of the Presidium of the RF SAC of 2 April 2013 No.15187/12[6]).

Two other cases were considered by the Intellectual Property Rights Court of the Russian Federation. At the same time, the court took into account the fact that the plaintiffs registered designations that had previously been used for a long time by

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[4] Resolution of the FAS of the North-Western district of 23 April 2001 in case No. A56-26978/00. The document was not published.

[5] Federal Constitutional Law No. 4-FZ of 6 December 2011 (ed. 4 June 2014) "On Amendments to the Federal Constitutional Law "On the Judicial System of the Russian Federation" and the Federal Constitutional Law "On Arbitration Courts in the Russian Federation" in connection with the creation of the intellectual property rights court in the system of arbitration courts" // Collection of Legislation of the RF. 2011. No. 50. Article 7334.

[6] Resolution of the Presidium of the RF SAC of 2 April 2013 No. 15187/12 in case No. A42-5522/2011. The document was not published.

other participants of the civil turnover as their trademarks, and pointed out that the acquisition and subsequent use by a market participant of the exclusive right to a means of individualization, knowingly used when introducing goods into circulation by other persons, contradicts the law, customs of the business turnover, requirements of integrity, reasonableness and fairness (decisions of 26 December 2013 in case No. A60-41938/2012[7] and of 11 February 2014 in case No. A60-52709/2011[8]).

It is noteworthy that the topic of the first meeting of the Scientific Advisory Council of the Intellectual Property Rights Court of the Russian Federation held on 27 December 2013 was the issues of unfair behavior. Having considered the recommendations of the Scientific Advisory Council, the Presidium of the Intellectual Property Rights Court of the Russian Federation approved the Certificate on unfair conduct, including competition, on the acquisition and use of means of individualization of legal entities, goods, works, services and enterprises[9] (hereinafter — the CIR certificate) by its Resolution No. SP-21/2 of 21 March 2014, which brings certainty to a number of issues related to unfair competition and abuse of rights in the field of intellectual property rights.

Despite the fact that the above-mentioned judicial acts and the CIR certificate largely contribute to the formation of uniform law enforcement practice, we are still at the very beginning of the road. Many of the answers given by the Supreme Arbitrage Court of the Russian Federation and the Intellectual Property Rights Court of the Russian Federation give rise to new questions that will undoubtedly soon be on the agenda. **First**, whether the person concerned has the right to apply to the court to recognize the actions to acquire exclusive rights over a trademark a misuse on the part of the copyright holder. **So**, it is established that the claim to recognize the actions unfair competition may be brought directly to court, bypassing the administrative procedure (p. 20 of the Plenum of the SAC of the Russian Federation of 30 June 2008 No. 30, p. 3.1 CIR certificate).

Secondly, what is an unprotected designation (without registration of a trademark), and what rights are generated by its use? In particular, the CIR certificate

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[7] Resolution of the Intellectual Property Rights Court of the Russian Federation of 26 December 2013 No. C01-262/2013 in case No. A60-41938/2012. The document was not published.

[8] Resolution of the Intellectual Property Rights Court of the Russian Federation of 11 February 2014 No. C01-325/2013 in case No. A60-52709/2011. The document was not published.

[9] Certificate on unfair behavior, including competition, on the acquisition and use of means of individualization of legal entities, goods, works, services and enterprises (appr. Resolution of the Presidium of the Intellectual Property Rights Court of the Russian Federation of 21 March 2014 No. SP-21/2). The document was not published.

notes that "one of the circumstances that may indicate unfair behavior of the person who registered the trademark may be that this person knew or should have known that third parties (a third party) at the time of filing an application for registration of the designation as a trademark lawfully used the appropriate designation for individualization of goods produced by them or services rendered without registration as a trademark, as well as that such designation has become known among consumers" (p. 4 of the CIR certificate).

Third, whether a court may refuse the copyright owner to protect the violated rights, citing abuse of the law when using it, if the goal is to reap the benefits of dishonest behavior arose from the right holder not immediately, but some time later after the registration of the trademark. It would seem that the answer is: "abuse can be established in considering the case to protect the violated right, if the claim is denied with the reference to the abuse of the right to acquire the exclusive right to a trademark". In other words, when considering claims of copyright holders for the protection of violated rights, their integrity as a whole can be evaluated, but only good faith is taken into account when acquiring rights to a trademark, and the subsequent behavior of the copyright holder remains "behind the scenes" (p. 3.2 of the CIR certificate). However, at the same time, paragraph 6 of the CIR certificate indicates that it is possible to take into account the subsequent (after registration) behavior of the right holder, although this right of the court is limited to cases on claims of illegality of FAS decisions and claims for recognition of the trademark registration as an act of unfair competition.

Therefore, the rules on good faith and abuse of rights were not actively applied by the courts in the past when protecting intellectual property rights and, in particular, when evaluating the actions of the right holder. However, now there is a positive trend, and *bona fide* rights holders and other participants in civil relations can count on strengthening their positions in disputes.

ON THE ISSUE OF LIABILITY WHEN CARRYING OUT STATE ENVIRONMENTAL MONITORING OF BODIES OF WATER

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Abstract
The authors of the article look at a possibility of holding economic subjects liable for unit discharge in a body of water established when carrying out state environmental monitoring. The article analyses effective federal and regional legislation concerning such questions and refer to judicial practice.

Keywords: monitoring, liability, environmental harm, ecological supervision, compensation for the damage inflicted.

Practical activities often raise a question of holding economic subjects liable for unit discharge in a body of water established when carrying out state environmental monitoring. The authors of the article try to answer the question whether state environmental monitoring can serve as a ground for liability.

State environmental monitoring is a set of complex observations over the environment, assessment and forecast of possible environmental changes undertaken when carrying out the whole set of state environmental monitoring by creating and operating observation networks and informational resources in subsystems within the uniform system of state environmental monitoring of the state data fund (Art. 1, 63 FZ "On Environmental Protection" of 10 January 2002 No. 7-FZ (edit. on 27 December 2019)[1].

[1] Collection of RF Legislation. 2002. No. 2. Art. 133.

One of the objectives of the uniform system of state environmental monitoring is to provide subjects of ecological relations with the necessary information on the environment — p. 2 Art. 63.1 of Federal Law No.7-FZ.

Under RF Government Ruling "On State Monitoring of the Environment" No.477[2] of 6 June 2013 (edit on 10 July 2014), the Federal Service for Hydrometeorology and Environmental Monitoring of Russia (*Rosgidromet*) shall provide executive bodies with timely factual and forecast information on the environment.

Article 30 of the RF Water Code No. 74-FZ[3] of 3 June 2006 (edit. on 2 August 2019) specifies different aims of state monitoring of bodies of water:

— to promptly identify and forecast negative impact of waters as well as negative processes affecting the quality of water in different bodies of water and their condition, to develop and take measures to prevent negative consequences of such processes;

— to assess the efficiency of measures undertaken to protect bodies of water;

— to provide information concerning the use and protection of bodies of water for state monitoring in the sphere of use and protection of bodies of water.

Such itemization has been implemented at the level of regional legislation.

Thus, RF Government Ruling "On Approving the Rules of State Monitoring of Bodies of Water" No. 219[4] of 10 April 2007 (edit. on 18 April 2014) stipulates the necessity to provide monitoring data and exchange it among federal bodies of executive power and executive bodies of the constituent entities of the Russian Federation.

Paragraph 3 of the RF Government Ruling "On Approving the Rules of State Monitoring of Aquatic Biological Resources and Application of Such Data" No.994[5] of 24 December 2008 (edit. on 6 February 2018) stipulates that monitoring of aquatic biological resources shall be carried out to use its results for state environmental control and provide the state, legal entities and individuals with reliable information on the condition of aquatic biological resources and the environment, including for the sake of dispute resolution in the fishing industry and conservation of aquatic biological resources and also holding people liable for offences committed in the sphere of fisheries and conservation of aquatic biological resources.

[2] Collection of RF Legislation. 2013. No. 24. Art. 3000.
[3] Collection of RF Legislation. 2006. No. 23. Art. 2381.
[4] Collection of RF Legislation. 2007. No. 16. Art. 1921.
[5] Collection of RF Legislation. 2009. No. 2. Art. 208.

As for regional legislation, noteworthy is Law "On Environmental Monitoring in the Territory of the Krasnodar Krai" No. 2124-KZ[6] of 7 December 2010 (edit. on 5 July 2018) adopted in the Krasnodar Krai. Article 9 (9) of the Law states that powers of the executive body of the Krasnodar Krai concerned with environmental monitoring include the obligation to provide relevant state bodies with information on different types of offences in the sphere of environmental protection which have caused harm to the environment and further hold such offenders liable.

It should be noted that officials carrying out state environmental monitoring are not authorized to hold offenders liable.

All information on ecological offences determined during state environmental monitoring serves as the ground for conducting non-scheduled inspections:

Pursuant to p. 9 of RF Government Ruling "On Federal State Environmental Monitoring" No. 426[7] of 8 May 2014 (edit. on 21 March 2019), environmental control is exercised by scheduled and non-scheduled inspections, both of documents and on the site, under Articles 9 — 14 of Federal Law "On the Protection of Rights of Legal Entities and Sole Traders When Exercising State Control (Monitoring) and Municipal Control" No. 294-FZ[8] of 26 December 2008 (edit. on 2 August 2019).

Pursuant to Article 10 (2) (2) of the Federal Law "On the Protection of Rights of Legal Entities and Sole Traders When Exercising State Control (Monitoring) and Municipal Control", any information received from state bodies or mass media concerning a threat of harm or harm inflicted to animals, plants, or the environment is a ground to conduct a non-scheduled inspection.

Relying on Order of the RF Ministry of Natural Resources "On Establishing the Administrative Rules for Exercising Functions of State Monitoring Over the Works Actively Affecting Meteorological and Other Geophysical Processes in the Territory of the Russian Federation by the Federal Service for Hydrometeorology and Environmental Monitoring of Russia" No. 181[9] of 29 June 2012 (edit. on 30 October 2017), officials in charge of state environmental monitoring are entitled to:

— issue orders binding for legal entities to eliminate violations found during inspections;

[6] Information Bulletin of the Legislative Assembly of the Krasnodar Krai. 2010. No. 37 (part I).
[7] Collection of RF Legislation. 2014. No. 20. Art. 2535.
[8] Collection of RF Legislation. 2008. No. 52 (part 1). Art. 6249.
[9] Bulletin of Normative Acts of Federal Executive Agencies. 2013. No. 2.

— submit materials to the investigative bodies to initiate criminal proceedings or bring a civil action.

Letter of the RF Ministry of Natural Resources "On State Environmental Monitoring"[10] No. 12-50/01508-OG of 21 February 2019, which clarifies the procedure of conducting inspections, says: officials of state supervision agencies, being state inspectors in the sphere of environment protection, have the right to draw up protocols on administrative offences connected with the violations of obligatory rules and take measures to prevent such offences following the procedures established by the RF legislation (Article 66 of Federal Law No. 7-FZ).

Administrative proceedings are initiated if there are grounds established by Article 28.1 (part 1) of the Code of Administrative Offences No. 195-FZ[11] of 30 December 2001 (edit. on 27 December 2019), including cases when sufficient evidence of committing administrative offences has been established directly by officials.

Order of the Ministry of Natural Resources of the Sverdlovsk oblast, paragraph 3, "On Establishing Administrative Rules to Conduct Regional State Ecological Monitoring" No. 777 of 12 July 2017 (edit. on 20 November 2019)[12] has established appropriate rules:

— to make reports on administrative offences related to violations of mandatory rules, consider cases of such administrative offences and take measures to prevent such violations;

— to submit to the relevant bodies materials related to the violations of environmental legislation to make a decision on initiating criminal proceedings if there are elements of a crime committed;

— to bring civil actions following the procedure established by the RF legislation to claim damages for the harm inflicted to the environment and its components as a result of violation of mandatory rules.

Similar rights and obligations of public officials conducting regional state ecological monitoring have been established by Order of the Ministry of Natural Resources of the Tver oblast "On Establishing Administrative Rules to Perform the State Function by the Ministry of Natural Resources of the Tver oblast to Conduct Regional State Ecological Monitoring in Economic and Other Activities Except for

[10] The document has not been published.

[11] Collection of RF Legislation. 2002. No. 1 (part 1). Art. 1.

[12] Official site of legal information of the Sverdlovsk oblast http://www.pravo.gov66.ru, 19 July 2017.

Objects Under Federal State Ecological Monitoring" No. 9-np[13] of 20 November 2014 (edit. on 21 December 2017), section V.

Courts do admit such evidence as the results of state ecological monitoring in their judicial practice. For example, Ruling of the Eleventh Arbitration Appeal Court No. 11AP-18191/2015 of 29 January 2016 in case No. A65-9636/2015 is based on the report prepared by the results of state ecological monitoring and photos attached hereto.

A similar position has been taken by the Moscow City Court. The Court admitted information gathered during state ecological monitoring of lands as well as information contained in state and municipal information systems and in open and widely accessible information resources as evidence when passing its decision in case No. 7-5112/2017 of 30 May 2017.

The RF Supreme Court does not challenge this position either. Thus, in its decision in case No. 11-AD17-20 of 5 July 2017 the Supreme Court admitted the report prepared on the results of state ecological monitoring as evidence proving the factual circumstances of the case.

It should be noted that any documents containing factual data proving the fact of committing an administrative offence, including photos, maps and schemes, acts on sampling and analysis, reports on the volume of a contaminant, documents stating the quantity assessment of biota death and contamination, damage to vegetation and soil, experts' conclusions on the assessment of indirect damage caused by an ecological offence, environmental impact assessment, witnesses' testimony, and other documents (p.5.4 of the Methodological Directions on Assessment and Compensation for Damage Inflicted to the Environment as a Result of Ecological Offences Committed established by the RF State Committee of Ecology on 6 September 1999[14]) can be admitted as evidence proving the actual harm done to the environment.

However, the information stated in the Certificate issued by a territorial division of the Federal Service for Hydrometeorology and Environmental Monitoring of Russia shall be confirmed by reports on sampling collection and analysis and experts' opinions.

In **conclusion**, it is worth noting that information on ecological offences submitted to the RF Ministry of Natural Resources and regional bodies of *Rosprirodnadzor* serves as a ground for conducting a non-scheduled inspection when conducting state ecological monitoring.

[13] Tverskaya zhizn' [Tver Life]. 2014. No. 197. 25 Octover.
[14] The document has not been published.

ON THE NOTION OF "GROUP OF COMPANIES" IN THE JURIDICAL PRACTICE OF RUSSIA

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Abstract
The paper investigates the notion of "group of companies" in the juridical practice of Russia. It contains a comparative analysis of the relevant statutes of the Russian Federation in their relation to the categories of "group of companies" and "group of persons". It also gives examples of possible legal effects in case of recognizing an association of persons to be a group of companies. The conclusion is that each system of legislative control establishes its own branch criteria of the organization's belonging to a group. Correspondence of the relations between various legal persons to the said criteria may entail various legal effects. The authors make grounded conclusions concerning the fact that the juridical system of Russia contains a number of statutory concepts similar to that of a group of companies; the mentioned statutory concepts of other types of business operation are aimed at achieving mutual goals, specifically: an investment company; a simple company (joint operation agreement); an investment partnership. The article offers a definition of a group of companies in the juridical practice of Russia, according to which a group of companies is to be treated as an association (without being a legal person) of two or more legal persons and/or self-employed entrepreneurs, that has gained its status in accordance with the law, united on the basis of legal criteria (grounds), with the application of a definite system of allowances, bans and limitations in case of recognition of the association as a group of companies and a single consolidated person at law created for the implementation of mutual economic aims with the retention of an individual economic interest. Also, the authors define features of a group of companies which should include: an actual and economic association of legal persons and/or individual entrepreneurs without being a legal person; an association of entrepreneurs that has gained its status in accordance with the law; an affinity based on legal criteria (grounds), with the application of a definite system of allowances, bans and limitations in case of recognition of the association as a group of companies and as a single consolidated person at law; availability of a mutual economic aim with the

retention of an individual economic interest. If the activity of a number of organizations did not reveal the features (criteria) of an association mentioned by this or that regulatory system (tax, anti-trust, corporative, etc.), this means that the activity of the above listed organizations is a regular commercial activity of legal persons mediated by various legal ways of implementing legal personality by a particular legal person.

Keywords: group of companies; group of persons; branch peculiarities; legal effects; features of a group of companies.

The Russian legislation in power does not offer any legal definition of the "group of companies" notion. Still the branch systems of legislative control contain a number of approaches to the definition of a similar statutory concept[1].

Thus, the term "group of persons" is introduced by the provisions of Federal Law No. 135-FZ "On Protection of Competition" of 26 July 2006 for the purposes of anti-trust law[2], "related persons", "controlled foreign companies" and "tax consolidated group" for the purposes of tax law[3], "an organization which, together with 65 other organizations and/or foreign organizations, in accordance with International Accounting Standards (IAS), is defined as a group" for the purposes of Federal Law No. 208-FZ "On Consolidated Financial Statements" of 27 July 2010[4].

Review of the regulatory sources using the "group of companies" term

The law system of Russia applies the following allied notions:

- a group of persons (Article 9 of Federal Law No. 135-FZ "On Protection of Competition" of 26 July 2006);
- related persons (Article 105.1 of the Tax Code of Russia);
- affiliated persons (Article 53.2 of the Civil Code of Russia).

A comparative analysis of the features which from the viewpoint of the legislator attest close connections between organizations is shown in Table No. 1.

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1 *See*: Rezvykh I. A. Otsenka sistem vnutrennego kontrolia i upravleniia riskami pri provedenii audita grupp kompanij [Assessment of the Systems of Internal Control and Risk Management When Auditing a Group of Companies]// Auditor. 2018. No. 7. SPS ConsultantPlus

2 Federal Law No. 135-FZ of 26 July 2006 "On Protection of Competition"// Collection of RF Legislation. 2006. No. 31 (Part 1). Article 3434.

3 Tax Code of the Russian Federation (Part 1), 31 July 1998, No. 146- FZ // Collection of RF Legislation. 1998. No. 31. Article 3824.

4 Federal Law No. 208-FZ of 27 July 2010 "On Consolidated Financial Statements"// Collection of RF Legislation. 2010. No. 31. Article 4177.

Table No. 1

A comparative analysis of relevant provisions in the Russian regulations

Criteria	Group of persons Art.9, Federal Law No. 135-FZ "On Protection of Competition" of 26 July 2006	Affiliated persons Art. 53.2, Civil Code of the Russian Federation	Art.20, Tax Code of the Russian Federation	Art. 105.1, Tax Code of the Russian Federation
Aim of legal definition	Anti-trust law's ban on activity (inactivity) of the economic entity at the goods market and on activity (inactivity) of a group of persons	Legal effect determination depending on the availability of connections between persons (affiliation)	Determination of the persons whose relations may influence the conditions or economic performances of their activity or the activity of those persons they represent (for the purposes of Ch. 25 of the Tax Code of the Russian Federation on the deals made prior to 1 January 2012)	To determine a possible influence due to the participation of one person in the capital of other persons in accordance with their agreement or in presence of some other possibility of one person to determine decisions taken by other persons
More than 50% of the total votes by stock (shares) in the registered (reserve) capital	Item 1, P. 1, Article 9			
Control of more than 20% of the total votes by stock, or deposits making the registered or reserve capital, or shares (both of company A within company B and of company B within company A: author's note)		paragraph 7 of Article 4; paragraph 8 of Article 4; paragraph 12 of Article 4	Item 1, P.1, Article 2	

Shares of direct and/or indirect participation of more than 25%, or share of direct participation of each previous person in each next organization making more than 50%				**Items1-3, P.2, Art. 105.1, Item 9, P. 2, Art. 105.1**
Participation of persons within one financial industrial group (the legal definition was excluded from the Russian law: author's note)		**paragraph 9 of Article 4**		
Functions of a single executive body	**Item 2, P. 1, Art. 9**	**paragraph 5 of Article 4**		**Item 7, P. 2, Art. 105.1**
Functions of a single executive body in a number of organizations exercised by one and the same person				**Item 8, P. 2, Art. 105.1**
Membership in the Board of Directors (supervision board) or any other governing board; membership in a collective executive board		**paragraph 5 of Article 4**		
Authority to issue binding instructions by virtue of corporate documents or agreement	**Item 3, P. 1, Art. 9**			

More than 50% of the number of members of a collective executive body and/or Board of Directors (supervision board, board of the fund) of several legal persons being the same physical persons (or their close relatives)	**Item 4, P. 1, Art. 9**			**Item 6, P. 2, Art. 105.1**
Right to appoint (vote) a single executive body	**Item 5, P. 1, Art. 9**			**Item 4, P.2, Art. 105.1**
Right to appoint (vote) more than 50% of the number of members of a collective executive body or Board of Directors (supervision board)	**Item 6, P. 1 Art. 9**			**Item 4, P.2, Art. 105.1**
Single executive bodies or not less than 50% of members of a collective executive body or Board of Directors (supervision board) appointed or voted by the decision of one and the same person				**Item 5, P. 2, Art. 105.1**
Spouse, parents (adoptive parents too), children (adopted children too), blood brothers/sisters and half-brothers/sisters	**Item 7, P. 1, Art. 9**		**Item 3, P. 1, Art. 20**	**Item 11, P. 2, Art. 105.1**

Persons, each mentioned by Law by some feature, making a group with one and the same person, as well as other persons making a group with such persons by some feature	**Item 8, P. 1, Art. 9**	**paragraph 6 of Article 4; paragraph 11 of Article 4**		
Persons who by some feature mentioned by Law make a group of persons	**Item 9, P. 1, Art. 9**			
Legal knowledge on other grounds			**P. 2, Art. 20**	**P. 5, Art. 105.1**
Obedience by official position*			**Item 2, P. 1, Art. 20**	**Item 10, P. 2, Art. 105.1**

* For physical persons only

A general disadvantage of the above criteria used to characterize a group of companies is that they take into consideration only vertically integrated business entities, practically ignoring their collaboration, their economic interests. It should be noted that unfettered independent business entities may name themselves a group but not on the grounds of joint participating interest shares.

Correlation of "group of companies" and "group of persons" notions

The Russian law contains examples of using the notion of "a group of persons". Thus, a group of persons denotes a total of physical persons and/or legal persons, corresponding to one or several features mentioned by Article 9 (1) of Federal Law No. 135-FZ "On Protection of Competition" of 26 July 2006 (hereinafter referred to as the Law "On Protection of Competition"). This permits distinguishing the following *grounds for separating a group of companies from a group of persons*:

— a group of persons, alongside legal persons, includes physical persons; a group of companies is solely and exclusively an association of legal persons;

— a group of persons includes legal persons associated together on the grounds mentioned by the Law "On Protection of Competition" (thus, occasionally considered is the participation interest in the legal person, which is 50% of the stock being voting stock (Article 9(1)(1) of the Law "On Protection of Competition").

The number of grounds of legal persons' interconnection within a group of companies is not limited by the Law. At the same time the existent influence within a group is not always linked with the availability of more than 50% of votes. The participation interest may be less.

All the above said allows making the following conclusion: notions as "a group of companies" and "a group of persons" partially overlap. However, this does not exclude recognition of a group of companies or its part to be a group of persons[5].

Legal effects of recognizing an association of persons to be a group of companies

In a number of branches of legislation, the Russian law system attaches legal meaning to the interconnectedness and interdependence of organizations. On the other hand, ***each branch states its own branch criteria of an organization's affiliation to a group.*** Correspondence of relations between various legal persons to the said criteria may give rise to various legal effects.

Thus, *the following effects* are envisaged according to the ***competition legislation*** for a group of persons[6]:

1. Anti-trust law's ban on activity (inactivity) of a group of persons at the goods market extend to activity (inactivity) of a group of persons unless otherwise established by Federal Law (Article 9 (2) of the Law "On Protection of Competition").

2. It is allowed to conclude competition restricting agreements between the companies of a group or to execute their concerted competition restricting actions subject to the conditions envisaged by the Law (Article 11 (7), Article 11.1 (6) of the Law "On Protection of Competition").

3. A company's affiliation to the group of persons is taken into consideration in estimating a need to obtain the agreement of an anti-monopoly authority or its further notification in relation to the creation or reorganization of businesses, conclusion of agreements between competing economic entities on joint activities, as well as in relation to dealing in stocks (shares), property belonging to businesses, rights with respect to businesses (Articles 27, 28, 29 of the Law "On Protection of Competition").

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[5] *See*: Sukhanov Ye.A. O grazhdanskoj pravosub'ektnosti gosudarstvennykh yuridicheskikh lits [On Civil Capacity of State Legal Persons] // Zhurnal rossiyskogo prava. 2018. No. 1, pp. 7–10.

[6] *See*: Polyakova V. Ye. Gruppa kompanij: poniatie, osobennosti pravovogo polozheniia [A Group of Companies: Notion, Peculiarities of a Legal Position] // SPS *ConsultantPlus*. 2019.

4. Companies' interrelation within a group of persons is taken into consideration in administrative proceedings to protect civil rights: in case of violation of competition legislation by one of the members of the group of persons, the order may also be issued to other members if they are able to remedy the default (paragraph 3, p.14 of Decision of the Plenum of the Supreme Arbitration Court of the Russian Federation No. 30 "On Some Questions Arising in Relation to Arbitration Courts' Execution of Competition Legislation" of 30 June 2008[7]).

The peculiarities of the ***tax position*** of a group of companies lie in the possibility of their recognition as interdependent persons (Article 20 of the RF Tax Code)[8], which leads to the control, by tax authorities, of the price of deals made between interdependent persons (transfer pricing) with the aim of tax computation based on the market value of the output, work, service (Chapter 14.1 of the RF Tax Code); recognition of the members of a group of companies as a consolidated group of taxpayers (Article 25.2 of the RF Tax Code), which enables to compute and pay the tax on the profit of organizations with regard to the total profit of business activities of the companies making a group (Chapter 3.1 of the RF Tax Code), as well as to charge the responsible member of the group with the organization's profit tax payment (paragraph 1, Article 45(1) of the RF Tax Code).

In case the companies making a group are recognized as interrelated persons on the grounds envisaged by the customs law (Article 37 of the Customs Law of the Eurasian Economic Union, see Supplement No. 1 to the Agreement on the Customs Law of the Eurasian Economic Union, see Supplement, hereinafter referred to as CL EEU), during customs cost check subject to additional analysis are the sale-attending circumstances, as well as assessed is the influence of the persons' interrelation on the price paid for the goods (Article 39 (4) of the CL EEU).

Thus, one may conclude that the Russian law does not use a single inter-branch notion and criteria of a group of companies, which fact excludes application of the criteria for a group of companies within one branch of legislation to the relations between the companies within other branches of legislation.

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[7] Ruling of the Plenum of the Supreme Arbitration Court of the Russian Federation No. 30 of 30 June 2008 "On Some Questions Arising in Relation to Arbitration Courts' Execution of Competition Legislation" // Bulletin of RF SAC. 2008. No. 8.

[8] Review of Judicial Practice of Courts in Cases Connected with Application of Chapters 26.2 and 26.5 of the Tax Code of the Russian Federation in Relation to Subjects of Minor and Middle Entrepreneurship established by the Presidium of the RF Supreme Court on 4 July 2018 // Bulletin of the RF Supreme Court. 2010. No. 3.

Correlation between the ways of business operations expressed as an investment company, simple company, investment partnership and the "group of companies" model

However, the Russian law mentions some statutory concepts bearing similarity to the "group of companies" model, yet not being as such. For example, the above statutory concepts embrace other business forms aimed at common goals, namely:

— an investment company;

— a simple company (joint operation agreement);

— an investment partnership.

The analysis of the ***"investment company"*** concept admits the following conclusion: the above model is intended for joint investment activity, which is treated by law as an activity jointly executed by partners by virtue of the investment partnership agreement and aimed at the investment of the partners' common ownership into investment facilities permitted by the Federal Law and this treaty with the aim of implementing investment, as well as innovative, projects (Article 2(1) of the Investment Partnership Law). It should be noted that the legal investment partnership concept is maximum close to one of the most popular types of foreign collective venture investment, i.e. limited partnership[9]. The Investment Partnership Law reflects the practice of implementation in the legal system of Russia of the provisions of foreign statutory acts, including the Uniform Partnership Act, Chapter 614: On Limited Liability Partnerships, British Law On Limited Liability Partnerships of 1907, Australian Pooled Development Funds Act of 1992[10]. As noted by Henry Hansmann, a renowned American expert in corporations law, "[corporate] legal relation is in its basics a contract relation insofar as the parties enter the legal person voluntarily, and this is not connected directly with any third persons"[11].

In the context of the Russian law, an organizational model of an investment partnership combines the features of a simple partnership agreement and a business

[9] Comments to Federal Law No. 335-FZ of 28 November 2011 "On Investment Partnership" (article-by-article) / Ye.Ya. Gulieva, A.A. Kirillovykh, A.Ye. Molotnikov, and others, edited by A.Ye. Molotnikov. M., 2012. P. 88.

[10] McCary D., Erik Vermelen E. Issledovanie vnekorporativnykh form biznesa: mezhdunarodnyj aspekt [Research of Non-Corporate Forms of Business: an International Aspect] / transl. by Zh. Molokovoy; ed. & foreword by A. Molotnikov. M., 2007.

[11] Hansmann H. Corporation and Contract // American Law and Economies Review. 2006. Vol. 8. No. 1, p. 1. *See also*: Christie M. Breaches of Contract by Corporations — Potential Liabilities of Directors and Controllers for Inducing Breach // Australian Journal of Corporate Law. 2013. Vol. 28. No. 3, p. 304.

corporation, i.e. a trust partnership. An investment partnership agreement states that two or more persons (partners) commit themselves to unite their investments and carry out joint investment activities to make profit, yet without establishing a legal person. An investment partnership agreement includes the policy of joint activities (investment policy statement), all of its amendments, addenda and supplements, agreements on complete or partial assignment of partners' rights and duties under the investment partnership agreement; preliminary contracts on this are subject to notarization at the location of the managing partner's agent.

The legal form that has become somewhat spread in the Russian Federation as a collective investment scheme, in the venture sphere too, is a simple partnership agreement (joint operation agreement), according to which two or more persons (partners) commit themselves to unite their investments and carry out joint activities, without establishing a legal person, with the aim of making profit or achieving some other legitimate goal. The major advantage of the joint operation agreement is absence of dual taxation, which is due to the contract nature of the partnership, the latter not being a legal person. Other merits of this form are: legislatively unlimited options in defining investment types and amounts, participating interest shares in the communal property and the order of distribution of profits and losses, structuring and managing the activities of the simple partnership, admissibility of step-by-step contribution, as well minimum, partner-controlled payoffs related to simple partnership's activity. Nevertheless the norms of Chapter 55 of the Civil Code of the Russian Federation on the simple partnership (joint operation agreement) are not adapted in full to the needs of business projects implementation and business operation group forms; hence these are of little use for the legal models peculiar to groups of companies. The investment partnership analysis allows for the conclusion that there exists a legal framework focused at integration of organizations with the aim of a definite project implementation in various national economic realms.

Criteria (grounds) for recognizing an association as a group of companies

Since the current legislation of Russia lacks a legal universal notion of "a group of companies", some legislative control systems (tax, anti-trust, investment, etc.) define appropriate features *(branch ones)* of the group of companies. Literal interpretation of the norms of the Russian legislation permits the following generalized definition of the group of companies:

A group of companies in the Russian law is an association (without being a legal person) of two or more legal persons and/or self-employed entrepreneurs, that has gained its status in accordance with the law, united on the basis of legal criteria (grounds), with the application of a definite system of allowances, bans and limitations in case of recognition of the association as a group of companies and as a single consolidated person at law, created for the implementation of mutual economic aims with the retention of an individual economic interest.

The features of a group of companies *shall include*:

• an actual and economic association of legal persons and/or self-employed entrepreneurs without being a legal person;

• an association of entrepreneurs that has gained its status in accordance with the law;

• an association united on the basis of legal criteria (grounds), with the application of a definite system of allowances, bans and limitations in case of recognition of the association as a group of companies and as a single consolidated person at law;

• availability of a mutual economic aim with the retention of an individual economic interest.

Leaving out an in-depth analysis of the listed features, we intend to take note of the most important details.

1. Each legislative control system establishes specific grounds for the recognition of this or that association as a group of companies.

2. Availability of a common economic interest and agreed goal: it should be noted that due to community of their interests and goals the partners cannot stand in opposition to each other unlike traditional debtors and creditors. As the members of the group (association) have the same aim and, as a result of discharge of their contract, expect the same legal effects, as mutual rights and obligations arise here in relation to each member towards the other members, then the agreement making the basis for such an association is of a multilateral nature[12]. This specificity of a multilateral engagement was once noted by I.S. Peretersky who specified that its participants "do not show antagonism of interests they demonstrate in case of typical

[12] *See*: Grazhdanskoe pravo [Civil Law] / ed. by Ye.A. Sukhanov. In 4 v. M., 2006. V. 1, p. 212 (the author of the chapter: Ye. A. Sukhanov). Comp.: Sukhanov Ye. A. Sravnitel'noe korporativnoe pravo [Comparative Corporate Law]. M., 2016, p. 121.

bilateral agreements"[13]. For example, unlike "typical bilateral agreements", a simple partnership is characterized by a complex, cross structure of interconnections induced by the multilateral nature of the relations existing between the participants.

3. One extremely important **peculiarity is the creation of an integrity, i.e.** an association, that will permit its participants to act in the property turnover conjointly[14]. Common ownership creation is not the aim of the association, but rather a way to achieve the goal of creating an association accomplishing the agreed goals of the participants.

It is understood that both the simple partnership agreement and the investment partnership agreement are a legal form of an association of persons created horizontally. One example of vertical associations is, say, a holding company.

In this connection there is one more important comment: voluntariness of creation and absence of economic duress are differentiating features of both the simple partnership and the investment partnership compared with the contract holding company also based upon a contract; however, in the latter case the contract creates relations of economic control between participants. Therefore, every form of a horizontal association is characterized by the absence of control between participants.

Conclusions

If a number of organizations do not reveal in their activities any features and/or criteria of an association mentioned by this or that legislative control system (civil, tax, anti-trust, corporative, land, etc.), the conclusion is that the activities of the above listed organizations are legal persons' regular business activities mediated by various legal forms of implementing the legal personality of a specific legal person, namely:

— by making deals;

— by appearing in the economic turnover in one's own name (under one's own trade mark and trade name);

— by appearing as a claimant and defendant in court;

[13] Peretersky I. S. Sdelki, dogovory [Transactions, Agreements] // Commentary to the RF Civil Code / ed. by S. M. Prushitsky & S. I. Raevich. M., 1929. Is. 5, p. 8.

[14] Ruling of the Arbitration Court of the Volgo-Vyatsk okrug of 10 July 2019 No. F01-2909/2019 in case No. A28-7036/2018 // Paper not published. SPS ConsultantPlus.

— by the ability to bear legal responsibility, etc.

In the above cases, organizations implement by themselves, i.e. independently of one another, every element of legal personality inherent to the separate legal person[15]: legal capacity, capacity to contract, passive dispositive capacity and competitive fitness[16].

[15] *See*: Ul'bashev A.Kh. Dva tela korporatsii: pravosub'ektnost' yuridicheskogo litsa i otdel'nye problemy korporativnoj otvetstvennosti // Aktual'nye problemy rossijskogo prava [Two Bodies of Corporations: Legal Personality of a Legal Person and Separate Problems of Corporate Liability // Topical Issues of Russian Law]. 2018. No. 11, pp. 52–59.

[16] Competitive ability is person's ability to be recognized as inconsistent (bankrupt) in accordance with the existing laws. The Russian legal science has borrowed this term from the legal doctrine of Germany to denote ability to be a subject of the inconsistency procedure. Thus, during the competition statute (Konkursordnung) time, i.e. 1877 to 1999, they used the notion of competitive ability (Konkursfahigkeit) in Germany. The German doctrine of today deems its content the same as that of the notion "passive legal standing" (passive Parteifdhigkeit). In this doctrine, the above notion is synonymous to the notion of "inconsistency institute" (Trunk A. Internationales Insolvenzrecht. Systematische Darstellung des deutschen Recht mit rechtsvergleichenden Beziigen. Tubingen, 1998. S. 104).

LAW ON INSOLVENCY (BANKRUPTCY): CONTROVERSIES

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Abstract
The article addresses a number of contentious questions in the application of the Insolvency Law. These issues have arisen during the interpretation of the Law and judicial practice.
Keywords: bankruptcy, dispute of the transaction, competitive mass, prepayments for goods, current payment.

The economic and judicial practice raises a lot of questions when applying the Law on Insolvency (Bankruptcy), in particular, such as: **1)** whether Article 61.2 of the Law on Insolvency (Bankruptcy) permits contesting a transaction when the bankruptcy estate remains intact even after contested transactions, when other conditions stated by Article 61.2 (2) (paragraphs 2 — 5) have not been established; **2)** whether Article 61.2 of the Law on Insolvency (Bankruptcy) considers the debtor's actions to purchase goods within its regular economic activity as detrimental to the creditors, if such activity is to potentially bring losses to the debtor but it has not been ceased by the creditors' decision; **3)** whether Article 5 of the Law on Insolvency (Bankruptcy) permits classifying the advanced payment for the goods as a current payment; **4)** whether Article 61.3 of the Law on Insolvency (Bankruptcy) permits contesting transactions to transfer money as prepayment for the delivered raw materials necessary for its economic activity as giving priority to other creditors, taking into account the provisions of Article 61.4 (2) and (3) of the Law on Insolvency (Bankruptcy) if the goods are shipped and prepayment has been fully made; **5)** whether the bankruptcy estate is reduced after paying for the goods if, upon the prepayment, the goods have been delivered in their full volume.

The first question. Under Article 61.2 (2) of the Law on Insolvency (Bankruptcy), any transaction entered into by the debtor with the purpose to prejudice the creditors' property rights can be contested if such a transaction has prejudiced the creditors' property rights while the other side is not aware of the debtor's purpose before the transaction has been made.

Consequently, it is the combination of the **following conditions** that is important:

a) the transaction has been entered into with the purpose to prejudice the creditors' property rights;

b) the transaction did prejudice the creditors' property rights;

c) the other side knew or should have known about the debtor's purpose before the transaction has been made.

Should any of the above said conditions not be proved, the court refuses to recognize the transaction invalid based on such a condition (p. 5 of Plenum Resolution No. 63 of 23 December 2010 "On Certain Matters Related to the Application of Chapter III.1 of the Federal Law "On Insolvency (Bankruptcy)" (hereinafter — Plenum Resolution No. 63)).

The legislator does not provide for an opportunity to contest a transaction depending on its value (the correlation of its value with the book value of the debtor's assets). It means that the reduction of the bankruptcy estate is one of the criteria to assess the harm caused to the creditors' property rights.

Thus, the answer should be affirmative, but with an important remark: *if all these conditions are established in aggregate*.

The second question. Article 2 (paragraph 32) of the Law on Insolvency (Bankruptcy) states that reduction of the value or size of the debtor's property and (or) the increase of recovery claims to the debtor as well as any other consequences that occur as a result of the debtor's transactions or legally significant actions or inaction which lead to a complete or partial failure of the creditors to satisfy their claims against the debtor's liabilities at the cost of his property is recognized as *prejudice to the creditors' property rights*.

The same meaning of the category "prejudice caused to the creditors' property rights" is used in Article 61.2 of the Law on Insolvency (Bankruptcy) (p.5 paragraph 4 of Plenum Resolution No. 63, Ruling No. 304-ES15-8760 of the RF Supreme Court of 9 July 2015).

This language is clearly rather broad; under it, *any negative consequences* limiting the creditors' possibility to satisfy their claims at the expense of the debtor's property

can be qualified as prejudice to the creditors' rights. Therefore if all the conditions are present, the grounds stated in Article 61.2 of the Law on Bankruptcy (Insolvency) can be applied both in transactions made during regular economic activity and in transactions having equal counter-performance which makes it possible to speak about the invalidity of such transactions.

At the same time, unprofitable economic activity of the debtor cannot serve as a starting point to determine a sign of prejudice to the property interests of the creditors. Certainly, the activity of the debtor against whom bankruptcy proceedings have been initiated cannot be considered profitable. However, **first,** several transactions can bring profit but without significantly affecting the debtor's inefficient economic activity on the whole and, **secondly**, there might be objective reasons for making such transactions, for example, to minimize losses connected with the suspension of production for which raw materials are purchased.

To prove the fact of prejudice to the creditors' property rights, there must be a detailed analysis of different reasons for such transactions and property consequences for the debtor after such transactions, including the analysis of circumstances which would enable to answer the following questions: Did the debtor receive equal performance? Was the debtor deprived of a possibility to satisfy claims of other creditors who have the preferential right to claim?

Let us underline again. Apart from proving the fact of prejudice and the purpose of entering into a transaction aimed at prejudicing the rights, when a transaction is contested on this ground, it is also necessary to establish that the other side of the transaction knew or should have known about the stated aim of the debtor by the moment the transaction was made.

As for the question at hand, it means that if it is proved that it is the debtor's unprofitable economic activity that prejudices the property rights of creditors, then it should be proved that such losses are the debtor's aim and the other side is aware of this aim.

Considering the above, if the other side of the transaction knew or should have known about the aim to prejudice the creditors' rights by the time of the transaction, it is not a proved fact when:

— it comes to effecting a current payment in the process of regular economic activity;

— the bankruptcy administrator is expected to act reasonably, conscientiously fulfilling his obligations;

— there is a certain control over payments on the part of a credit organization which cannot overlook a payment in the sequence of payments (if there are payments of priority, see Resolution of the RF Supreme Arbitration Court Plenum No. 36 of 6 June 2014 "On Some Matters Related to Bank Accounts Operated by Credit Organizations of Persons in Bankruptcy Proceedings");

— there is no evidence proving the creditor's knowledge of the above aim.

Third question. Article 5 of the Law on Bankruptcy (Insolvency) states that *current payments* are monetary obligations, dismissal pay claims and (or) payment claims of people working or who used to work under the employment contract; and compulsory payments which occur after the date of accepting the application to find the debtor bankrupt, unless stated otherwise by the Law on Bankruptcy (Insolvency). Should the creditors' claims to pay for the delivered goods, rendered services and performed works occur after the initiation of bankruptcy proceedings, such claims are also considered current.

Taking into account the specific character of the situation in question, we will analyze only the category of the current payment as a monetary obligation.

Under Article 2 of the Law on Bankruptcy (Insolvency), a *monetary obligation* is the debtor's obligation to pay to the creditor a certain sum of money under the civil-law transaction and (or) on any other ground provided for by the RF Civil Code or RF fiscal legislation.

Analyzing the said definitions, we can distinguish the following criteria which qualify the debtor's payments as current ones. **First**, a current payment is a monetary obligation; it is a qualified obligation which presupposes the use of money as a means of payment, a means of debt recovery (p.1 of Plenum Resolution No. 63 of 23 July 2003 "On the Current Payments against Monetary Obligations in a Bankruptcy Case"). **Second**, the payment is of a civil-law nature (except for cases when payment is made based on the RF fiscal legislation). **Third**, the category of current payments includes only such monetary obligations which occur (with some exceptions) after the date of initiating bankruptcy proceedings.

The analysis of the situation enables us to make a conclusion that the prepayment effected in the name of the Supplier does not meet the stated criteria, to be exact, criterion No. 1. The obligation to make an advanced payment is not a monetary obligation (as well as the obligation to give a monetary loan), because the monetary obligation occurs only when money is a means of payment against a monetary debt

(p. 1 of Resolutions of the RF Supreme Court and RF Supreme Arbitration Court Plenums No. 13 / 14 of 8 October 1998 "On the Practice of Application of the RF Civil Code Provisions Concerning Interest Rates for the Use of Other People's Money"). In all these cases (the obligation to pay in advance, to grant a credit) the transfer of money does not repay the debt, but on the contrary, creates a debt on the part of the receiver. The ground (aim) for the transfer of money in monetary obligations is a payment, redemption of debts; the ground for the paying party in the obligation to make a prepayment (an advanced payment) is the acquisition of the right to claim counter performance from the other side (supplier) under the contract.

Besides, a monetary obligation is not characterized only by the obligation to pay a certain sum of money. The creditor must have a possibility to make the debtor fulfill this obligation. Under Article 487 and Article 328 of the RF Civil Code, should the buyer fail to pay for the goods in advance, the supplier has the right only to suspend the delivery of the goods or refuse to deliver the goods. The judicial practice does not recognize the right of the supplier to claim the prepayment for the goods in court.

In addition, it should be noted that since the obligation to pay in advance is not a monetary obligation, there are no grounds to consider that the supplier is the creditor in relation to the debtor within the meaning of "the creditor" under the Law on Bankruptcy (Insolvency).

Fourth question. Article 61.3 of the Law on Bankruptcy (Insolvency) is designed to contest such transactions of the debtor which result or may result in a preference of one of the creditors before the others when satisfying their claims.

Let us remember that one of the main principles of the current legislation on bankruptcy is *proportionate satisfaction of creditors' claims*. Therefore actions violating such provisions can be contested based on the grounds stated in Article 61.3 of the Law on Bankruptcy (Insolvency).

By the general rule, if an arbitration court has accepted the application to recognize the debtor bankrupt (or within one month before the arbitration court is expected to accept such an application), a transaction made after that and if it possesses the signs of a preference of one debtor over the others may be found invalid (Article 61.3 (2) of the Law on Bankruptcy (Insolvency)).

However, one condition should be taken into consideration: a transaction made in violation of the sequence stated in Article 134 (2) of the Law on Bankruptcy

(Insolvency) may be found invalid on the basis of Article 61.3 (2) of the Law on Bankruptcy (Insolvency) if as a result of such a transaction the debtor has no enough money left to satisfy the claims against current payments in the volume which they had the right to before the contested transaction was made and if it is proved that the debtor whose claim has been satisfied knew or should have known about the violation of the sequence. If by the time the application to contest such a transaction is tried, the creditors who had a priority have had their claims satisfied in the relevant volume or if it is proved that the bankruptcy estate contains such financial resources to satisfy the claims, such a transaction cannot be found invalid (Plenum Resolution No.63 (13)).

The position of the highest judicial instance is rather important and enables to list additional conditions related to the existence of other payments at the time the contested transaction was made and the real amount of money at the disposal of the debtor. The possession of the necessary amount of money to make all the current priority payments is a criterion sufficient to prove that there is no violation of the rights of other current creditors. Again, we are speaking about the availability of such financial resources, but not about the fact of payment as such, which may be not made due to other reasons unrelated to the contested payment.

It should be noted that Article 61.4 of the Law on Bankruptcy (Insolvency) provides for a special procedure of contesting separate categories of transactions; in particular, transactions made during regular economic activity and/or transactions having equal counter performance. So, for example, transactions to transfer property and accept duties and obligations during the debtor's regular economic activity cannot be contested on the basis of Article 61.2 (1) and Article 61.3 of the Law on Bankruptcy (Insolvency), if the value of the property transferred against one or several interrelated transactions or if the volume of duties and obligations does not exceed 1% (one percent) of the total value of the debtor's assets determined on the basis of the debtor's accounting statements within the last reporting period (Article 61.3 (2) of the Law on Bankruptcy (Insolvency)).

Consequently, current transactions made during regular economic activity may be classified both as transactions that can be contested under Article 61.3 of the Law on Bankruptcy (Insolvency) and as transactions that can be contested exclusively under Article 61.2 (2) of the Law on Bankruptcy (Insolvency). The criterion for such classification is the value of property or the volume of obligations (duties) against

a transaction or several interrelated transactions which cannot exceed 1% (one percent) of the total value of the debtor's assets.

As for transactions when the debtor receives *equal reciprocal performance* of obligations *immediately* after the conclusion of the contract, such transactions may be contested only on the basis of Article 61.2 (2) of the Law on Bankruptcy (Insolvency).

The RF Supreme Arbitration Court has underlined that Article 61.4 (3) of the Law on Bankruptcy (Insolvency) covers transactions to perform obligations which are made immediately after the conclusion of the contract, in particular, retail sales transactions (Plenum Resolution No. 63 (15)).

The question which transactions can be classified as transactions made *immediately* after the conclusion of the contract is of an evaluative character. The judicial practice demonstrates that such rules are not applicable to transactions made more than a month later after the date of signing a contract (Resolution of the Arbitration Court of the Volgo-Vyatsky okrug of 19 June 2015 in Case No. A43-26570/2013, Resolution of the Arbitration Court of the Ural okrug No. F09-5427/15 of 26 August 2015, Resolution of the Arbitration Court of the Povolzhsky okrug No. F06-5668/15 of 26 August 2015).

Relying on the above given legal characteristics of transactions, in particular, on equal reciprocal performance, we consider that actions to transfer money as prepayment for the delivered raw materials cannot be contested under Article 61.3 of the Law on Bankruptcy (Insolvency).

Besides, we would like to underline that Article 61.3 of the Law on Bankruptcy (Insolvency) concerns a preference given to one creditor over other creditors in case of satisfying their claims. If a person is not considered as the creditor within the meaning under the Law on Bankruptcy (Insolvency), we cannot say that such a transaction gives a preference to one creditor over other creditors in case of satisfying their claims. Consequently, the very legal possibility to contest such a transaction under Article 61.3 of the Law on Bankruptcy (Insolvency) is undermined while the possibility to contest a transaction under Article 61.2 of the Law on Bankruptcy (Insolvency) is still preserved.

Fifth question. The Law on Bankruptcy (Insolvency) treats bankruptcy estate as all the property that the debtor possesses at the time of initiating bankruptcy proceedings and established during bankruptcy proceedings (Article 131 (1) of the

Law on Bankruptcy (Insolvency). In other words, bankruptcy estate is nothing but a combination of different types of property belonging to the debtor.

The logic of the legislator in determining bankruptcy estate is quite clear: it is to secure a possibility to satisfy the creditors' claims to the maximum.

Relying on the definition above, we consider that when the goods already paid for are received, we should speak *not about the reduction of the bankruptcy estate* but about *its changed composition*.

The conducted legal research has enabled us to make the following conclusions:

1. The Law on Bankruptcy (Insolvency) does not provide for a possibility to recognize transactions which imply equal reciprocal performance invalid under Article 61.2 (2) of the Law on Bankruptcy (Insolvency), if the applicant does not prove that the aim of such a transaction was to prejudice the property interests of creditors and that the other party was aware of such an aim. If the debtor's economic activity on the whole is not profitable, it does not mean that it is a sign of prejudicing the property interests of debtors.

2. Article 5 of the Law on Bankruptcy (Insolvency) does not allow classifying prepayment as a current payment in a civil-law transaction made after the initiation of bankruptcy proceedings. The other party expecting a prepayment is not a creditor within the meaning under the Law on Bankruptcy (Insolvency).

3. Actions to transfer money as a prepayment for the raw materials delivered may not be contested under Article 61.3 of the Law on Bankruptcy (Insolvency) due to the equal volume of reciprocal performance received by the debtor.

4. Even when the debtor receives the goods already paid for, it is not the case of bankruptcy estate reduction.

OBJECTIVE CONDITION FOR CRIMINAL LIABILITY — A CONTINENTAL CRIMINAL LAW DILEMMA

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Abstract
Objective Condition for Criminal Liability is one of the most controversial academically debated topics in criminal law, since it opposes the basic principle of guilt that is required for every offence. It represents a highly disputed element of the offence that makes the person liable even when no guilt to that element can be attributed to him or her. Therefore, many advocate against using the objective condition for criminal liability or demand that it must be covered by at least negligence (lack of due diligence approach). The second problem is the uncertainty when an element of the offence is an objective condition for criminal liability; therefore, opposing the principle of legality as the basic legal principle in criminal law.

Keywords: objective condition, element of an offence, guilt, criminal law, principle of legality.

1. Introduction

The continental criminal law doctrine prides itself on its dogmatic tripartite structure of the offence (essence of a crime[1], unlawfulness and guilt), where guilt is a crucial element of every offence and can only be present in the form of intent and negligence. Strict liability[2] in continental criminal law is unheard of as there can be

[1] In German criminal law the essence of the crime is called *Tatbestand* and combines *actus reus* (objektiver Tatbestand) as well as *mens rea* (subjektiver Tatbestand). Bohlander M., Principles of German Criminal Law. Oregon: Hart Publishing, 2009, p. 16.

[2] Mora on Strict Liability in Ashworth A., Horder J., Principles of Criminal Law, 7th edition. Oxford: Oxford University press, 2013, p. 160. Siemester P., Spencer J. R., Sullivan G. R., Virgo G. J.,

no offence without a specific form of guilt of the perpetrator[3]. However, with a thorough analysis of the continental doctrine, it becomes clear that it also acknowledges a form of strict liability in the form of an objective condition for criminal liability[4] — a highly controversial element of the offence that bypasses guilt altogether and makes the person liable even when no guilt to that element can be attributed to him or her.

The purpose of this article is therefore to present the dogmatic principles of an objective condition and to present some personal views and probable solutions to this dubious concept.

2. Objective Condition for Criminal Liability

An objective condition is a legal instrument that is widely known and used by the lawgivers in continental legal systems[5]. However, this instrument has always been controversial because of its relation with the principle of personal guilt. Nowhere did this tension come to the foreground as clearly as in German and continental criminal legal theory. Hence, we shall reveal how the objective condition has been described by prominent continental legal theoreticians[6].

Roxin argues that an objective condition for criminal liability (Ger. *Objektive Bedingungen der Strafbarkeit*) is a separate condition, which has to be met for a perpetrator to be liable for his already accountable wrongful conduct[7]. They are

Siemester and Sullivan's Criminal Law, Theory and Doctrine, 4th edition. Oregon: Hart Publishing, 2010, p. 173. Robinson P.H., "Strict Liability's Criminogenic Effect" // Criminal Law and Philosophy. 2017, No. 12, pp. 411-426. Stanton-ife J., Strict Liability: Stigma and Regret // *Oxford Journal of Legal Studies,* 2007, No. *2*, pp. 151–173.

3 Horvatić Ž., Derenčinović D., Cvitanović L., Kazneno pravo [Criminal Law]. Zagreb: Pravni fakulet Sveučilišta v Zagrebu, 2017, p. 70.

4 In the following "objective condition".

5 *See* for example Bavcon, L., Šelih, A., Korošec, D., Ambrož, M., Filipčič, K.: Kazensko pravo: splošni del [Criminal Law], 6th edition. Uradni list Republike Slovenije, Ljubljana, 2013, pp. 193-195. For more on objective conditions for criminal liability of legal persons *see* Fedorov, A. V., Objective Conditions for Criminal Liability of Legal Entities in the Russian Federation and Prospects of its Introduction // Russian Law: Theory and Practice. 2016. No. 1, pp. 70–93.

6 Authors are aware of problems which can plague the comparative legal analysis. Fewer problems are however encountered if one examines and compares legal instruments which are being developed by the legal theory, even more so if one only compares views of theoreticians who all operate in continental legal systems. *See* for example Henderson, J., The Problems of Comparative Law. // Russian Law: Theory and Practice. 2010. No. 2, pp. 111–118.

7 Ger. die Unrechtshandlung. *See* Roxin C., Strafrecht: Allgemeiner Teil [Criminal Law, Common part], Bd. 1: Grundlagen: Der Aufbau der Verbrechenslehre, 2. Auflage. C. H. Beck, München, 1994, p. 866.

understood by Roxin as the fourth element in the structure of offences. The sheer thought that a separate condition outside of the essence of a crime, unlawfulness and guilt has to be analysed for criminal liability to be activated is however highly controversial. Hence, some other theoreticians rather understand objective conditions as circumstances, which merely extinguish the criminal liability and are therefore outside the scope of the structure of offences. It is however not disputed that such statutory provisions do not belong to the sphere of either wrongfulness (Ger. *Unrecht*) of a conduct or guilt[8].

Objective conditions are primarily results of a conduct which substantiates the perpetrator's criminal liability, but which is not necessarily covered with *dolus* (intent, Ger. *Vorsatz*) or negligence. The perpetrator's wrongful conduct is therefore in and of itself ripe to be considered criminal. What, then, is the reason for an objective condition to be added to a statutory provision? Roxin argues that the answers can be found in penal economy[9]. Objective conditions are used in instances where the pursued purpose of an incrimination is outside of the scope of criminal law and where criminal law has been outweighed by considerations of necessity of punishment[10]. This does not mean that such conduct is not *worthy* of punishment or *necessary* to be punished. The concepts of *worthiness* of punishment and *necessity* of punishment rather give way to other governmental policies outside of the scope of criminal law, such as foreign relations[11].

A typical objective condition can therefore be found in Articles 104 and 104a. of the German Criminal Code (Strafgesetzbuch[12], henceforth: StGB). Article 104 StGB incriminates violation of flags and state symbols of foreign states. However, 104a. StGB states that such an offence can only be prosecuted if the Federal Republic of Germany maintains diplomatic relations with the other state. Although, some dispute this, a major part of the German criminal legal doctrine argues that the maintenance of diplomatic relations is an objective condition for liability[13].

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8 Ibid., pp. 866; 872–873.

9 Ibid., pp. 872–873.

10 Ibid., p. 875.

11 Ibid., p. 878.

12 Neugefasst durch Bek. v. 13.11.1998 I 3322; zuletzt geändert durch Art. 1 G v. 22.3.2019 I 350.

13 Roxin, Strafrecht: Allgemeiner Teil [Criminal Law, Common part], pp. 143, 168. *See* also Welzel, H.: Das deutsche Strafrecht [German Criminal Law], 11. neubearbeitete und erweiterte Auflage. Walter de Gruyter, Berlin, 1969, p. 491; Eser, A.: Schönke/Schröder: Strafgesetzbuch: Kommentar [Commentary of the German Criminal Code], 30. neue bearbeitete Auflage. C.H. Beck,

Consequently, a mistaken assumption of a perpetrator that an objective condition is missing is irrelevant because it does not affect the guilt or the liability of the perpetrator. It means that errors of facts which are an objective condition do not affect the guilt of the perpetrator, which directly contradicts the principle of personal guilt. An objective condition furthermore neither affects the time nor the place of commission of criminal acts[14].

Some theoreticians argue that objective conditions are *per se* not compatible with the criminal legal doctrine and therefore cannot be seen as the fourth element in the structure of offences. Roxin agrees that many statutory provisions, which are labelled as objective conditions should be attributed to the essence of the crime, unlawfulness or guilt. A complete disregard for objective conditions as the fourth element in the structure of offences would however be too extreme. It is namely a fallacy in which a conclusion is taken for granted in the premises (*petition principii*) if one merely argues that substantive criminal law does not cover anything beyond the determination of guilt[15].

Roxin, however, does explicitly argue against a broad interpretation of statutory provisions as objective conditions. This is primarily the case when the ostensive objective condition affects the degree of *wrongfulness* of a conduct. In §231 StGB, the offence titled "Taking part in a brawl" is incriminated: "Whosoever takes part in a brawl or an attack committed against one person by more than one person shall be liable for this participation to imprisonment not exceeding three years or a fine if the death of a person or grievous bodily harm (section 226) is caused by the brawl or the attack." In this incrimination, Roxin argues, the death of a person or grievous bodily harm cannot be labelled as an objective, although court practice sees it as such. The *wrongfulness* of a conduct, which would deserve a punishment for up to three years in prison, cannot be attributed merely to the partaking in a brawl. It seems more likely that the lawgiver wanted to punish partaking in particularly dangerous brawls. If this is however the case, then grave consequences are a part of wrongfulness

München, 2019, §104a para. 2; B. von Heintschel-Heinegg, B.: BeckOK StGB, 42. Edition. C. H. Beck, München, 2019, §104a, para. 3; Kühl, K., Heger, M.: Strafgesetzbuch: Kommentar [Commentary of the German Criminal Code], Band 3, 29., neu bearbeitete Auflage. C. H. Beck, München, 2018, §104a para. 1; compare with Joecks W., Miebach, K.: Münchener Kommentar zum StGB [München Commentary of the German Criminal Code], 3. Auflage. C. H. Beck, München, 2019, §104a para. 6–8.

[14] Roxin, Strafrecht: Allgemeiner Teil [Criminal Law, Common part], pp. 875; 412.

[15] Ibid., p. 876.

of the essence of the crime. Because *guilt* has to cover any circumstances, which are a part of essence of the crime, it therefore has to cover all the circumstances, which constitute the dangerousness of the brawl. This means that the perpetrator, at least, needs be able to predict that the brawl could cause the death of a person or grievous bodily harm[16]. Meaning there should, at least, be negligence to this part of the offence.

Jescheck tackles objective conditions in the chapter on conditions of criminal liability outside the scope of wrongfulness and guilt. He argues that there is a small number of statutory provisions wherein the *necessity* of punishment is not established solely by *wrongfulness* of conduct and the perpetrator's guilt. Some incriminations also depend on further requirements, which are neither a part of *essence of the crime*, nor do they concern merely the prosecution of the perpetrator. One such group of statutory provisions are objective conditions[17].

Objective conditions are not procedural, but substantive conditions. Despite this classification, they are treated similarly to procedural conditions. Hence, solely the fact that the objective condition was met is crucial for criminal liability. It is not relevant if its onset was intentional or even was a consequence of the perpetrator's negligence. It is furthermore irrelevant if the objective condition occurs long after the perpetrator's conduct and even if he or she could not predict the relevant consequences of his or her action, which constitutes the objective condition. However, this also means that he or she could not be liable for an attempt to commit a criminal offence if he/she wrongly believes that the objective condition is met[18]. As objective conditions are outside of the scope of *essence of the crime* and guilt, any mistakes (mistakes of fact or mistakes of law) are irrelevant. Objective conditions are furthermore irrelevant for determining the time or place of the wrongful conduct[19]. They can namely be understood as *excuses absolutories* of criminal substantive law[20]. This is why even the *causation* in certain incriminations, such as the above mentioned §231 StGB, does not need to exist between the objective condition and the main act.[21]

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[16] Ibid., pp. 868-879. *See* also Schmiedhäuser, E. Objektive Strafbarkeitsbedingungen [Objective Condition for Criminal Liability]. // ZStW. 1959. No. 4, pp. 562–563.

[17] Jescheck, H.: Lehrbuch des Strafrechts: Allgemeiner Teil [Criminal Law, Common part], 4. Auflage. Duncker &Humblot, Berlin, 1988, p. 497.

[18] Ibid., pp. 500–501.

[19] Ibid, p. 505.

[20] Ibid., p. 298.

[21] Ibid., p. 250.

Contrary to Roxin, Jescheck differentiates between proper and improper objective conditions. Proper objective conditions are those, which are used by the legislative to *deny* the necessity of punishment even in cases where the wrongness of a conduct and guilt are obvious. Those are the cases where the *worthiness* of punishment is present, but the *necessity* of punishment is absent because of certain considerations regarding criminal policy. In such cases, the principle of personal guilt and blameworthiness[22] cannot be breached.

What seems more controversial is the scope and effect of improper objective conditions. Such conditions are in contrast to proper objective conditions disguised grounds for aggravation of punishment which should, according to their nature, belong to the element of *essence of the crime*. However, they are formally labelled as conditions for criminal liability because the lawgiver wanted to keep certain statutory provisions (e.g. their parts) outside of the scope of intent and negligence. Such conditions therefore collide with the principle of personal guilt and blameworthiness in favour of certain inclinations, which are related to criminal policy. However, such reservations regarding the improper objective conditions could, according to Jescheck, partly be mitigated by emphasizing the easily recognisable risk of the perpetrator's conduct[23].

He nonetheless argues that in cases such as the above mentioned § 231 StGB, a judge ought to find a way to uphold the principle of personal guilt and blameworthiness. This should be done by using the instruments of sentencing. If the perpetrator's intent only covers the essential part of the offence (partaking in a brawl) and the onset of the objective condition (grievous bodily harm of a person) cannot be attributed to his negligence, the judge ought to stick to the bottom range of the provided prison sentence[24].

Welzel describes objective conditions as certain conditions outside the scope of *the essence of the crime*, unlawfulness and guilt, which have to be met in order to trigger the liability of a perpetrator. He argues that the objective conditions do not affect the wrongfulness of a conduct and therefore do not clash with the principle of personal guilt and blameworthiness[25]. It does however seem like Welzel's

[22] Ger. *das Schuldprinzip.*

[23] Jescheck, Lehrbuch des Strafrechts: Allgemeiner Teil [Criminal Law, Common part], pp. 502–503.

[24] Ibid., p. 504.

[25] Welzel, Das Deutsche Strafrecht, pp. 58–59.

argumentation only concerns what Jescheck describes as proper objective conditions, since he only provides examples which fit into this category of objective conditions.

Rengier describes objective conditions for criminal liability as conditions outside of the scope of the objective side of the *essence of the crime.* In contrast to Welzel, he provides merely examples which fit into the category of objective conditions which Jescheck describes as improper objective conditions (for example the above mentioned § 231 StGB). Rengier therefore argues that objective conditions for criminal liability are in conflict with the principle of personal guilt and blameworthiness because they do not need to be covered by either intent or negligence.[26] He also emphasizes that any mistakes regarding the objective condition for criminal liability are irrelevant[27].

Rönnau emphasizes that objective conditions for criminal liability are the counterpart of grounds for exemption from penalty such as withdrawal. This is because typically objective conditions are consequences (results) of a conduct, which *substantiates* criminal liability[28].

There are no definitive criteria for determining if a statutory provision is an objective condition. Objective conditions need to be extracted from the wording of the law, by the means of interpretation. Statutory provisions nevertheless sometimes contain clear indications of objective conditions, such as "*is only punishable, if"* or "*will be punished, if*". The nature and justification of its existence are however still controversial, mainly because of its (in)compatibility with the principle of personal guilt and blameworthiness[29]. This is why Rönnau argues that the argumentation of Roxin is to be preferred, according to which the perpetrator needs to be, at least, negligent towards the circumstances, which supposedly constitute the objective condition. He adds that concerns regarding this approach, which are related to criminal policy, seem overstated. It would not be too complicated to show that a person who enters a brawl with a weapon in hand is negligent towards aggravated results of the fight[30].

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[26] Rengier, R.: Strafrecht: Allgemeiner Teil [Criminal Law, Common part], 8. Auflage. C. H. Beck, München, 2016, p. 46.

[27] Ibid., p. 283.

[28] Rönnau, T., Grundwissen — Strafrecht: Objektive Bedingungen der Strafbarkeit [Criminal Law Grounds, Objective Condition for Criminal Liability]// JuS. 2011. No. 8, p. 697.

[29] Ibid.

[30] Ibid., p. 698.

The prevailing opinion of the German criminal legal doctrine, however, seems to be against the scaling back of interpretation of statutory provisions as objective conditions[31]. Regarding the offence of "Taking part in a brawl" (§ 231 StGB), major commentaries of StGB state that the grave consequence is to be understood as an objective condition and therefore does not need to be covered with the perpetrator's negligence[32]. It is, however, controversial how to interpret the causation between the partaking in a brawl and the objective condition. Some argue that it is completely irrelevant if the objective condition was met during the time when the perpetrator was actually partaking in the brawl or not. What is important is merely the *causal nexus* between the brawl as such and the objective condition[33]. However, it is argued that it would not be compatible with the principle of personal guilt and blameworthiness to uphold the causation if the perpetrator joins the brawl after the objective condition was already met. It would therefore be wrong to hold a person accountable for a consequence, which he did not and could not even potentially contribute to[34].

3. Dilemmas and final thoughts

The principal difficulty of the objective condition is the uncertainty when it should be imposed. There is a general lack of legislative guidance on the issue as the Parliament rarely explicitly determines that the objective condition should be applied to the wording of the offence, leaving the matter in hand of the judges freely to their judicial interpretation[35]. As the rule of law and principle of legality demand explicit certainty in wording of a criminal offence, this presents a crucial problem,

[31] *See* for example Beckemper K., Die Funktion der objektiven Bedingung der Strafbarkeit: Einschränkung auf strafbedürftige Fälle oder Verstoß gegen das Schuldprinzip? [The Function of the Objective Condition of Criminal Liability: Limitation to Criminal Cases or Breach of the Guilt Principle?]. // ZIS. 2018. No. 10, p. 401.

[32] Fischer, T., Strafgesetzbuch: mit Nebengesetzen [Commentary of the German Criminal Code], 63. Auflage. C. H. Beck, München, 2016, pp. 1621–1623; von Heintschel-Heinegg, BeckOK StGB, § 231 para. 18; Kindhäuser, U., Neumann, U., Paefggen, H.: Strafgesetzbuch, 5.Auflage. Nomos, Baden-Baden, 2017, § 231 para. 20; Eser, Strafgesetzbuch [German Criminal Code], §231, para. 21.

[33] Von Heintschel-Heinegg, BeckOK StGB, § 231 para. 19; Joecks, Miebach, Münchener Kommentar zum StGB [München Commentary of the German Criminal Code], §231, para. 24.

[34] Fischer, Strafgesetzbuch: mit Nebengesetzen [German Criminal Code], p. 1622; A. Eser, Schönke/Schröder: Strafgesetzbuch: Kommentar [München Commentary of the German Criminal Code], §231, para. 9.

[35] McAuley F., McCutcheon J. P., Criminal Liability. Dublin: Sweet & Maxwell, 2000. p. 346; Ormerod D., Laird P., Smith and Hogan's Criminal Law, 14th ed. Oxford: Oxford University Press, 2015, p. 178.

as the courts are inconsistent in their interpretation[36] and rely mostly on educated guesswork.[37] This presents a serious attack on legal security, as no one is ever certain when the objective condition will be applied by the courts, bearing in mind that the legislature is far more suited to determine whether an objective condition would more efficaciously promote the statute's objective.

Therefore, we recommend, that the courts should refuse imposing an objective condition where no indication for this is provided in the statute.[38] We also believe that when the legislator would like to implement an objective condition in a statutory provision, he should do so definitively to leave no room for doubt and for a dubious and incoherent judicial interpretation.

Another problem of objective conditions is the luck argument. Participating in a brawl is against the law and one who does so knows he is committing something against the accepted legal standards. One who violates traffic rules knows that this is wrong[39]. If out of this conduct occurs a death or serious bodily injury of someone (which is a typical objective condition in Article 126 and Article 323 of the Slovenian Criminal Code), criminal law activates its repression, and the defendant cannot say he was blameless. He intentionally participated in a brawl or intentionally or, at least, negligently violated traffic rules — therefore the principle of guilt is satisfied. However, he will be liable for the offence only if the objective condition actually occurs. If someone violates traffic rules and hits a person with a car, it comes down to luck whether that person will suffer a serious bodily injury. Hitting a young strong person might result only in light bruises, while hitting an older weaker person might result in a serious injury although the perpetrator's conduct was the same in both cases. We could say that one was only lucky[40] if the objective condition did not appear and therefore there was no criminal offence. However, luck can never be a factor for determining someone's criminal responsibility.

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[36] Ormerod and Laird, Smith and Hogan's Criminal Law, p. 185.

[37] McAuley and McCutcheon, Criminal Liability, p. 346.

[38] This is also the view of McAuley and McCutcheon, Criminal Liability, p. 346. *See* also Schmiedhäuser, "Objektive Strafbarkeitsbedingungen", p. 564.

[39] *See* more on this topic in: Sullivan G. R., Simester A. P. Causation without limits: causing death while driving without a licence, while disqualified, or without insurance // Criminal Law Review, 2012, No. 78, pp. 16–21. Cunningham S. K., Has law reform policy been driven in the right direction? How the new causing death by driving offences are operating in practice // Criminal Law Review, 2013, No. 9, pp. 712–729.

[40] Moral luck regarding criminal liability is discussed in Simmons K. W. When is Strict Criminal Liability Just? // Criminal Law & Criminology, 1997, No. 87, pp. 1075–1137.

The final argument against the objective condition is that it contradicts the principle of personal guilt. Every element of the essence of a crime should be covered by the personal guilt of the perpetrator. This is what justifies sentencing[41] of the perpetrator, who had intent or was, at least, negligent towards a certain criminal offence. As an objective condition is outside the scope of personal guilt, the defences that would normally exclude guilt (mistake of fact, duress, order of a superior, etc.) will have no effect in regard to the objective condition. Therefore, there are many in the continental criminal law doctrine (dominantly Roxin, Rönnau, Rengier) who argue that guilt should be attributed to all the elements of the offence, at least, when it comes to *improper* objective conditions of liability. They also argue in favour of the negligence approach — that the accused should, at least, be negligent in respect to the objective condition. They are therefore, in fact, rebutting the use of the objective condition in criminal law, since if it is covered by negligence it is not an objective condition any more. We also share this view.

Only by preserving high standards of safeguarding basic human rights in a criminal trial and by proving guilt beyond reasonable doubt in connection to all the elements of the offence will the criminal trial, in fact, be fair, and criminal law will preserve its basic function: to punish those who wilfully and knowingly acted blameworthy, although they could have acted lawfully.

[41] Novoselec P., Bojanić I., Opći dio kaznenog prava [Criminal Law], 4th ed. Zagreb: Pravni fakulet Sveučilišta v Zagrebu, 2013. p. 213.

IMPLIED DUTY OF GOOD FAITH IN ENGLISH CONTRACT LAW — RECENT DEVELOPMENTS

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Abstract

The article discusses recent significant developments in English law regarding the implication of a duty of good faith in commercial contracts. It also addresses certain concerns that may arise in practice and outlines recommendations that should be considered when negotiating and performing a deal.

Keywords: good faith, English contract law, commercial contracts.

Introduction

In his 2013 judgment in *Yam Seng Pte Ltd v International Trade Corp Ltd*, Leggatt J. in the High Court stated that there was "*nothing novel or foreign to English law in recognising an implied duty of good faith in the performance of contracts*"[1].

However, there remains no generally applicable principle of good faith in English law[2]. Instead, duties of good faith are only implied in certain types of legal relationships, such as employment, partnership or fiduciary relationships[3]; between parties to "relational" contracts that are premised on high levels of collaboration and expectations of predictable performance based on mutual trust and confidence[4]; with respect to the exercise of certain forms of contractual discretion by a party

1 *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), para 146.

2 *Yam Seng*, para 122.

3 A fiduciary relationship is a relationship of trust and confidence that arises under English common law whereby one party (the fiduciary) is obliged to act in the best interests of another party (the beneficiary), whether by providing advice to, acting for or on behalf of, such party — e.g., relations that arise as between a trustee and beneficiary, principal and agent or attorney and client.

4 *Yam Seng*, para 142.

(known as the *Braganza* duty); or where required by statute, such as under the Consumer Rights Act 2015[5].

The historical reluctance of English law towards embracing the idea of a generally applicable duty of good faith stems from two primary elements: the ethos of freedom of contract, whereby parties are free to pursue their self-interest, and the fear that the content of a duty of good faith would be vague and subjective, which may result in differing interpretations of contractual provisions, thus creating legal uncertainty. The position under English law contrasts with that of many civil law jurisdictions[6].

Nevertheless, since *Yam Seng*, there have been significant developments in English law that have expanded implied duties of good faith.

Of the various types of contracts that may carry an implied duty of good faith, this article will focus on the implied duty of good faith in the particular context of relational contracts and the *Braganza* duty, as those two categories are most relevant and generally applicable to commercial practice. This article also addresses certain concerns arising from these recent developments and outlines practical recommendations going forward.

Relational contracts

Many contracts, such as franchise agreements, distribution agreements and joint venture agreements, are entered into for long periods of time and often require high levels of collaboration between their parties. As was the case in *Kent* considered below, a high degree of communication and cooperation, and expectation of predictable performance based on mutual trust and confidence that these contractual relationships entail has led to a growing willingness to imply a duty of good faith. A number of such commercial relationships have now been characterised as "relational contracts"[7].

Sheikh Tahnoon Bin Saeed Bin Sakhboot Al Nehayan v Ionnis Kent[8]

The Sheikh (claimant) and Mr. Kent (defendant) entered into a joint venture to set up a brand of luxury hotels. The business was unsuccessful; the parties' relationship

[5] Section 62(4) of the Consumer Rights Act 2015 provides that a term is "unfair" if, "contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer."

[6] For instance, as a matter of general principle, Article 1 of the Russian Civil Code expressly provides that parties must act in good faith in establishing, exercising and protecting their rights and no one can benefit from its illegal or *mala fide* conduct. As further elaborated by the Supreme Court of Russia, the *bona fide* conduct of a party means a conduct that is expected of any participant in civil law relations taking into account rights and interests of the other party and assisting it, among other things, in obtaining necessary information.

[7] *Yam Seng*, para 142.

[8] *Sheikh Tahnoon Bin Saeed Bin Sakhboot Al Nehayan v Ionnis Kent* [2018] EWHC 333 (Comm).

deteriorated into acrimony, and the parties negotiated a separation agreement and a related promissory note. When the claimant sought to enforce the separation terms, the defendant resisted. The court upheld the defendant's argument that the original joint venture agreement was a relational contract into which a duty of good faith should be implied. The court further held that the duty had been breached by the actions of the claimant's representatives during negotiations of the separation of the business as they covertly entered into parallel negotiations with a third party for the sale of the claimant's stake in the joint venture, and put the defendant under illegitimate pressure, including blackmail[9], to sign the deal. The claimant's claim to enforce both the agreement and promissory note therefore failed.

In addition to the basic requirement that there must not be any express contractual terms that contradict the implication of a duty of good faith, the court in *Kent* considered the following factors to be material in determining the existence of a relational contract[10]:

• the parties are committed to collaborating with each other, typically over a long-term relationship[11];

• the relationship requires a high degree of communication, cooperation and predictable performance based on mutual trust, confidence, and loyalty, which may not fully and adequately be set out in the parties' written contract but which are implicit in the parties' understanding of their venture; and

• the relationship anticipated greater candour and mutual trust than would be the case in an ordinary commercial bargain between parties dealing at arm's length.

All these factors were found in the venture between the Sheikh and Kent, in addition to the finding that their venture was based on their personal friendship and both parties were content to deal with each other informally on the "*mutual trust that they would pursue their common project in good faith*"[12].

Based on *Kent,* it appears that, whilst the question will always depend on the circumstances of each case, joint venture agreements, shareholders' agreements, share purchase agreements with a long pre-closing period providing for complex

[9] *Kent*, para 227.

[10] *Kent*, para 167.

[11] As noted in *Alan Bates and Others v Post Office Limited* [2019] EWHC 606 (QB), para 732, notice provisions which allow parties to terminate their contractual relationships would not generally prevent a finding that a long-term relationship was intended by the parties.

[12] *Kent*, para 173.

reciprocal covenants during that period, franchise agreements and long-term distributorship agreements may be more likely than other types of agreements to fall within the scope of relational contracts. The courts appear likely to give particular weight to close relationships of trust between the parties. That trust may be indicated, in particular, by the parties deciding that it was unnecessary to record all of the terms of their legal relationships in writing.

The concept of relational contracts was recently revisited by the English High Court in *Bates*.

Bates v Post Office Ltd[13]

Sub-postmasters ("SPMs") who were operating post offices across the UK brought claims against the Post Office. The SPMs reported their operations and revenues to the Post Office and were responsible for any losses caused by their or their staff's negligence. In 2000, the Post Office introduced a new accounting system called *Horizon* which, amongst other things, identified discrepancies in the revenues reported to the Post Office. Based on the findings of the *Horizon* system, the Post Office would, automatically and without further investigation, issue fines and pursue criminal prosecutions against allegedly delinquent SPMs. The SPMs claimed that *Horizon* was defective and, in any event, they were owed an implied duty of good faith by the Post Office in the administration and pursuit of claims against the SPMs regarding any alleged discrepancies.

The court in *Bates* found that the contract between the SPMs and the Post Office was a relational contract, but it did so on the basis of a very different set of considerations to those in *Kent*. They included[14]:

- the provision of a public service through the post office branches, which entailed a relationship of trust between the SPMs, the Post Office and the public;
- the entitlement of SPMs to certain "employment-type" benefits;
- the requirement under law for the Post Office to maintain branches across the UK, even in locations that would not normally be commercially viable; and
- the significant investment of the SPMs in, amongst other things, purchasing or leasing premises for Post Office branches.

[13] *Alan Bates and Others v Post Office Limited* [2019] EWHC 606 (QB).
[14] *Bates*, 728.

Certain legal commentators and practitioners have expressed some concern that the main common factor behind the finding of a relational contract in *Bates* and *Kent* was an envisaged long-term relationship between the relevant parties. Unlike *Kent*, in *Bates*, there was no context of "friendship" or other similar relationship to anchor a finding of a relational contract. The parties were dealing at arm's length and it appeared that their contractual relationships were governed by a comprehensively-drafted contract[15]. This has resulted in concerns that the expectation of a long-term contractual relationship alone could found a relational contract.

Yet, such an approach is debatable. *Bates* was an exceptional case, involving a prominent public service element and a relationship between the SPMs and the Post Office that had elements typical of employee-employer relationships. The former element makes *Bates* a factually exceptional case, whilst the latter potentially re-categorises any implied duty of good faith as employment-based, or as based upon a closer relationship than would be expected in a typical commercial transaction. Accordingly, it may be that *Bates* should not be regarded as a significant expansion of the scope of relational contracts beyond the ambit of *Kent*.

Implied duty of good faith in relational contracts

Once a relational contract is identified, the scope of an implied duty of good faith must be determined. This is not entirely certain, and will depend on the particular circumstances of the relationship between the parties. Any duty will normally apply reciprocally to all parties to a relational contract.

The general principle is that an implied duty of good faith is a duty to refrain from such a conduct which would be regarded as "*commercially unacceptable by reasonable and honest people*"[16]. This means that parties to a relational contract are expected to do more than simply refrain from outright dishonest and deceptive behaviour[17]. On the other hand, parties are not expected to hold themselves to the high standards expected of fiduciaries — they are not expected to subordinate their interests to those of another party[18]. In practical terms, this appears to mean that parties should exercise contractual powers in good faith and transparently for the purposes for which they were conferred. In a parallel vein, they should not act in a way that would

[15] *Bates*, 66.
[16] *Kent*, para 175.
[17] *Yam Seng*, para 139.
[18] *Kent*, para 167.

undermine the relationship of trust and confidence between the parties, which includes not exploiting one's position in the relationship at the expense of other participants[19].

By way of example, in the context of *Kent*, an implied duty of good faith was breached when the Sheikh deliberately concealed his parallel negotiations with a third party, which were contrary to the interests of Kent[20]. That said, there is nothing wrong in a party to a relational contract pursuing its own interests, as long as it does so openly and transparently in relation to the other parties — the issue in *Kent* was not that the Sheikh had pursued negotiations with third parties in his own interest, but that he had deliberately concealed them from his business partner.

This would suggest that the following practical considerations should be taken into account when negotiating and performing a deal:

• Contracts that are comprehensively drafted and negotiated at arm's length are less likely to see a duty of good faith being implied.

• Whilst expressly excluding a duty of good faith is possible, it is unlikely to be conducive to the business relationship of the parties in practice. Alternatively, it might be advisable to draft an exclusion of any "implied duties" in the "Entire Agreements" clause.

• A duty to act in good faith can be provided for expressly in a contract, even if no such duty would be implied or required by law, but its scope should be clearly indicated. A vaguely drafted duty of good faith would erode contractual certainty, particularly if a contract simply provides for a general reciprocal undertaking of the parties to "*act in good faith*" or "*act in a businesslike manner*".

• The principles of freedom of contract mean that the courts will be reluctant, based upon a general reference to an implied duty of good faith, to override or qualify the express rights and obligations of the parties if those are clearly set out in the contract, even if there is an apparent imbalance between the parties' positions.

Braganza duty

In 2015, the Supreme Court in the case of *Braganza v BP Shipping*[21] established a duty to not exercise a contractual discretion in a way that is arbitrary, capricious or irrational[22] (the "*Braganza* duty").

[19] *Kent*, para 176.
[20] *Kent*, para 176.
[21] *Braganza v BP Shipping Ltd and another* [2015] UKSC 17.
[22] *Braganza*, paras 27, 29 and 30.

This duty is not limited in application solely to relational contracts. It generally arises by implication where a party has a contractual discretion that affects the rights of both parties — in other words, where there is "*a clear conflict of interest*".[23] It is more likely to arise where the nature of the contractual relationship reveals an unequal balance of bargaining power[24] or where parties are not dealing at arm's length or a contract is a relational one[25]. However, the parties can exclude the implication of a the *Braganza* duty to an exercise of discretion either by expressly specifying what limits (if any) should apply to such discretion, or by making it unambiguously clear that no limits are to apply whatsoever[26]. The *Braganza* duty does not affect unilateral rights that are clearly set out in a contract.

The *Braganza* duty adopts an approach similar to that for the exercise of a statutory discretion in English public law. It focuses on both the process through which a decision is made and the outcome of the decision. On the process side, the party entitled to exercise the discretion is required to ensure that it takes into account all pertinent factors and does not take into account irrelevant factors. With respect to the outcome, the party is not necessarily required to reach any one particular decision — there is no necessary "right answer" as such — but the decision made must be within the range of those that a reasonable decision-maker could have reached, and anything beyond this range will be illegitimate.

Watson and others v Watchfinder.co.uk Ltd[27]

Mr. Watson and others (claimants) were directors and shareholders of a consultancy firm that was engaged by *Watchfinder* (defendant) to attract investors. Prior to services being rendered, the claimants and the defendant entered into a share option agreement under which the claimants were granted the right to acquire shares in the defendant. The option agreement contained a consent provision according to which the option could only be exercised with the consent of a majority of the board of directors of the defendant[28]. Over the course of providing their

[23] *Braganza*, para 18.

[24] *Braganza*, para 18. See also *UBS AG v Rose Capital Ventures Limited, Dr Vijay Mallya, Mrs Lalitha Mallya, Mr Sidartha Vijay Mallya* [2018] EWHC 3137 (Ch), para 49.

[25] *UBS AG v Rose Capital Ventures Limited and ors* [2018] EWHC 3137 (Ch) (n 25), paras 49(2)-(3) and 52.

[26] *Rose*, para 55.

[27] *Watson and others v Watchfinder.co.uk Ltd* [2017] EWHC 1725 (Comm).

[28] *Watson*, para 2.

services, the claimants introduced the defendant to several potential investors, one of which made significant financial investments in the defendant. The claimants then sought to exercise the option, but the defendant refused on the basis that the requisite board consent was not obtained.

At first glance, the consent provision in *Watson* might appear to be an unconditional right of veto for the defendant. However, such an interpretation was rejected by the court as a "*commercial absurdity*" — it was clear on the facts that the parties intended the option to be binding[29]. On the other hand, the court found that the option was not intended to be freely exercisable either, and the existence of the consent provision meant that the parties intended for some form of restriction to apply to the exercise of the option. In the absence of the express wording in the contract to set the limits or criteria for exercise of the discretion, the court found that the restriction took the form of the *Braganza* duty.

The court then considered how the *Braganza* duty should apply. It began by establishing the "target" of the contractual discretion — why had the discretion been given to the relevant party? Interpreting the contract, the court found that the discretion existed to ensure that the claimants had performed their obligation to find new investors and so had "*contributed to the growth, value or prospects of the defendant in some significant way*". Accordingly, the discretion allowed the defendant to refuse consent to the option if the claimants had introduced no or only insignificant investors.

However, the court held that the defendant's directors had failed to follow an appropriate decision-making process, stating that the board made no considered exercise of the discretion, consent to the exercise of the option was merely mentioned in passing at a board meeting and there was no consideration by the board of the introduction by the claimants of a significant investor. In consequence, the court rejected the defendant's purported exercise of its contractual discretion to refuse consent, and instead ordered specific performance for the transfer to the claimants of the shares subject to the option.

Taking *Watson* and *Rose* as guidance, parties should bear in mind the following practical recommendations when negotiating and performing a deal that involves one or more parties being given discretion:

[29] The court paid attention to the fact that the claimants had insisted on its execution prior to rendering any services to the defendant.

• Where a contract renders the exercise of a right subject to discretion, the parameters for the exercise of such discretion should also be clearly and specifically set out in the contract.

• The more specific and clear such parameters are, the less likely that it will be necessary for the *Braganza* duty to be implied.

• For the party entitled to exercise any discretion, proper consideration should be given to the discretion and clear records, such as detailed board minutes, should be maintained to show that all relevant matters were considered and related steps were taken.

• Contracts can be drafted so as to exclude the implication of the *Braganza* duty.

Conclusion

Where it exists in civil law systems, the principle of good faith in contractual relations cuts both ways. On the one hand, it is intended to uphold the presumed intent of contracting parties, fill up possible gaps in contractual terms, prevent abuse or arbitrary exercise of rights, restore the balance between the parties and, generally, protect a weaker party's interests. On the other hand, it may erode legal certainty by introducing a degree of subjectivity.

As discussed in this article, it remains the case that there is no generally applicable principle of good faith in English law. However, when negotiating and performing a contract, parties should still pay careful attention to what they do or say, because the principle of good faith may be implied in certain relationships, particularly in relational contracts or where a party is given a discretionary right. Further, a duty of good faith could arise from the laws of other jurisdictions even where a contractual relationship is governed by English law since, in certain jurisdictions, a duty of good faith may apply as an overriding legal principle regardless of the governing law chosen by the parties. The parties may also expressly agree in their contracts to act in good faith, but the practical effect of doing so, particularly in the context of enforcement, may be uncertain and limited.

As is frequently the case with English law contracts, care and diligence at the drafting stage to ensure that the obligations of the parties are clearly set out, the limits of any discretions are clearly defined and potential implied duties are clarified or excluded can help to ensure certainty within the contract, allowing all parties to fully understand their obligations and rights throughout the contract's life.

STUDENTS AS CONSUMERS OF EDUCATIONAL SERVICES IN THE ENGLISH SYSTEM OF HIGHER EDUCATION

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Abstract
The article examines possible definitions of "customer" and "consumer" in higher education, as compared to what we currently understand of their meaning in a classical market economy. The author identifies and assesses possible challenges to the assumption of the 'students as consumers' approach based on the available research. The article draws upon a review of the currently available research in English including a documentary analysis of the English legal framework and supporting acts.

Keywords: higher education, students, customer, consumer, consumer protection law, the quality of education.

There is a long-standing debate over the question if the students are customers (and consumers) in higher education or not. This question is not new; researchers have discussed this issue over many years but have failed to establish a universal agreement. As Guilbault notes, the answers range from "students are not customers by any definition" to "students should have excellent customer experience"[1].

The words "customer" and "consumer" are often used interchangeably. However, these words often have a different meaning, and it is important to highlight these contextual differences when examining the role of a customer and consumer.

According to the United Kingdom Consumer Rights Act, the word "consumer" means an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession[2]. According to a *Wikipedia* definition, the undertaking of an activity of representing in sales, commerce and economics, a

[1] Melodi Guilbault. Students as Customers in Higher Education: The (controversial) debate needs to end // Journal of Retailing and Consumer Services. 2018. No. 40, p. 295.

[2] Consumers Right Act (2015). Available at: http://www.legislation.gov.uk/ukpga/2015/15/pdfs/ukpga_20150015_en.pdf

customer is the recipient of goods, services, products or ideas[3], whereas the Oxford Dictionary describes the word "customer" as a person who buys goods or services from a shop or business[4].

So, it is possible to say that a customer is a person who purchases and pays for products or services while a consumer is a person who uses products or services. A customer can also be a consumer and vice versa. The consumer may not pay for the product or service. The majority of researchers agree that customer orientation is a main component in market-oriented higher education institutions, but they highlight several strong limitations in practice.

Schwartzman notes, "if students are envisioned only or primarily as consumers, then educators assume the role of panderers, devoted more to immediate satisfaction than to offering the challenge of intellectual independence"[5]. Cheney et al. write that the customer metaphor encourages students to be passive receivers and compare it with spoon-feeding. They also emphasize that "if we consider students strictly as consumers, we are suggesting that all we need to do is find out what they want at any given moment and give it to them… Consumers simply express their desires and then wait for them to be fulfilled"[6].

Several authors have noted the importance of students' engagement in learning and being co-creators of education, otherwise students tend to get a degree than to be learners and "show reduced responsibility for producing their own knowledge".[7] Bunce et al. have also found that students who expressed a consumer orientation demonstrated poorer academic performance[8]. Molesworth et al. note "that the inculcation of a consumer identity has brought about a more passive approach to learning in which students place much more emphasis on their rights rather than their responsibilities, and on having a degree rather than being a learner"[9].

[3] Available at: https://en.wikipedia.org/wiki/Consumer

[4] Available at: https://www.oxfordlearnersdictionaries.com/definition/english/consumer

[5] Schwartzman, R. (1995) Are Students Consumers? The Metaphoric Mismatch between Management and Education. // Education. 1995. No. 116. p. 220.

[6] Cheney G., McMillan J. and Schwartzman R. (1997) Should We Buy the "Student-as-Customer" Metaphor? Available at: http://mtprof.msun.edu/Fall1997/Cheney.html

[7] Bunce L. et al. The student-as-consumer approach in higher education and its effects on academic performance // Studies in Higher Education. Online First. 2016. p. 1959.

[8] Bunce L. et al. Ibid.p. 1958.

[9] Molesworth M. et al. Having, being and higher education: the marketisation of the university and the transformation of the student into consumer // Teaching in Higher Education. 2009. No.14:3. pp. 277–287.

A customer-driven model for education is a fundamental problem. Macfarlane highlights that "this all means that we have a bizarre situation where we are treating students as customers and at the same time becoming increasingly authoritarian about how they can learn at university"[10].

In marketing terms, customer demand and customer satisfaction are important methods of assessing the quality of goods and services. But this point can be viewed as controversial in the field of higher education. *English Complete University Guide* (2017) defines customer satisfaction as "how happy students are with the quality of teaching at the university"[11]. In business, customers can determine the quality of products or services but students are not able to act as experts. There are differences in understanding quality and happiness among students, and it remains unconfirmed how satisfaction relates to quality of teaching and quality of learning experiences[12]. At the same time, students can be satisfied with one courses while studying but can only appreciate others after graduating when the prior information and knowledge proves useful in their job[13]. As Scarbec notes, "a high level of student satisfaction does not necessarily measure the quality of education, though it may be one indicator"[14].

The main consumer principle "The customer is always right" also does not work in the field of higher education as higher education institutions are not responsible for all aspects of students' lives. They also should not readily accept all of the students' feedbacks as "doing so may further risk academic standards because students may have a propensity to see their degree as something that can be bought and not something that requires effort and engagement"[15].

Shulman in his article underlines the need for the state involvement and state responsibility in student consumerism[16]. Today it is possible to say that the states take an active part in this issue through the lawmaking procedures.

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[10] Macfarlane B. Why students are treated worse than customers // UniversityWorld News. 20 May, 2016. No.414. Available at: http://www.universityworldnews.com/article.php?story=20160517150918945

[11] https://www.thecompleteuniversityguide.co.uk/

[12] Lodge J. M. and Bonsanquet A. Evaluating Quality Learning in Higher Education: Re-Examining the Evidence // Quality in Higher Education. 2013. No. 20 (1). pp. 3–23.

[13] Cheney G., McMillan J. and Schwartzman R. Ibid.

[14] Scrabec Q. (2000). A Quality Education is Not Customer Driven // Journal of Education for Business. May/June 2000. p. 298.

[15] Bunce L. et al. Ibid. p. 1973.

[16] Shulman, C.H. Student Consumerism: Caveat Emptor Reexamined. Available from: American Association for Higher Education, One Dupont Circle, Suite 780, Washington, D.C. 20036. 1976.

In accordance with the Consumer Rights Act (2015), students in England are now recognized as "consumers" and are protected by consumer protection law as any consumer of goods or services[17]. The Consumer Rights Act consolidates several standards in providing educational services, as higher education is a service. Services must be provided with reasonable care, skill, time and price and should include the information about the trader or service. The law fixes the list of information which students need and how they should receive it. As Shulman writes, "as prime consumers of education, students need complete and accurate information about prospective choices upon which they may base decisions about postsecondary education"[18]. Higher education institutions under the Consumer Protection from Unfair Trading Regulations (2008)[19] and the Consumer Contracts Regulations (2013)[20] also have obligations to provide material and pre-contract information, full terms and conditions, a procedure for handling complaints. If services are not provided as agreed, students have the right to require repeat performance or to a price reduction. Repeat performance must be provided in reasonable time and "without significant inconvenience to the consumer" and the service provider "must bear any necessary costs incurred in doing so". A price reduction can be used in a situation where repeat performance is impossible or the service provider cannot reasonably offer a course within a given timeframe and without at the same time minimizing significant inconvenience to the consumer.

For protection and defense of their rights, students can contact the higher education institutions directly or the Office of the Independent Adjudicators for Higher Education, which has been created for handling students' complaints[21]. If students disagree with their decisions, they can seek a judicial review.

Recognizing students as consumers is not new, but full integration of the "students as consumer" concept in higher education seems to be unachievable as students are a special group of consumers, which have not only rights but also several obligations. They must actively participate in the educational process. English higher education

[17] Consumers Right Act (2015). Available at: http://www.legislation.gov.uk/ukpga/2015/15/pdfs/ukpga_20150015_en.pdf

[18] Shulman, C.H. Ibid.

[19] Consumer Protection from Unfair Trading Regulations (2008). Available at: https://www.legislation.gov.uk/uksi/2008/1277/contents/made

[20] Consumer Contracts Regulations (2013). Available at:http://www.legislation.gov.uk/uksi/2013/3134/contents/made

[21] Available at: https://en.wikipedia.org/wiki/Office_of_the_Independent_Adjudicator

institutions have started to put into practice such ideas as "listening to the students' voice" and "making students responsible partners" which also support the student-as-consumer metaphor. Universities can hear students' voices through participation in committees and meetings, through surveys and other forms of feedback, different activities. English higher education institutions have started to engage students in improving curricula, teaching and technology, involving them in planning different courses and it has proved beneficial for both the universities and the students. The role of students as responsible partners and changing agents gives an opportunity for students and staff to work in partnership to make learning better. As Brooks et al (2016) notice, the students-as-partners concept offers a valuable alternative to the rhetoric of consumerism[22].

[22] Brooks et al. Students' Unions, Consumerism and the Neo-Liberal University // British Journal of Sociology of Education. 2016. Vol. 37. No. 8. pp. 1211–1228.

INDEMNITY (COMPENSATION FOR LOSSES) AND LIQUIDATED DAMAGES: THE DIFFERENCE OF INSTITUTIONS IN ENGLISH CONTRACT LAW

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Abstract
The article analyzes a new institution of contract law for the Russian law — indemnity, which is a more flexible legal mechanism for restoring the property status of a creditor, in some cases has become an alternative to such a measure of civil liability as damages. The provisions of English law make it possible to secure indemnity as an exclusive sanction to replace damages. The article concludes that there are significant differences in the nature of the institutes under consideration, the presence or absence of the obligation to reduce damage, the statute of limitations on claims for the appropriate type of compensation. In addition, the institute of indemnity, unlike liquidated damages, does not represent a measure of civil liability (this is a debt obligation, the period for filing claims for which is established directly in the contract); in the absence of limitations of the subject composition provides for a substitution of parties in the obligation; it is not of a nature of assignment, it is a "self" insurance that affects the formation of the contract price; it is not a way to determine the size of losses; unlike liquidated damages as a reasonable estimate of foreseeable losses, indemnity may act as a legal mechanism for limiting liability.

Keywords: indemnity, contractual damages, liquidated damages, damage, civil liability.

The obvious similarity of the institute of indemnity with insurance provides serious grounds for identifying contractual indemnity with subrogation, thus giving rise to corresponding disputes in practice[1]. One of the most accredited publications, the *Black's Law Dictionary*, defines subrogation as "the substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or

[1] *Phoenix Ins. Co. v. United States Fire Ins. Co*. [1987] 189 Cal. App. 3d 1511.

securities that would otherwise belong to the debtor"[2]. The indemnity contract, in turn, is succinctly defined as "a contract that repays the insurer losses back to them"[3]. Thus, we can conclude that compensation for losses is a special case of subrogation. In this regard, A.G. Karapetov rightly classifies indemnity as the so-called "**self insurance**", i.e. the cases "when the risk of occurrence of losses associated with a concluded contract is insured by one of the parties by the other party", while the "premium for taking the risk is included in the contract price"[4]. In other words, the author identifies the key difference between indemnity and insurance — the obligation to compensate for the losses lies not with a third party, but with one of the parties to the contract. In this case, the choice in favor of indemnity is rightly connected by the author with two factors: difficulties in finding an insurer who is ready to insure the risk of the occurrence of such circumstances for less than a self insurance premium, and also because it is often easier for the debtor as a specialist in the relevant field to assess the risks of the occurrence of such losses than it would be for an external insurer[5].

Lack of a unified approach to the interrelation between indemnity and insurance is, we believe, based on the fact that the rights transferred to the debtor through indemnity to claim against the party liable for damage are treated by the Anglo-Saxon doctrine as subrogation[6]. In addition, this position is reflected in the two well-known precedents of *Darrell v. Tibbitts* and *Castellain v. Preston*, where the contract of insurance in relation to resolving the issue of the amount of compensation was qualified by the Royal Bench Branch of the High Court of England and Wales as a contractual indemnity[7]. It should be specified, however, that by the time these cases are considered (1880 and 1883, respectively), the institute of indemnity, we believe, has not yet fully budded off the parent branch of insurance law, which explains the use of some of its rules and terminology.

In turn, liquidated damages which are also a legal mechanism for accounting for the risks of the parties to the agreement cannot be categorized as self insurance for

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[2] Black's Law Dictionary. 6th ed. / J.R. Nolan, ed. St. Paul: West Publishing Co., 1990. P. 1427.

[3] Ibid. P. 769. *See also*: *Dawson v. Fidelity & Deposit Co.* of Md [1961] 189 F. Supp. 854.

[4] *See*: Karapetov A.G. Zavereniia ob obstoiatel'stvakh i usloviia o vozmeshchenii poter' v novoj redaktsii GK RF [Assurances and Conditions for Compensation of Losses in the New Version of the RF Civil Code] // Zakon, 2015, No. 6.

[5] Ibid.

[6] Courtney W. The Nature of Contractual Indemnities // Journal of Contract Law, 2011. Vol. 27, No. 1; Sydney Law School Research Paper, 2011. No. 11/41. P. 15.

[7] *Darrell v. Tibbitts* [1880] L.R. 5; *Castellain v. Preston* [1883] L.R. 11 QBD

the following reasons. **Firstly**, the risk is not redistributed, since the general rule applies when compensating for liquidated damages — the agreed sum of compensation is payable by the person who violated the terms of the contract and there is no replacement of the lender. **Secondly**, the "insured event" in case of compensation for liquidated damages is a violation of the terms of the contract, and not the occurrence of a certain event. Consequently, the risk of breach of contract is insured, and not the onset of some event. **Thirdly**, agreeing on liquidated damages does not imply an increase in the contract price, since an alternative method is developed for determining the size of damages that are mandatory for compensation, and there is also no "insurance premium" of the party to the agreement.

It should be noted that the concept of contractual indemnity, as well as of liquidated damages, has been shaped by judicial practice and clarified by doctrine over several centuries. Its content was specified, the scope of its application was narrowed, the interrelation of the said measure with compensation for losses was adjusted, and the degree of autonomy of the parties when agreeing on such conditions grew. In this regard, foreign literature indicates that the relevant judicial practice in interpreting contractual terms on indemnity is not established, but is in constant development[8].

The lack of a unified approach to understanding contractual indemnity is visible to this day. Thus, Penny L. Parker and John Slavich define indemnity as "a contract between two parties whereby one agrees to cover any liability, loss or damage sustained by the other from some contemplated act or condition, or damage resulting from a claim or demand of a third person"[9]. Guenter Heinz Treitel, in turn, specifies that the indemnitor is obliged to cover only those losses of the indemnitee that were expressly stipulated in the indemnity agreement, even if there was a real possibility to foresee other losses[10].

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[8] *See*: Loveman J.A. Understanding Contractual Indemnity and Defense Obligations under California Construction Law // Building & Bonding: The Construction Group News letter. Fall, 2011. URL: http:// www.lexology.com/ library/ detail.aspx?g=6fded1d1-55b9-4b6c-a558-64ac4fd79d36; Davies E. What does hold harmless mean? What is an indemnity anyway? // PLC Construction, 2011. 19 July. URL: http:// constructionblog. practicallaw.com/what-does-hold-harmless-mean-what-is-an-indemnity-anyway; Courtney W. Op. cit. P. 3.

[9] Parker. P.L., Slavich J. Contractual Efforts to Allocate the Risk of Environmental Liability: Is There a Way to Make Indemnities Worth More Than the Paper They Are Written On // Southwestern Law Journal, 1991. P. 1351.

[10] Treitel G.H. The Law of Contract. 11th ed. London: Sweet & Maxwell, 2003.

The variety of definitions of contractual indemnity is attributable to the fact that its content, like the content of liquidated damages, is largely determined by the agreement itself. That is why English law makes the legal agreement on compensation for losses dependent on the "clarity" and "maximum accuracy" of its wording[11]. Note that, otherwise, the courts, as a rule, refuse to satisfy claims for the reimbursement of a contractual indemnity[12].

At the same time, the common feature of all types (forms) of the institute of indemnity, that is inherent also in the liquidated damages, is the exclusively restorative nature of the former. It is reflected, in particular, in three aspects of the principle of "exact protection". The first aspect concerns the **"effectiveness" of protection**: depending on the terms of the agreement, the debtor undertakes to prevent losses and/or compensate for the losses already incurred. The second is the "**accuracy**" **of protection**: the compensation must correspond to the losses incurred on the pound-for-pound basis. The third aspect is related to the **"volume" of protection**: either all losses are to be indemnified, or, as a rule, only those expressly stipulated in the indemnity agreement[13]. In addition, the restorative nature of indemnity is manifested in the prohibition on seeking compensation for indemnity as unjust enrichment, in particular, the inadmissibility of the so-called "double indemnity": a creditor does not have the right to claim compensation for those losses that were covered by other sources than the debtor or its affiliates (for example, insurance coverage)[14].

It should also be noted that, despite the fact that the type of indemnity under consideration represents a contractual mechanism for restoring the property status of a creditor, English law **prohibits reducing its size**. Of course, the impossibility of reduction of the amount of compensable losses by the court carries with it the risk of depriving the weaker party of the defense mechanism against accepting the extremely disadvantageous terms of the transaction imposed by the stronger party to the agreement. In this case, in general law, there is a rule similar to the rule on the

[11] *See*: Sweigart R.L. English Indemnity Law-Parsing the Promise: Words Are Important, But So Are Actions // Pillsbury Winthrop Shaw Pittman, 2011 (March). P. 1.

[12] *See*: *Weaver-Bailey Contractors, Inc. v. Fiske-Carter Construction Company* [1983] 657 S.W.2d 209; *Arkansas Kraft Corp. v. Boyed Sanders Construction Co.* [1989] 764 S.W.2d 452.

[13] *See*: Courtney W. The Nature of Contractual Indemnities. Oxford, Portland: Hart Publishing, 2014.

[14] *See*: Segalova E.A. Ogranicheniia zaverenij, garantij i obiazatel'stv po vozmeshcheniiu poter' v dogovore kupli-prodazhi aktsij (dolej) po anglijskomu pravu // Grazhdanskoe Pravo [Limitations of Pledges, Guarantees and Obligations in Compensating Losses in Shares (Interest) Purchase Contract under English Law // Civil Law], 2015. No. 6.

distinction between liquidated damages and penalties: if the conditions for compensation for losses become punitive, the creditor is deprived of the right to judicial protection.

Taking into account that the content of the contractual indemnity constitutes the obligation of the debtor to compensate for the losses of the creditor, to make good, it is important to single out the characteristics sufficient for the formulation of the concept. **Firstly**, contractual indemnity represents legal relations of inter-assignment, the assumption of another's debt, the contractual redistribution of risks. **Secondly**, only losses that are not related to the violation of obligations of the contract, but caused by the presentation of the legal claims of third parties or public authorities, are subject to compensation. **Thirdly**, the agreement of terms on indemnity is taken into account when forming the contract price. As additional features of the institute under consideration, it is worth highlighting the possibility of limiting liability[15] by defining a specific list or nature of the grounds for compensation. In addition, the parties have the right to limit compensation to a previously agreed amount or to provide with a number of restrictions the possibility of eliminating losses by the forces and means of the debtor.

We will separately consider the characteristics of contractual indemnity in a comparative aspect. **First of all**, it is worth noting that the contractual terms of the liquidated damages do not imply a substitution of parties in the obligation, and therefore do not constitute legal relations of inter-assignment. The application of this liability measure does not authorize the transfer of obligations from the original creditor to a new one, but, on the contrary, in contrast to contractual indemnity, constitutes relative legal relations. **Further**, since the liquidated damages are one of the types of (methods of calculating) losses, the fact of breach of contract is the basis for their compensation, and not the performance of actions of third parties or public authorities specified in the agreement. And, **finally**, as it has been noted earlier liquidated damages are an alternative contractual way to compensate for losses, the agreement on which does not entail a change in the contract price. The costs of their agreement, as a rule, are part of the cost of negotiating an agreement. Thus, based on the analysis of sufficient characteristics of contractual indemnity, we can conclude that the nature of the compared contractual mechanisms is different.

[15] Application of the term "liability" is conditional as violation does not serve as the basis for compensation of losses.

Considering the additional characteristics of contractual indemnity, we can note the following. It should be recalled that the payment of contractual indemnity is not a measure of civil liability, since the offense (violation of the terms of the contract) cannot be the basis for its payment. Moreover, as the experience of Great Britain, Germany and France shows, the reason for the emergence of the institute of indemnity appears to be in the difficulties that arose during the application of measures of liability for violating warranty and guarantees. For example, in case of the conclusion and performance of a contract when the buyer is aware of the risks of the occurrence of circumstances, responsibility is either completely impossible (in English law), or its size can be significantly changed (as in Germany and France).

The nature of the contractual indemnity in this connection appears to be a monetary claim, the basis of which is the occurrence of circumstances determined in the agreement that are not related to the breach of the contract. However, the practical meaning of the use of contractual indemnity, as A.V. Tomsinov rightly notes, is "limiting liability compared to conventional measures of common law (which cannot be changed)"[16].

This kind of restriction can be expressed as follows. **First**, the debtor has the right to control the creditor's legal expenses related to the settlement of disputes regarding the occurred circumstances with which the agreement associates the compensation for losses. This manifests in securing the debtor's obligation to accompany the court proceedings concerning the claims of third parties related to the subject matter of the main contract. It should be noted that this kind of obligation arises, as a rule, from the moment such claims are filed. In relevant literature, it is noted that such conditions are fixed in the majority of agreements on indemnity, since it precludes unreasonable expenses of the creditor connected with the removal of the burden from the subject of the main contract[17]. The demand for such restrictions can be

[16] Tomsinov A.V. Zavereniia ob obstoiatel'stvakh i vozmeshchenie poter' v rossijskom prave v sravnenii s representations, warranties i indemnity v prave Anglii i SSHA // Vestnik ehkonomicheskogo pravosudiia Rossijskoj Federatsii [Assurances of Circumstances and Compensation of Losses in the Russian Law in Comparison with Representations, Warranties and Indemnity in the Law of England and USA // Bulletin of Economic Justice of the Russian Federation] 2015. No. 11.

[17] Steinberg J., McCord L. Indemnity Procedures and Liability in IT Contracts // Daily Report (January 22, 2016). URL: http://www.kilpatricktownsend.com/en/ Knowledge_Center/ Publications/ Articles/2016/01/ Indemnity_Procedures_ and_Liability_in_IT_Contracts.aspx

explained by the fact that the creditor, being "insured" against such losses, actually loses interest in the results of the proceedings.

Secondly, in the agreement it is permissible to condition the compensation for losses by exceeding their certain amount or to establish the limit of liability, limiting either the amount of potential compensation to a predetermined amount, or make clear the list of circumstances, the losses occurring from which are undertaken to be compensated. Otherwise, the debtor undertakes to indemnify any creditor's losses related to the subject matter of the contract. It is worth noting that such an obligation of a debtor, as a rule, arises after the creditor has actually suffered such losses: has satisfied the claims of third parties, settled the tax arrears, etc.

Thus, the Supreme Court of the US state of Colorado obliged the lessee (indemnity debtor) to indemnify the lessor's losses related to compensation for injury to a woman who slipped in the lessor's parking lot[18]. The court arguing its decision indicated that according to the terms of the contract, the flower shop (lessee) undertook to indemnify the business center (lessor) for losses related to claims for compensation for damage to someone on the rented area or another lessor's territory. And, since the indemnity agreement had a broad indemnity clause, the lessee, despite the absence of guilt, was awarded to indemnify the loss of the lessor. In another case, a broad indemnity clause was the basis for imposing the obligation to compensate for losses caused by injury to an organization that was not related to construction work, during which the plaintiff suffered[19].

Thirdly, by providing compensation for losses of "any and all claims", the debtor may limit the grounds for compensation to those that were not caused by culpa of the creditor (limited indemnity). However, such a clause should also be explicitly reflected in the indemnity agreement. Otherwise, as evidenced by the relevant court practice, the debtor will be obliged to compensate for any property losses of the creditor arising in the event of circumstances specified in the indemnity agreement, regardless of the degree of the creditor's fault[20]. In this regard, A.G. Arkhipova further notes that, unlike English law, where enforcement of contractual terms on compensation for losses caused by the creditor's negligence (intent) is allowed, "the US law and court practice combine different — sometimes directly opposite —

[18] *Constable v. Northglenn LLC* [2011] 248 P.3d 714.
[19] *Bernotas v. Super Fresh. Food Markets* [2004] 863 A.2d 478.
[20] *Polozola v. Garlock, Inc.* [1977] 343 So. 2d 1000; *Mills v. Fidelity & Casualty Co.* [1964] Civ. A. No. 8007.

approaches to the question of acceptability of conditions of compensation for losses caused by negligence or intention of the creditor"[21].

In turn, liquidated damages, incorrectly interpreted by identifying them with penalty, can be considered as a legal mechanism for limiting civil liability. To look at liquidated damages through the prism of foreseeability of losses also leads to the conclusion about the limited nature of compensation. However, in this regard, it is worth clarifying that establishing liquidated damages, the parties do not set a limit to their liability, they do not knowingly reduce the level of protection of civil rights, but make a reasonable estimate of foreseeable losses from violation of specific terms of the agreement, thereby agreeing on the amount of full, unlimited indemnification. In other words, the very nature of liquidated damages as a compensatory measure of civil liability is in conflict with the phenomenon of its limitation, and does not allow contrasting the compared measures on this basis. In this regard, it is worth noting that with compensation for both losses and damages, the proof of their size is based on the principle of foreseeability. Accordingly, the amount of compensation in both cases may be limited by this criterion. Therefore, on the one hand, the equivalence of the size of liquidated damage or indemnity to the foreseeable amount of damages confirms the reasonableness of their assessment by the parties when concluding such agreements. On the other hand, foreseeability also serves as a criterion for distinguishing the compared categories from punitive measures of liability: in the case of a substantial, as a rule, manifold, inconsistency of the sizes of the first ones and the foreseeable damages, the court accordingly limits the corresponding amount of compensation.

It should be noted that **the broad indemnity clause** allows fixing the obligation of the debtor to compensate not only for the losses, but also for the losses incurred by the creditor as a result of the circumstances specified in the agreement[22]. At the same time, this does not mean that indemnity can act as a way to calculate such damages — in this case, the institute in question only plays the role of a legal basis for changing parties in the obligation to pay damages. The difference between indemnity and compensation for losses as such should be considered in this regard.

[21] Arkhipova A.G. Vozmeshchenie poter' v novom GK RF: "za" ili "protiv"? // Vestnik grazhdanskogo prava [Compensation of Losses in the New RF Civil Code: For or Against? //Bulletin of Civil Law], 2012. No. 4.

[22] *See*: Parker. P.L., Slavich J. Op. cit.

First of all, it is worth noting that the nature of indemnity is a debt obligation: the party to the agreement undertakes to compensate the losses of the other party related to the conclusion or performance of the contract, but not its violation[23]. So, A.G. Arkhipova reasonably defines the nature of indemnity as a "claim for execution specifically in the form of paying the debt claim"[24]. In turn, damages, on the contrary, is a measure of civil liability, the basis of which is a violation, but not the occurrence of circumstances related to the conclusion or performance of the contract.

Further, it should be noted that as a general rule, a creditor under an indemnity agreement is not obliged to reduce the amount of the corresponding losses[25]. At the same time, according to the generally accepted approach, the creditor should not contribute to an increase in losses under the pain of a proportionate decrease in the amount of compensation by the court.

In addition, different limitation periods apply to the cases in question. As it is known, the general limitation period applies to claims for damages. However, for claims for damages, this rule is not general, since the corresponding obligation of the debtor is dispositive in nature and varies in different areas. For example, E.A. Senegalov points to the one-and-a-half-year period for transactions on the acquisition of shares and the 6-7-year period for the provision of compensation related to tax disputes[26].

The subject composition of legal relations arising in connection with the use of compared structures is also different. Recall that the use of liquidated damages is limited to the scope of business relations. In turn, indemnity has no such restrictions.

Until recently, the distinction of the institute in question from damages was the recognition by the courts of the validity of the conditions of the agreement on indemnity, according to which the debtor pledged to compensate for any losses associated with a third-party action or an occurrence of some event[27]. However, in

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[23] *See*: *Royscott Commercial Leasing Ltd v. Ismail Independent* [1993] CA (93/0266/C); *Codemasters Software v. Automobile Club de L'Quest* [2009] EWHC 2361; *BN AMRO Commercial Finance plc v. Ambrose McGinn, Ross Lawrance Beattie, Marcus Leek* [2014] EWHC 1674.

[24] Arkhipova A.G. Op. cit.

[25] *BN AMRO Commercial Finance plc v. Ambrose McGinn, Ross Lawrance Beattie, Marcus Leek* [2014] EWHC 1674.

[26] *See*: Segalova E.A. Op. cit.

[27] Let us remind that according to English law only those losses which the party could expect reasonably at signing of the contract are subject to compensation (*See*: *Hadley v. Baxendale* [1854] EWHC J70).

1996, the Court of Appeal in England and Wales acknowledged that even in the presence of an agreement on indemnity, a clause on covering all the consequences, only those losses that were **foreseeable at the conclusion of the agreement** are subject to compensation[28]. In other words, the amount of compensation ceased to serve as a characteristic differentiating indemnity and damages.

It should be noted that as the concept of liquidated damages was derived from their comparison with punitive damages, and so the indemnity was formed due to the comparison of the latter with the losses and classical insurance. As a result, indemnity, which is a more flexible legal mechanism for restoring the property status of a creditor, in some cases has become an alternative to such a measure of civil liability as damages: the provisions of English law make it possible to secure indemnity as an exclusive sanction to replace damages[29].

Thus, there are significant differences in the nature of the institutes under consideration, the presence/absence of the obligation to reduce damage, the statute of limitations on claims for the appropriate type of compensation. In addition, the institute of indemnity, unlike liquidated damages, **firstly** does not represent a measure of civil liability (this is a debt obligation, the period for filing claims for which is established directly in the contract); **secondly**, in the absence of limitations of the subject composition provides for a substitution of parties in the obligation; **thirdly**, it is not of a nature of assignment, it is a "self" insurance that affects the formation of the contract price; **fourth**, it is not a way to determine the size of losses; **fifth**, unlike liquidated damages as a reasonable estimate of foreseeable losses, indemnity may act as a legal mechanism for limiting liability.

[28] *Total Transport Corp v. Arcadia Petroleum Ltd (The Eurus)* [1996] QBD.
[29] *See*: Tomsinov A.V. Op. cit.

MAIN APPROACHES TO THE INTRODUCTION OF ARTIFICIAL INTELLIGENCE ELEMENTS INTO THE JUDICIAL SYSTEM OF THE RUSSIAN FEDERATION AND FOREIGN COUNTRIES (USA, UNITED KINGDOM, CANADA, CHINA)[1]

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Abstract
The article focuses on the study of legal, technical and factual possibilities of introducing artificial intelligence's elements into the Russian judicial system and the judicial system of foreign countries. The artificial intelligence is seen as a virtual assistant.

Keywords: artificial intelligence, digitalization of the judicial system, new generation technologies, e-justice, e-court.

Since the appearance of the most primitive voice assistants SIRI ranging from Apple to capabilities of unmanned vehicles, artificial intelligence penetrates absolutely all spheres of social reality. As statistics show, the leading areas of use of "machine intelligence" in Russia at the end of May 2019 were such areas as research and development, customer service, predictive analytics (the survey was conducted among customers and suppliers of the artificial intelligence technologies by the portal *TAdviser*). The technologies of a new generation are the least popular in solving legal problems.

[1] The study was supported by the Russian Foundation for Basic Research as part of scientific project No. 18-29-16111.

Nevertheless, the legal sector is not at the stage of digital stagnation. Many companies and organizations, and more importantly — the courts, are gradually being transformed through digitization. Across Russia the judicial authorities are moving from traditional (paper) management to electronic — the so-called "one electronic window"[2]. Video conferencing technology allows judges, parties and witnesses to participate in the trial virtually. The electronic court notice reduces the time for notification of the participants in the process. The diversification of evidence submitted simplifies the evidentiary process, bringing the justice system to a new better level.

Despite some digital innovations in the judicial system of Russia, the transition to progressive and innovative legal proceedings using elements of artificial intelligence remains doubtful.

Meanwhile, in 2013 *IBM Watson*, an artificial intelligence system of the American company IBM, helped to diagnose and prescribe treatment for a patient with leukemia whose case baffled the doctors for several months. The supercomputer studied the patient's medical information and after ten minutes it was able to compare his condition with twenty million cancer records. It should be noted that the artificial intelligence system has not replaced doctors, but only helped them in saving lives. Similarly, we cannot talk about replacing judges with "thinking machines". With the use of individual elements of artificial intelligence, judges will still control the final decision on the case, but the combination of their legal thinking and the computer's ability to process and analyze information can facilitate the decision-making process, making it more accurate and operational. In this case, only the question how to introduce these elements into the judicial system in the most harmonious and relevant way will remain relevant, and the answer will be in the plane of technical innovations and the practice of their implementation and use in Russia and abroad.

Firstly, artificial intelligence can be useful as a tool for collecting and analyzing information. For example, analytical platform ROSS, created on the basis of IBM *WARSON*, is actively gaining popularity in the United States. ROSS is the world's first "lawyer" with artificial intelligence who, upon receiving a request, automatically searches all possible databases, including the current legislation, judicial practice and thematic material, analyzes the results and generates a clear and reasonable answer, supporting its conclusions with links to the primary sources. This system

[2] Ponomarenko V.A., 2015. Elektronnoe grazhdanskoe sudoproizvodstvo v Rossii [Electronic Civil Legal Proceedings in Russia]. M: LLC Prospect. p. 87.

could be an ideal assistant not only for law firms looking for the easiest ways to solve their legal issues, but also for judges in making decisions, because ROSS is not a static reference and legal system, but such a system of artificial intelligence which is constantly developing and predisposed to memorization and training, systematization and analysis of information.

Another tool for the analysis of legal information can be iManage RAVN. It is a product of the London-based company *RAVN Systems*, able to read automatically, interpret, classify and extract key data from the legal documents (contracts, acts, accounts, financial statements, etc.). iManage RAVN is a personal assistant, the functionality of which allows carrying out the examination and analysis of legal documentation easily, thereby reducing the time of consideration of the case and increasing the efficiency of the trial on the whole.

Secondly, artificial intelligence can become a powerful ally in the electronic document search carried out in the mode of electronic detection (e-discovery), which uses computer algorithms to identify and label documents based on keywords and other metadata. As the elements of artificial intelligence are increasingly integrated into our daily lives, electronic detection tools (technology-assisted review — TAR) are being introduced into the standard practice of the electronic discovery. Five years ago, TAR was not even heard of in court, but today they are considered one of the most important search tools.

The first example of court practice supporting the use of TAR in reviewing documents was the decision of the Federal Magistrate Judge of the U.S. for the southern district of New York, Andrew Peck, in the case *Da Silva Moore v. Publicis Groupe*, in which the judge determined that TAR is the best and most effective means of finding and reviewing legal documents. The Department of Economic Affairs of the High Court of Justice endorsed this approach and adopted an amendment requiring parties to use "the most effective means" available for reviewing documents, including TAR and predictive coding. The amendment entered into force on 1 October 2018[3].

Thirdly, artificial intelligence is the basis of the virtual assistants' principle, which can be employed not only as software clients, with which the owners of modern devices cope with everyday affairs quickly, but also as personal assistants in solving different legal issues. The virtual assistants are able to take into account, plan and perform tasks

[3] Rideout P. G., Song, G., 2018. Continued Efficiencies in the Commercial Division. New York Law Journal, Vol. 74. pp. 1–3.

in a multi-functional mode. *Apple's Siri* and *Microsoft's Cortana* may be essential assistants of modern judges. For example, they can be instructed to notify the trial participants of the date and time of the hearing, which can be organized as follows.

The electronic filing system on the website of the State Automated System (SAS) of the Russian Federation (RF) "*Pravosudie*" [in English — "Justice"] receives an appeal. For example, a claim is automatically sent to the judge by automatically distributing cases between the judges, and the virtual assistant of the judge determined by system receives a signal. After analyzing the information received, the electronic assistant informs the judge about a possible date and time of appointment of the preliminary hearing. If the judge makes a decision on the acceptance of the statement of claim and selects the date and time of appointment of the preliminary meeting, proposed by the assistant, the virtual assistant notifies the participants in the process in the way that is chosen by the applicant. If the judge makes a determination of a different nature, the virtual assistant automatically sends a scan of the determination to the applicant. In this case, fundamental changes in the legal acts will not be required. This issue can be resolved at the level of a simple regulation, since the use of virtual assistants does not create a new method of notification, but only automates its use.

It should be noted that all of the above proposed options for the use of artificial intelligence-based tools do not aim to create a fundamentally new image of the judge, introducing into the judicial system a mechanized analogue of the human mind — the so-called electronic judge. Their real task is to optimize the decision-making process, simplify the work of the judge, thereby reducing material and procedural costs significantly, leveling the risks of stagnation of the judicial system in the conditions of digital modernization of the social realities.

In foreign practice, the use of artificial intelligence elements does not seem such a distant and ambiguous task. The forums where most civil disputes in the world are resolved are platforms such as *Alibaba* and *eBay*, not state courts or private mediators[4]. In the US, the *LexMachine* platform allows predicting the outcome of the trial through automatic selection and analysis of information posted on the Internet. In the UK, the Money Claim Online system has been operating for about 10 years. It is a configuration of electronic writ proceedings[5]. In this regard, the question arises

[4] Katsh E., Rabinovich-Einy O., 2017. Digital Justice: Technology and the Internet of Disputes. Oxford: Oxford University Press. p. 5–6.

[5] Argunov A. V., 2018. Iskusstvennyj intellect rassudit? Vestnik grazhdanskogo processa [Does Artificial Intelligence Judge? Bulletin of Civil Process], V. 8, No. 5. p. 38.

whether it is possible to adopt a fairly successful experience of foreign countries, without destroying the information and legal basis of the Russian judicial system, gradually moving to digital rails, using advanced technologies not as an analogue of the judge, but as a means of increasing its potential. It is important not to allow computerization of processes, which due to their characteristics can be performed only by a person. It is necessary to create a sound legal basis for the digitalization[6].

Developing this idea, it is possible to introduce elements of artificial intelligence into the judicial system of Russia in a test mode for certain categories of cases. For example, in cases dealt with in summary and writ proceedings.

Such versions of artificial intelligence use in simplified variations of cases have already received their right to life in the United States. The app *DoNotPay,* created by a student from Stanford Joshua Browder, allows its users to contest parking tickets and to sue in the court in the amount of 25,000 USD. All this takes place within a single application and without bearing material costs for the services of a representative.

British Columbia operates The British Columbia Civil Resolution Tribunal (CRT). It is the online court in Canada, one of the world's first examples of online dispute resolution. Despite the fact that its competence includes disputes of a civil nature at the cost of a claim up to 25 thousand Canadian dollars, the CRT is not considered a judicial body, but an administrative tribunal. The citizens use special services to access the Tribunal from a computer or mobile device. The artificial intelligence analyzes the information and provides users with possible solutions to their problems. The trial participants have the opportunity to settle the dispute with the help of special software using templates and drop-down menu. If the online negotiations failed, then the interaction of the parties is joined by a mediator who also acts remotely. The compromise found by the parties is transformed into a judicial act, which acquires the force of a traditional judicial decision. If the dispute is not resolved, the trial participants move to the final stage, which is denounced in the form of a court session online, by phone or video conferencing meeting[7].

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[6] Anosov A. V., 2018. Informatsionno-pravovye voprosy formirovaniia elektronnogo pravosudiia v Rossijskoj Federatsii: diss. …kand.yurid.nauk [Information and Legal Issues of E-justice Formation in the Russian Federation]. Diss. …for Cand.Leg.Sc. The Institute of State and Law of the Russian Academy of Sciences. p. 37.

[7] Katsh, E., Rabinovich-Einy, O., 2017. Digital Justice: Technology and the Internet of Disputes. Oxford: Oxford University Press. p. 160.

In China, robots can analyze and extract the data necessary for considering a case from all possible sources at the legislative level, thereby they reduce the burden on the state apparatus and the judiciary. Some of the robots have their own specialization. They are specialists in such fields as commercial law or labor disputes. Moreover, Chinese courts use artificial intelligence to analyze personal messages and comments on social networks, which can be used as competent evidence in the courts. And the Chinese traffic police are known to use a face recognition technology to identify and convict criminals.

Scientists from the University College of London and the University of Sheffield created a "computer judge", which can provide for a decision of the European Court of Human Rights with an accuracy of 79 %. The developers are sure this invention is not an analogue to the human judge, but they consider that it is appropriate to use the "e-court" to quickly identify patterns in judicial decision-making.

The issues of ethics and morality are certainly important when we consider the introduction of artificial intelligence into the judicial system, creating e-justice[8]. However, these two concepts are in the plane of subjective judgment, while artificial intelligence can and should help judges in lower courts. In this case, the human judge will remain the final arbiter at the top of any judicial system. Artificial intelligence will only be a means of achieving the desired result. Nevertheless, the legislator and law enforcers choose only what they consider to be a morally superior interpretation.

The very pace at which the new generation of technologies is developing today makes it necessary to demand due attention, both from lawyers and from politicians, ethics specialists and scientists. Organizations such as the International Association for Artificial Intelligence and Law (IAAIL), as well as bodies that regulate the development and implementation of artificial intelligence elements in the social reality are necessary to ensure interaction between lawyers and the public in order to develop rules and guidelines for the proper use of machine intelligence and successful operation of artificial intelligence in the judicial system.

Thus, the rational and harmonious interaction of human intelligence with machine intelligence is not only a key basis for the modernization of modern relations, but also a determinant for the transfer of civilization to a completely new digital level, blurring the lines between the virtual world and the real-time mode.

[8] Dworkin, R., 1986. Law's Empire. London: Harvard University Press. p. 60.

THE USSR ADVISERS IN SPAIN IN 1936–1939 AND THEIR ROLE IN THE DEFENSE OF THE REPUBLIC

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Abstract
The article depicts the role of the Soviet advisers during the period of the civil war in Spain. For this, the authors relied on the participants' memories about the events of Soviet military advisers as well as on the different sources of contemporary researchers. Special role was played by Marsel Israelevich Rosenberg, a Soviet diplomat, the first representative of the USSR in the League of Nations who in fact became the coordinator of a huge mechanism of activities carried out by the two intelligence services of the USSR: Intelligence Agency of the Workers-Peasants Red Army (RKKA) and Foreign Intelligence of the Foreign Department of the General Directorate for State Security of the People's Commissariat for Internal Affairs (NKVD). Scholars are still at odds concerning the motives for NKVD's destruction of the elite of outstanding officials of People's Commissariat of Foreign Affairs, RKKA, military and foreign intelligence services, party and Soviet workers, and popular writers. The authors will dwell upon this theme in future publications.

Keywords: civil war in Spain, the USSR advisers in Spain 1937-1939, army of putschists, Generalissimo F. Franco, international assistance to Spain, repressions of the USSR, advisers in Spain.

Documents recently introduced in the scholarly turnover are of key importance for covering the work of Soviet advisers. They are contained in the monographs of Yu.E. Rybalkin "Stalin and Spain", A. Beevor "Civil War in Spain", "Special Operations

in Spain (ed. by S.V. Rats), S.V. Rats "Secret Services of the USSR in Spain", and in the compilation information materials of Intelligence Agency of RKKA "RKKA and Civil War in Spain 1936-1939" in such a form as if they are the reports of Soviet advisers (V.A. Alafuzov, Ya.K. Berezin, G.I. Kulik, N.G. Kuznetsov, I.N. Nesterenko, K.K. Svertchevsky, G.M. Shtern). These documents touch upon the issues of martial law, party construction, the state of the Armed Forces of the republic, the introduction of the institution of commissars, the role of military advisers. They also contain the conclusions about the quality of the Soviet armaments, and specific proposals about the use of tank units, aviation and fleet.

The contributors to the article relied on the memories of those actively involved in the events of Soviet military advisers who could convey their messages and impressions to contemporaries. We think that the brightest memoirs are the works of P.I. Batov, L.A. Vasilevsky, N.N. Voronov, S.A. Vaupshasov, N.G. Kusnetsov, M.E. Koltsov, R. Malinovsky, A.I. Rodimtsev, I.G. Starinov, I. Erenburg, and M.B. Yakushin.

Thus, the mechanism of a military coup was launched in Spain in 1936. The putschists represented more than 80% of the officer corps, foreign legion, and Moroccan mercenaries. In fact, the fascist international of European states chose the side of rebels.

Italy and Nazi Germany — the founders of fascism — immediately complied with the call of F. Franco[1], one of the coup's leaders. Personal contacts of F. Franco and W. Canaris[2] largely contributed to this assistance. Walter Schellenberg[3], one of the Security Service leaders (political intelligence) recalls that F. Franco got acquainted with W. Canaris (the leader of the military intelligence and counterintelligence of the Third Reich) in 1916. Their friendship was based on the unity of views, *i.e.*, they both were convinced anticommunists. Within the next ten days, the first transport planes of German and Italian Air Forces landed on the territory of Morocco for transferring

[1] Franco Bahamonde (Francisco Paulino Hermenegildo Teódulo Franco Bahamonde; 1892–1975) — Spanish military and political figure, leader of a military coup in 1936. On 1 October 1936, he was declared the leader of nation, since 1939 "lifelong supreme ruler of Spain". In 1969 he declared prince Juan Carlos as his successor and King of Spain.

[2] Wilhelm Franz Canaris (1887–1945) — German military figure, Admiral, Chief of the Abwehr, the German military intelligence service of the Third Reich. He was arrested on a charge of cooperating with the English intelligence service, and assassination attempt on Hitler. He took part in saving Jews during the Second World War. Canaris was hanged in April 1945.

[3] Walter Friedrich Schellenberg (1910–1952) — head of foreign intelligence for Nazi Germany, SS Brigadeführer, NSDAP member since 1933. He died in Italy of hepatic disease.

the units of African rebels' legion to the south coast of Italy to establish a beachhead. Special headquarter "W" was established in Berlin in order to help the rebels. At first, it was headed by H. Wilbert, then by General E. Jaenecke. Overall leadership was provided by Marshall W. Göring. The Berlin transportation company "*Pankover Transportgesellschaft*" was involved in the transfer of military cargos for rebels.

In September 1936, the Nazis transported the whole military unit — aviation Legion "Condor" consisting of 7,000 people. During the period of civil war in Spain more than 6,000 Wehrmacht soldiers "were breaking in" through Legion "Condor" (even a special medal "For Spain" was minted). According to RKKA Intelligence Service, there were 15,000 military men in Legion by June 1937. The Italian Government sent four divisions of volunteers. The number of corps increased to 85,000 people by summer of 1937[4]. Portugal sent 20,000 military men. Besides the mentioned countries, the Francoists were supported by fascists — volunteers from Hungary, Romania, Sweden, and Finland, and an incomplete company of Russian officers — participants of the White movement. This is a very interesting picture: Who is who?! The number of fascist volunteers was nearly 180,000 people by the spring of 1937, the general number of putschists' contingent increased to 500,000 people. In Franco's units there was a great number of foreign instructors. For example, in one infantry battalion there were several advisers: 2 German officers and 6-7 non-commissioned officers.

The putschists army was distinguished by absolute unity. On 1 April 1936, F. Franco was declared the leader of the nation — the Caudíllo, Generalissimo, and the supreme commander of the armed forces. The units of Francoists were distinguished by iron discipline backed by shooting deaths of violators in front of formation.

Different sources account for 2 or 3 thousand Soviet military advisers and specialists that visited Spain. As it is seen from the figures, this number cannot be compared with the number of German and Italian instructors in the Army and Fleet of General F. Franco.

According to Soviet military advisers, by November 1936, the republican army consisted of units of volunteer republicans that had been gathered according to their belonging to the party with the full absence of discipline and elementary military

[4] RKKA i Grazhdanskaia Vojna v Ispanii 1936-1939 [RKKA and Civil War in Spain 1936–1939]. Vol. 1, p. 481.

skills, and the militia units that did not have any weapons. There was no aviation, and 90% of all the ships were in the hands of sailors devoted to the republic though all the officer corps took the side of the putschists. There were no modern tanks and artillery. Senior government officials were very complacent and lacking initiative. Complete chaos reigned in the leadership.

Despite the comprehensive support to F. Franco from international fascism, the first consolidation of forces took place on the battle fields. Later, mass media began to call it "antifascist coalition", and its participants were called antifascists. The Soviet Union was the first to answer the republican Spain request for help.

Before the beginning of the civil war in Spain, the Iberian Peninsula was not the priority direction for diplomatic and intelligence services of the USSR. Being a country with insufficient economy, Spain in the 1930s was on the margins of European policy, so there were no representative offices of the USSR in Spain till the summer of 1936. There was an urgent need to find an experienced person who had connections in diplomatic circles of European countries who could speak European languages.

The final choice of the party and Soviet leaders was made in favor of Marsel Israelevich Rosenberg[5]. Before his appointment to work in Spain he had been the USSR Charge d'Affaires in France and later worked as a Deputy Secretary-General of the League of Nations. There is not much information about his life in literature. Some episodes from his life became known due to the archive of his widow Marianna Yaroslavskaya. On 21 August 1936, he was appointed Ambassador of the USSR in Spain, Leon Gaikis became a secretary. After a month, old Bolshevik V.A. Antonov-Ovseenko[6] was appointed Consul General, one of the leaders of those who assaulted the Winter Palace and who supported L.D. Trotsky in the beginning of the 1920s, and after his deportation from the USSR publicly and embarrassingly repented for

[5] M.I. Rosenberg (1896–1838) — Soviet diplomat, first representative of the USSR in the League of Nations, Deputy Secretary-General of the League of Nations. In February 1937, he was recalled from Spain, was shot in 1938, rehabilitated in 1956.

[6] V.A. Antonov-Ovseenko (1883–1938), a member of the Russian Communist Party (Bolsheviks) from 1917, Soviet party figure, organizer of the Red Army. He supported L. Trotsky in 1921-1922. In 1922, he was the Chief of Political Department of the Red Army, the same year he began to support the left opposition. Being in Spain in 1936, openly supported and advocated for the anarchists and Trotskyists (POUM) on the issue of giving more rights to Catalonia. He was considered more of a Catalan than Catalans themselves. For deviation from the party's course he was accused for relationships with the Trotskeyists, in 1937 he was recalled from Spain, shot in 1938, rehabilitated in 1956 for lack of corpus delicti (author's note). His confession was published in "*Izvestiya*" newspaper of 24 August 1936.

his political mistakes. He was closely acquainted with the future leader of Spanish Trotskyists Andre Nina[7]. V.A. Antonov-Ovseenko was said to be more of a Catalan than Catalans themselves.

In any case, V.A. Antonov-Ovseenko established solid relations with separatists in Barcelona and proposed Moscow to give weapons to Moroccan tribes to spark off a partisan war in F. Franco's rear[8]. He provided great help to republican troops as a military adviser. He also actively criticized the activity of A.M. Orlov, an NKVD representative in Spain that in addition to his activity served as a reason for his recall to Moscow and further arrest and shooting.

M.I. Rosenberg is known to have arrived in Spain with a group of military intelligence representatives. In August 1936, the group was headed by Yan Karlovich Berezin (party nickname — Starik [the old man]). Rosenberg, in fact, became a coordinator of mechanism that provided the activity of two intelligence services of the USSR: Intelligence Agency of the Workers-Peasants Red Army (RKKA) (the whole apparatus of advisers, instructors and volunteers were under the responsibility of its head) and foreign intelligence of the Foreign Department of the General Directorate for State Security of the People's Commissariat for Internal Affairs (NKVD). In 1936, they were represented by Chief Military Adviser Ya.K. Berezin, Chief Adviser on Internal Security and Counterintelligence A.M. Orlov[9] (L.L. Fel'dbin), Military Attache on branches of the armed forces.

A colorful figure of Marsel Israelevich Rosenberg was focused on by resident correspondents of newspapers "*Pravda*" and "*Isvestiya*", *i.e.*, N. Koltsov and I. Erenburg, as well as Military Consul V. Antonov-Ovseenko, Military Attache

[7] A. Nina, the leader of the Trotskyists in Spain. From 1931 till 1934, he was L. Trotsky's personal secretary, corresponded with him till 1937, leader of POUM (Partido Obrero de Unificación Marxista), was liquidated in 1937 by officers and agents of NKVD (Sekretnye Sluzhby SSSR v Ispanii 1936-1939 [Secret Services of the USSR in Spain 1936-1939], St. Petersburg, "*Liki Rossii*" Publishing House, 2017, p. 34).

[8] A. Beevor. Grazhdanskaia Vojna v Ispanii [Civil War in Spain]. Moscow "*KoLibri*" Publishing House, 2018, pp. 206–261.

[9] Aleksandr Mihailovich Orlov (1985-1973) — real name Leiba lazarevich Feldbin. From 1936 to 1938, he was the chief internal security and counterintelligence adviser under Spanish Government, resident of external intelligence of NKVD, Senior Major in 1936. For Spain he was awarded the order of Lenin, under the threat of arrest he left for the USA via Canada and became defector in 1938. In 1953, he published the book "Istoriya Stalinskih Prestuplenii" [History of Stalin's Crimes]. FBI kept an eye on him though during the interrogations he did not give out the information about the Soviet agents. S.V. Rats. "Sekretnye Sluzhby SSSR v Ispanii" [Secret Services of the USSR in Spain], St. Petersburg, 2017, "Liki Rossii" Publishing House, pp. 138–141.

V.E. Gorev, Attache on Economic Matters of the USSR A.K. Stashevsky[10], and matters connected with operation "X".

Due to the personal contact of M.I. Rosenberg with the President of the country and Prime Minister of Spain, it was possible to resolve the issue about the removal of gold reserve very quickly. Due to his initiative and persistency, "Issue of Comrade Rosenberg about the Spanish Gold" was first-time heard at *Politburo* in October. Despite the fact that the USSR during that time signed the international Non-Interference Covenant, M.I. Rosenberg did a lot for the transportation of the Soviet weapons through the French border, maintaining the position of the USSR concerning its help to the republic. As it is seen, comrade Rosenberg did a lot for the USSR.

In a published letter of I. Erenburg to the Ambassador of the USSR we can find information about their exchange of views, *e.g.* on the issue of promoting Soviet films "Chapaev', "We are from Kronshtadt", widening Soviet propaganda in Spain, on military assistance, and the state of affairs on the front[11].

Analyzing the correspondence of I. Erenburg with M. Rosenberg, M. Koltsov, V. Antonov-Ovseenko, N. Buharin and I. Stalin, we can conclude that the activity of both resident correspondents went far beyond the limits of their direct powers. In this connection, both can be called political advisers, active conductors of political position which they got from chief editors of newspapers "*Pravda*" and "*Isvestiya*", party and military leaders of the USSR. The said can be exemplified by I. Erenburg's letter to V.A. Antonov-Ovseenko which content more resembled a report of an intelligence agent on the work done.

"Dear Vladimir Aleksandrovich, having finished the first trip to the Aragonese front with a truck for propaganda, I think it is necessary to inform you about the things that I noticed on the front and front line. In spite of the poor staff, we managed to issue 7 newspapers within 4 days which we printed at the field positions or in the nearest home front, among them is "*Golos Batal'ona Imeni Voroshilova*" ("Voice of Battalion Named after Voroshilov"), and also organized 7 film shows of "Chapaev"

[10] Ibid, p. 259. — A.K. Stashevsky (1890–1937) — military intelligence officer of RKKA, resident of military intelligence in Berlin in 1921, from 1934 to 1937 he was the head of Glavpushnina of Comissariat of External Trade of the USSR. He had a good knowledge of German, French, English, and Polish languages. From 1936 to 1937, he was also a commercial Attache in Spain (*author's note*).

[11] Ibid, pp. 432–446.

and several small meetings. I enclose newspapers and kindly ask you to send them to Moscow with a copy of the letter".

Then, I. Erenburg describes the moral spirit of the soldiers on the Aragonese front: "Military units on the Aragonese front have pulled themselves up a little. Great order is visible. The failure of a recent offensive in Huesca has had a little reflection on the squad's mood. There are some primitive trenches at several locations. Unified command still exists only on paper. Communication has become better lately. Nearly everywhere, the telephone connects the forefront with the headquarters. 10,000 Durruttis's[12] squads have also pulled themselves up. Though, here everything is based on Durruti's authority. As Durruti is in Madrid now, his military unit has lost a half of military effectiveness. Things are even worse in other anarchist military units, mainly in Columns "The Black and Red" and "Ortis". Marx Division is an exemplary, mainly the aviation column, in comparison with other ones. The equipment is poor. The battalion that stays to the south-east from Huesca in Pompenillo (the former battalion of Chapaev) has only two machine guns. They both become useless after two bursts. There is lack of shells. Hand bombs are bad. At the same time, the mood is good and offensive". (Barcelona, 17 November 1936)[13].

Ilya Grigorievich Erenburg wrote a letter to M.I. Rosenberg. It contained the same information on the military and political character (from Barcelona to Madrid of 17 September 1936).

Though, after triumphant homecoming, unbelievable popularity among the Soviet youth, both correspondents took part as representatives of the leading newspapers in the proceedings on the case about the betrayals of motherland. M.Koltsov was soon arrested and shot in 1939, and I. Erenburg was effectively sidelined. His foreign passport was taken away. In his letter to I. Stalin written during the time of Big Terror, when the life of the author (I. Erenburg) was hanging by a thread, he directly spoke about his important political mission that he had exercised in Spain. Here are some lines from this letter:

"From the very beginning of the Spanish war I have been living and breathing this thing. I wrote about Spain for "*Isvestiya*", wrote to Spanish newspapers, to communist journals of France, America, Czech, wrote articles, analytical reviews, and a novel.

[12] Durruti, one of the leaders of anacho-syndicalists in Barcelona, died of an injury suffered at the front in 1937.

[13] S.V. Rats. Sekretnye Sluzhby SSSR v Ispanii 1936-1939 [Secret Services of the USSR in Spain 1936-1939], pp. 437–439.

Besides, I helped as I could to promote the propaganda…"

Then Erenburg writes about personal and very delicate instruction of the leader: "…shortly before the departure, I could manage in one of my articles to raise up a group of "left writers" including the group "Vendredi', Malraux and others against Gide. It is very important to fight against the anti-Soviet propaganda locally"[14].

Thus, in the letter of 14 June 1936 to N.I. Buharin, the outstanding figure of the communist party who at that time was the chief editor of newspaper "*Isvestiya*", Erenburg informs about the offer of the "*Flammarion*" Publishing House to compile a volume of selected Stalin's compositions in 280-300 pages:

The "*Flammarion*" Publishing House is one of the biggest in France. It publishes the leftists and the rightists, Daudet, Maurras and Romain Rolland, Barbusse, etc. It published Barbusse and Stalin… "I cannot fulfil this task because it is a very responsible thing for which I am not qualified enough"[15].

The said chapter contains information only about a part of letters from huge correspondence made by I. Erenburg, covering military and political situation in Spain. His articles resembled the analysis of a major geopolitician. Erenburg's materials were rarely published in newspapers but were very popular due to a deep analysis of a political situation. One of the outstanding examples is the article published in newspaper "*Isvestiya*" of 1 January 1937 under the title "We will overpass!"

We understand the moral and mental well-being of the author while waiting for I.V. Stalin's decision when he was ordered to write an article about the group of betrayals-Trotskyists which was headed by his former leader N. Buharin. I.Erenburg and M. Koltsov were present during the trial. Erenburg refused to write the article. After N. Buharin's shooting, *i.e.* after the March proceedings of 1938, chief editor of newspaper "*Isvestiya*", G. Selih, solemnly proclaimed to I. Erenburg that he was not allowed to go abroad.

A positive decision about I. Erenburg's business trip abroad was made by Stalin a little bit later. It was for him to decide which Russian intellectual will live and who will be liquidated. In I. Erenburg's case it was surprising that all his close Spanish relations were eliminated: V. Antonov-Ovseenko, Ya. Beresin, V. Gorev, M. Koltsov, M. Rosenberg, A. Stashevsky, but he survived. We can only suppose that just before

[14] Ibid, p. 440.
[15] Ibid, p. 433.

a world war the author with international relationships and huge authority was still needed by the leader of the peoples. But it is only our assumption!

In the beginning of November 1936, Mikhail Koltsov (name at birth — Moisey Haimovich) was in Madrid and elaborated on the military situation which was in the capital in his political bestseller "*Spanish Diary*". In his opinion, republican Government escaped to Valencia in panic, having abandoned the city. 8,000 imprisoned fascists were left in Madrid's prisons. Some historians, especially foreign ones, still accuse M. Koltsov, an experienced international journalist and a participant in two revolutions, that it was he who allegedly made recommendations concerning the liquidation of Francoist officers. Such a claim, particularly, is made by Antony Beevor in the fundamental paper "Civil War in Spain. 1936-1939."

At the same time, M. Koltsov describes this dramatic situation. In his view, the leaders of the headquarters on the defense of Madrid and members of the Central Committee of the communist party, Miguel Martinez and Checa proposed to direct the captives to Valencia in small groups consisting of 200 people[16]. M. Koltsov personally did not give any advice, he only took part in the said conversation where there was no word said about shooting. The conversation took place in the "*Palas*" hotel at night between 6 November and 7 November. The "*Palas*" hotel was the headquarters of the Central Committee of the Spanish communist party.

However, let us cite Antony Beevor:

"The decision about the imprisoned was made at 10:30 AM on 8 October at the meeting of the representatives of the Union of Socialist Youth and local federation of Confederación Nacional del Trabajo. The detainees were divided into three categories:

1. Fascists and dangerous elements. Immediate execution with covering (our) responsibility.

2. Not dangerous detainees. Immediate evacuation to Chinchilla prison, maximum security.

3. Innocent (of the charges). Immediate release to demonstrate humanism to foreign embassies.

We do not know precisely whether this order was given by Carrillo's assistant Cazorla or Koltsov, *Pravda's* correspondent and special envoy who declared that "such important elements should not fall into the hands of fascists"[17].

[16] M.E. Koltsov. Ispansky Dnevnik [Spanish Diary], p. 234.
[17] A. Beevor. Grazhdanskaia Vojna v Ispanii [Civil War in Spain], p. 290.

There is not enough information to make a non-ambiguous conclusion on Koltsov's role in this bloody act. A historical fact is that more than 2,000 detained Francoist officers were shot by the republicans on 8 November in the vicinity of Madrid by the decision of the 20-year old Santiago Carrillo and Amor Nuño, and moreover, the Government did not know anything about this decision for certain as it was in Valencia at that time[18]. The said was done without charge or trial!

M. Koltsov established business contacts with POUM representatives close to Trotskyists, anarchists, leaders of international brigades, with Soviet advisers. He often went to the operative facilities of the 14th partisan corpus; he had friendly relations with Dolores Ibarruri, lived in Madrid in the "*Gaylord*" hotel in Madrid where he rented apartments. At the same time there lived such famous historical figures as A. Orlov, G. Syroezhkin, H.U. Mamsurov, E. Hemingway, I. Erenburg. Sometimes, Koltsov's apartments turned into an international press center where Soviet and foreign advisers and writers exchanged news till early morning.

M. Koltsov wrote a lot. Practically every day he transmitted information to newspapers. Part of such texts was sent by him via telephone. In his book "Ispansky Dnevnik" ["Spanish Diary"], he gave a detailed analysis of the role played by the Trotskyist organization (POUM) in the rebellion against the central Government in Barcelona in May 1937. According to the information received by him from a reliable source, POUM leaders maintained contacts with nationalists' intelligence service and launched the rebellion in Barcelona under their orders[19]. That was a very serious accusation against the party who was an active member of Frente Popular. M. Koltsov writes: "In a spy organization together with the representatives of old reactionary aristocracy and Falange Española, POUM members also took part. Apart from spy activity, they were going to prepare an armed fascist revolt in Madrid streets". The decrypted text of a ciphered message sent by Franco's agent pointed out to the character of relations with the POUM leader[20].

"Executing your (Franco) order, I was in Barcelona to "meet with N., a POUM leading member. He promised me to send new people to Madrid to intensify the work of POUM. Due to these measures, POUM will become a real support to our movement in Madrid as well as in Barcelona"[21].

[18] Ibid, pp. 290–291.
[19] Ibid, p. 516.
[20] Ibid, p. 517.
[21] Ibid.

Today, it is difficult to define the reliability of Koltsov's sources of information. Many Western authors think that the disclosure of POUM as an organization acting on Franco's order was a fake prepared within the NKVD resident agency headed by the chief adviser on internal security and counterintelligence A. Orlov and his agents. The provocation was aimed at discrediting Trotskyists as a political movement in Spain resulting in physical liquidation of its leaders. This fake could possibly be "presented" to M. Koltsov as facts received from "a reliable source".

It is still not clear whether M. Koltsov believed this information or not. Though, it would be naive to think that M. Koltsov did not maintain contacts with the NKVD leader in Spain. In fact, he was a trumpet of the USSR propaganda, such an excessively notable, authoritative and informed figure with serious powers. So, such an experienced NKVD representative as A. Orlov could hardly miss him.

This version is supported by the photograph included in the compilation of information materials of RKKA Intelligence Agency "RKKA and Civil War in Spain 1936-1939". On the photo we can see the main heroes of the Spanish tragedy sitting at the festive table. A.M. Orlov dressed in an elegant suit sits in the center. To his right, we see V.E. Gorev, M.E. Koltsov, I.M. Ratner, and P.V. Abramson. To his left, we see C. Sanga, L. Lacasa, and H.-U. D. Mamsurov. The photo is signed: "Madrid, 7 November 1936". This photo explains much: only very close people united by a common activity and personal relations could meet round such a table on 7 November 1936"[22].

If we suppose that the information about POUM contained in the "Spanish Diary" is a fake, it means that leading publishing houses of the country of Soviets disseminated a lie about the party that was fighting against fascists and its members died of wounds from the nationalists' bullets in the trenches[23]. Possibly, the story with the "decrypted text to Franco" was part of an operative plan of I. Stalin on liquidating Trotskyism and its leaders abroad and inside the USSR. This plan was brilliantly realized by NKVD agents in May 1937 by the defeat of POUM in Spain and liquidation of its leader A. Nina, and the murder of L. Trotsky in August 1940. We think that it was most likely that M. Koltsov was used in an unwitting fashion by the representatives of NKVD in Spain.

[22] RKKA i Grazhdanskaia Vojna v Ispanii 1936-1939 [RKKA and Civil War in Spain 1936-1939]. Vol. 1, p. 289.

[23] M.E. Koltsov. Ispansky Dnevnik [Spanish Diary], p. 77

The only historical fact is the event when, on 2 May 1937, the units of POUM and anarchists left their front positions bare and went to Barcelona. The march was suppressed by the devoted units of the central Government, POUM leaders were shot, and the organization was banned.

National newspapers published incriminating articles about the relations of POUM with Francoists. International community witnessed how precarious unity of the popular front was breaking.

That is why, answering the question whether or not I. Erenburg and M. Koltsov belonged to the category of advisers, we can confidently answer that they were political advisers to the national Government and actively participated in the political processes, had special orders from military and political leaders of the USSR, though formally they had a status of accredited journalists of central newspapers "*Isvestiya*" and "*Pravda*". How were they connected with NKVD? We think we should ask the same questions about their links with the USSR party leaders of that time. It is well known that I. Stalin personally listened to M. Koltsov's three-hour report about the state of affairs in Spain during his short-term visit to Moscow in May 1937, and I. Erenburg performed delicate tasks of the leader, which he wrote about in his letters.

The clearest answer to this question was given by I. Erenburg in his book "Years, People, Life": "It is difficult to imagine the first year of the Spanish war without M.E. Koltsov. For the Spaniards he was not only a prominent journalist but a political adviser"[24].

Speaking about M.I. Rosenberg who was the USSR authorized representative in Spain, we can state that on the top of his career during the development of drama around the struggle for the republic, he was called from Spain to Moscow, then was assigned to a rather humiliating office of authorized representative in Tbilisi, was arrested and later in the beginning of 1938 shot as an English and American spy. Rosenberg was rehabilitated on 27 June 1957 for lack of *corpus delicti*.

We should stress the role of representatives of the USSR military and external intelligence services and the leaders of apparatuses Ya.K. Beresin and A.M. Orlov respectively in establishing the agencies of intelligence and counterintelligence services of a young republic and organizing the so-called 14th partisan corpus which

[24] I. Erenbur. Gody, Lyudi, Zhizn' [Years, People, Life]. Books three and four. Moscow. Soviet Writer, 1962, p. 132.

activity was oriented at the organization of subversive reconnaissance units acting in the Trotskyist's home front. In this connection, we can name reconnaissance officers: I.G. Starinov, H.-U. D. Mamsurov (Intelligence Agency of RKKA), G.S. Syroezhkin, N.I. Eitingon (foreign intelligence, General Directorate for State Security of NKVD).

Senior advisers of the Spanish People's Army proved to be wise commanders: the commander of the tank brigade — D.G. Pavlov, in military aviation — I.O. Proskurov, in navy fleet — N.G. Kuznetsov, V.A. Alfuzov, in land forces — R.Ya. Malinovsky, K.A. Meretskov, A.I. Rodimtsev, in artillery — N.N. Voronov.

Speaking about positive moments of military advisers' participation in the civil war in Spain from the view of military skills development, Colonel R.Ya. Malinovsky (Malino) after becoming a Marshal and the Minister of Defense applied the Spanish experience in connection with X operation under the code name "Anadyr 62".

Several "Spaniards" were awarded the Victory Order. Among them is Rodion Yakovlevich Malinovsky (Malino), Marshal of the Soviet Union in 1944, twice Hero of the Soviet Union, Minister of Defense of the USSR from 1957 to 1967.

Kirill Afanasyevich Meretskov (Petrovich, Rossini), Marshal of the USSR, Hero of the Soviet Union, Cavalier of the Victory Order, was awarded 7 Orders of Lenin. He was also the author of such books as "Being in the Service of the People" and "Unwavering as Russia".

Two "Spanish" advisers are Heroes of the Soviet Union. The first is Aleksandr Ilyich Rodimtsev, twice Hero of the Soviet Union (1937, 1945), Lieutenant-Colonel. He wrote documentary books "Under Spanish Sky", "At the Last Frontier", "The Guards Fought up to the Last Ditch". The second was Nikolay Nikolaevich Voronov (Voltaire). He was awarded this title in 1944. He was the Chief Artillery Marshal in 1965.

Nikolay Gerasimovish Kusnetsov (Nicolas Lepanto), Hero of the Soviet Union, Admiral of the Soviet Union Fleet in 1951. He wrote a series of documentary books about war, including the book "At Far Meridian" about his work in Spain.

Great experience in the fight against fascists was acquired by future Heroes of the Soviet Union S.A. Vaupshasov, V.Z. Korzh, K.P. Orlovsky, N.S. Prokopyuk, A.M. Rabtsevich who executed sabotage operations of NKVD in the enemy's home front during the World War II.

204 male and female interpreters shared the burden of the civil war in Spain with military advisers who mainly did not know foreign languages. The interpreters

credibly represented the country of Soviets, giving boosts of fearlessness and optimism. Specifically, we would like to mention M. Fortus and S. Grinchenko as the most heroic ones. They both were related to the Intelligence Service of RKKA. All interpreters were awarded Government awards.

Scholars still argue about the NKVD motives to liquidate the elite of outstanding agents of the People's Commissariat for Foreign Affairs, RKKA, military and foreign intelligent services, party and Soviet workers, and popular writers. The authors of the present article will dwell on this theme in future publications.

Unfortunately, the first "wave" of military and political advisers died before 1941 as the ninth wave of the "Big Terror" crossed them out of the list of those who participated in the World War II, but they deserve our memory. The following people lost their lives due to unlawful repressions and then were rehabilitated: Senior Advisers — Ya.K. Berzin, G.M. Shtern, Corps Commander, Heroes of the Soviet Union: Ya.V. Smushkevich (twice), I.I. Proscurov, P.V. Rychgov, G.M. Shtern, D.G. Pavlov, Consul General V.A. Antonov-Ovseenko, Authorized Representative of the USSR in Spain M.I. Rosenberg, Commercial Attaché A.K. Stashevsky, political adviser, special correspondent of newspaper "*Pravda*" M.E. Koltsov, legendary Major of national security G.S. Syroezhkin. We cherish memory of them!

ABAY: OPENING THE HORIZONS OF THE NEW ERA (ON THE OCCASION OF 175 YEARS OF THE BIRTH)

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Abstract
The article is dedicated to the outstanding thinker, poet, and public figure of Kazakhstan — Abay Kunanbayev (1845-1904). The biography and contemporary significance of his creative heritage are briefly presented. The author considers Abay's judicial and legislative activity, the basic norms of the "Charsky Regulation" (1885), in the preparation of which Abay participated actively and where an attempt was made to combine customary Kazakh law and imperial legislation. Abay's criticism of various political and legal aspects and moral imperfections of the modern society and at the same time a strategic guide to the alliance with Russia are shown. The author concludes that Abay as an educator, ahead of his time, opened the horizons of a new era for the Kazakh people, prepared their consciousness for the need to develop education and perception of Western culture, adjusted to the need to change some negative features of domestic psychology. At the same time, Abay together with the future leaders of the Alash Party cared about preserving the core national values and minimizing losses for the people at the upcoming steep turn of history.

Keywords: Abay, Kazakhstan as a part of the Russian Empire, Abay's participation in the lawmaking process, court of biys, customary law, enlightenment, Abay's criticism of the then society.

> *"As an embodiment of the intelligence, moral and spiritual culture of his nation, Abay is undoubtedly an epoch-making national achievement".*
>
> Chingiz Aitmatov[1]

The year of 2020 is marked by the 175th anniversary of the birth of the outstanding son of the Kazakh people — Abay Kunanbayev. The anniversary will be celebrated at the state level, it is planned to republish his works, translate them into major world languages, hold international scientific conferences at the UNESCO headquarters

[1] *Cit.ex:* Abay. Ya — chelovek-zagadka… [Abay. I am a mystery man] Trans. from Kazakh / G. Belger. Astana: Audarma, 2009. 504 p. P. 11.

and in the capital of Kazakhstan, film documentaries, hold various competitions, assign the name of Abay to the State Prize for Literature and Art and the airport in Semey, create Abay Centers on the basis of embassies of Kazakhstan abroad, etc. The Kazakh State Academic Theatre of Opera and Ballet named after Abay (Almaty) will perform the Abay Opera in Turkey, Russia and China[2].

Abay as an educator

Every nation of the planet Earth has its spiritual and moral pillars. One of such fundamental pillars in the consciousness of the Kazakh people is the creative heritage of the poet, composer, educator, and public figure, Abay Kunanbayev (August 23, 1845 — July 6, 1904)[3]. His works reflect the traditions of folk art and problems of the society at the pre-revolutionary turn of the late 19th century and the beginning of the 20th century. Abay's legacy is the blend of the traditional mind of the Kazakh people and their world perception, anticipation, understanding of grandiose historical changes, the upcoming acceleration of development and new prospects in the life of the people and all their social groups, which opened up in the minds of the outstanding Kazakh educators.

The age of Enlightenment was a natural stage in the evolution of the public mind of all people on the eve of an active formation of the industrial society with its needs for substantial increase of the level of education of the population, its liberation, its release, and preparation for a new dynamically developing society with people who have legal awareness. In the end of the XIX and early XX centuries, educators in different countries elucidated the perspective of the historical trajectory of nations, encouraged them to rethink critically the past and present and prepare for the forthcoming radical changes in the structure of society and its life.

Being a brilliant educator, Abay guided his people for entering a new historical era. He was the person who "revealed to his people the horizons of development, took the spiritual culture and thinking of the Kazakh people to a new level, opened

[2] *See:* Official site of the President of Kazakhstan http://www.akorda.kz/ru/secretary_of_state/secretary_of_state_news/o-zasedaniyah-gosudarstvennyh-komissii-po-podgotovke-i-provedeniyu-175-letnego-yubileya-abaya-kunanbaiuly-i-1150-letnego-yubileya-abu-nasra-?q=%D0%90%D0%B1%D0%B0%D0%B9 (13 January 2020).

[3] *See also:* Udartsev S.F. Abay Kunanbayev: myslitel, sudya, zakonodatel// [Abay Kunanbayev: thinker, judge, legislator] In book.: Genii kultury: Pushkin i Abay = Madeniyet danyshpandary: Pushkin zhane Abay/ Sinergetika obrazovaniya. No. 8 [Geniuses of Culture/Synergy of Education No.8] Schol. journal (Social Sciences and Humanities). Spec. ed. [Auth.: Kharin N.V. (Russia, МГОУ), Udartsev S.F.(Kazakhstan, KAZGUU)]. Rostov-on-Don — Astana — Armavir, 2007. 254 p.

the new spiritual continuum for his nation, developed the new models of artistic perception of reality"[4].

By the beginning of the XX century, Kazakhstan, as a huge part of the territory of the largest state of the planet, the Russian Empire, was on the eve of an active movement towards a new level of development and new forms of education, culture, and economy. The traditional, primarily nomadic society was in front of the "historical door", behind which a very different industrial society, alien to the traditional principles of life, was emerging.

Objectively, education in all countries contributes to the corresponding shifts in minds, preparing for the onset of a new industrial stage of society's evolution. At the same time, enlightenment has some reasonable historical objectives of criticizing forms of social life, culture and the perceptions of the traditional society.

The role of education is also to signal about the need for more intensive work on historical adaptation to new conditions and comprehensive self-improvement for individuals and for the society as a whole. In many ways, this explains sometimes harsh and ruthless critical judgments about the modern society of his time and the contemporaries of the thinker who was deeply concerned about possible negative consequences of the phenomena, human traits and public policies he condemned. On the other hand, the educators paid much attention to the education of the reformers themselves, explaining to them the need for a careful, step-by-step reform, preservation of moral and cultural values that bound the traditional society. For a good reason, the educators of Kazakhstan such as Ch. Valihanov (1835-1865) paid much attention to customary law and the court of *biys* (judges) and to explaining the peculiarities of these phenomena to the representatives of the czar's administration. They understood their (*biys*') powerful potential for self-organization of the folk, which was not tied to the past stages of historical development but could be useful in the future. This did not prevent them from criticizing some *biys* for their ignorance of customs and the unfair and selfish exercise of court.

Abay's origin and education, the influence of the powerful

Abay Kunanbayev was a great educator, thinker and poet of the Kazakh people. He was born in the Semipalatinsk region, in a noble family, by his father he originated from the clan *Tobykty*. His official name was Ibrahim (Abraham), but his mother, and

[4] Abdildin Zh., Abdildina R. Abay — genialnyi myslitel' i gumanist. [Abay — a Sublime Thinker and Humanist] Astana: Foliant, 2015. P. 25.

the others called him by hypocoristic Abay[5]. His father was the senior sultan in the local administration. On the father and the mother's sides, some of his ancestors were known and authoritative *biys* in the steppe.

At the age of ten, Abay was sent to the madrasa school of the Semipalatinsk Imam, Ahmed-Riza. He also attended the Russian parish school for several months. Abay studied religious Arabic texts and Eastern classical pieces of literature. However, the father considered that five years in madrasa was enough for his education. He thought his son to be ready for preparing him for the practical activities of a *biy* and decided to cease his studies.

Abay was continuing his self-education all his life. He broadened his knowledge in the field of Eastern literature and philosophy, discovered Russian and European culture and literature (including studying the works of the founders of positivism) through talking to the exiled activists of the liberation movement, working in the library in Semipalatinsk, and studying the books and periodicals available to him. He was engaged in translations from Russian into Kazakh of some works by A.S. Pushkin, M.Y. Lermontov and others, and created his own original works, that were spread in the steppe thanks to the established traditional forms and the ground-breaking technique of memorizing and transmitting the information orally.

The freedom-loving works and the personality of the thinker were influenced by the representatives of the intellectual elite of the political exiles. Abay became especially close to Eugene Michaelis (born in 1841). Michaelis studied at St. Petersburg University and was personally acquainted with N.G. Chernishevsky. For his participation in the student movement in 1861 he was exiled to Petrozavodsk, then to other cities, finally, in 1869 to Semipalatinsk, where he worked as an assistant office manager in the regional administration. In 1879, he was released from the police supervision, and in 1881 — 1882 he temporarily acted as the county judge and regional prosecutor. His friendship with Abay continued later. It is known that in 1893 Abay visited Michaelis in Ust-Kamenogorsk for several days[6]. Russian friends

[5] *See*: Bukeikhanov A. Abay (Ibrahim) Kunanbayev (Nekrolog)// Abay i arkhiv / [Obituary// Abay and the Archive] Ed.-in-Chief: N. Shakeyev. Auth.: S. Baizhanov. Almaty: "Gylym", 1995. P. 138.

[6] Detailed in: Galiyev V.Z. Ssyl'nye revolutsionery v Kazakhstane (vtoraia polovina XIX veka). [The Exiled Revolutionaries] Alma-Ata, 1978. Pp. 126-128; See also: G(erasimov) B(oris). Pamiati Yevgeniia Petrovicha Michaelisa// Semipalat. podotdela Zap.-Sib. otdela IRGO. B. VIII. [In memorial of Eugene Petrovich Michaelis// Semipalatinsk sub-division of the West Siberia department of IRGO B. VIII] Semipalatinsk. 1914. Pp. 1–5. URL: http://

helped Abay in his self-education, guided him in the Russian culture and literature, but also enriched themselves with Abay's deep knowledge of culture, customs, and the customary law of the Kazakh people and the peoples of Central Asia. A. Bukeihanov wrote that Abay "admired L.N. Tolstoy and Saltykov" and for the rest of his life remembered Michaelis with gratitude, "attributing all his education to him" and noticing that Michaelis "opened my eyes"[7].

The exile Severin Severinovich Gross (1852-1896), a Polish by nationality and a graduate of the Faculty of Law of St. Petersburg University, personally acquainted in St. Petersburg with A.F. Koni, A. Spasovich[8] and other prominent lawyers, also visited Abay in the steppe. Gross worked on the pamphlet "Legal Customs of Kirgiz", and apparently, consulted Abay on these issues.

Abay as the educator saw that the main task of the time in enlightenment was to educate the people and introduce them to the world culture. At the same time, he considered the way of perception of the world culture by the people to be more reliable through European education, especially Russian education, through the best representatives of Russia. He linked the general level of development of the people, forms of their lives, well-being with the level of development of the people's minds, their world perception, and an open exchange of cultural values with other peoples.

Abay's judicial and lawmaking activities

Since the age of 15, Abay attended court proceedings. At the age of 20, he was already famous as a good speech maker and an expert in steppe customs, who was projected to become a famous *biy* (judge). The authority of Abay-biy was also evidenced by the fact that he was repeatedly elected as a mediator-conciliator (Tube-biy) in disputes between the representatives of different counties.

Abay served for many years as a judge (*biy*) and a volost (a small administrative peasant division in Russia) governor[9]. In the report signed by Major General Galkin

bibliotekar.kz/istorija-kazahstana-za-8-klass-hrestomat/pamjati-evgenija-petrovicha-mihayelisa.html (13 January 2020).

7 Bukeikhanov A. Op.cit. P. 141. O perevode Abayem "Yevgeniia Onegina" i populiarnosti v Stepi pesni Abya "Pis'mo Tatiany" [On the Translation by Abay of 'Eugene Onegin' and the Popularity of the Song by Abay 'Tatiana's Letter'] *see* Story by A. Bukeikhanov (ibid).

8 Detailed in: Galiyev V.Z. Op.cit. Pp. 131 — 132; Bukeickanov A. Op.cit. P. 140.

9 O sisteme obychnogo prava kazakhov perioda yego rastsveta [About the System of Kazakh Customary Law in the Period of its Prosperity] *see*: Fuks S.L. Ocherki istorii gosudarstva i prava v XVIII i pervoj polovine XIX v. [Under the General Editorship of S.F. Udartsev. Digest of the History of S.F. Udartsev and N.O. Dulatbejkov (in Rus. and Eng. languages). Opening chapter — by Sh.V. Tlepina. Comments and prep.of text — K.A. Alimzhan, Sh.V. Tlepina,

on 25 August 1903 in the name of the military governor of the Semipalatinsk region, said that "Ibrahim Kunanbayev is 60 years old, married to 3 wives, has about 20 children, possesses 1,000 horses and 2,000 sheep. He is a highly developed and intelligent man, who served as a *biy* for two periods by three years and three periods by three years as the governor of the Chingiz volost, thereafter, he served as the governor of the Nukur volost for one period of 3 years as assigned by the government. Kunanbayev's service was distinguished by reasonable performance and energy, devotion to the government and lack of bigotry"[10].

Considering the cases as the *biy*, Abay showed deep knowledge of legal customs, sought to understand them thoroughly and to fairly resolve the dispute. At the same time, Abay tried to identify the really guilty without any bias. Far not everyone liked this, especially those from the noble or rich, who expected to be treated more favourably by the young *biy*. As A. Bukeihanov wrote "there is no doubt that Abay in the old times would justify the prophecy of the steppe: one would become a *biy* whose right to judge was created not by formal election, but by recognition of his talent, as the glory of the writer and artist is established. The new time, characterized by the success and consolidation in the steppe of Islam, drew Abay's attention to the knowledge of books in Arabic, Persian and Turkic. Thanks to his leisure and ability, he himself reached the proficiency reading in Arabic and Persian languages, and acquired the name of an expert in sacred books"[11].

Abay was known not only as a *biy*, but also as a ***steppe legislator***. In 1885, one of the first legal documents in the Kazakh language published in print and distributed among the Kazakh people was adopted in the village of Karamola on the bank of the Char River (hence one of the titles of the document — "The Charsk Regulation"). It was a set of customs and laws of the steppe and was adopted at the extraordinary congress of more than a hundred *biys* of a number of counties of the Semipalatinsk region. As proposed by the military governor of the Semipalatinsk region, *biys* elected Abay as their chairman at the congress (that time he was about

S.F. Udartsev. Astana / St. Petersburg.: JSC "Yuridicheskaya kniga of the Republic of Kazakhstan" / LLP "University editorial Consortium "Yuridicheskaya kniga", 2008. 816 p.

[10] Top secret. Ministry of Internal Affairs of the head of the Semipalatinsk volost August 25, 1903 r. No. 48. Semipalatinsk. Gospodinu voennomu gubernatoru Semipalatinskoi oblasti. Raport uezdnogo upravitelya Navrotskogo. Podpisal general-mayor Galkin// Abay and Archiv [To Mr. Military Governor of Semipalatinsk oblast. The report by the head of the Navrotski volost. Signed by Major General Galkin // Abay and Archive] Almaty: "Gylym", 1995. P. 133. The peculiarities of the manuscript preserved.

[11] Bukeikhanov A. Opt.cit. P. 139.

forty years old). There is evidence that it was Abay who drafted the document submitted to the congress and that he read out a prepared normative act consisting of 93 articles (paragraphs), which was unanimously approved by the attendees[12]. The Act attempted to synthesize the customary law of the Kazakh and certain provisions of the Russian legislation, which was to ensure continuity of the development of the law and at the same time some convergence of the laws of the steppe and the laws of the Russian Empire in a way acceptable for the normal and natural development of the Kazakh society. Final paragraph 74 states that *yerezhe (*regulation*)* is composed "according to customs and by our conscience and justice"[13].

A number of interesting features of the document can be noted. Paragraph 7 of the document recognized the right of customary law parties belonging to two different counties to determine the location of the dispute by agreement[14]. This rule of customary law is closer not to the State Court of the late XIX and early XX centuries, but to the principles of modern arbitral tribunals and international arbitration, which provide for a possibility for agreement between the parties on both the place of settling their dispute and the law on the basis of which the dispute will be considered.

In addition to hearing testimony, the court of *biys* allowed such evidence as adjuration in accordance with the provisions of a number of articles. Paragraph 14 stated that the oath rite is held "on the Quran in the presence of the mullah of the volost of the defendant"[15]. Paragraph 17 established that "the oath rite must be held before sunset"[16]. *Biys* made the records about those who were elected to take the oath, how much livestock or property would have to be paid in case of false oath.

According to Paragraph 27 of *yerezhe* (regulation), a *kun* (fine) of 100 camels was established for the intentional homicide, and of 50 camels for the homicide by misadventure. For the murder of a woman, the *kun* was twice less, respectively guilt.

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[12] *See*: Zakonopolozhenie, sozdannoe v Karamole// Abay i Archiv [Regulation Developed in Karamola//Abay and the Archive]. Almaty: "Gylym", 1995. Pp. 62–63. However, in this edition yerezhe has 74 Articles (or Paragraphs).

[13] Ibid. P. 81.

[14] *See*: Yerezhe, sostavlennoye na Charskom chrezvychainom syezde v maye 1895// Abay i Archiv [Yerezhe, Developed at the Charsk Extraordinary Congress in May, 1895]. Almaty, 1995. Pp. 67–68. In book — yerezhe.

[15] Ibid. P. 69.

[16] Ibid.

Interestingly, there was the rule that "there was no *kun* for murdering of a husband by a wife or a wife by a husband"[17].

A married woman, taken away or escaped with a lover according to Paragraph 31, was returned to the volost directly to the congress of *biys* and this court decided the case. If the husband agreed to take his wife back, a fine of 1 to 3 nines (a certain number of different livestock) was taken from the person who took her. If a husband refused to live with the wife escaped, she stayed with the person who took her away and he had to pay the *kalym* (dowry), and the wife was not given anything. There were some special rules related to the taking away of the proposed woman[18].

Adultery was punished by caning of both a man and a woman (paragraph 30). Fights, riots, and disobedience to local authorities were punished by fines, including monetary fines. In some cases, such offenders could be arrested by the sentence of the governor[19].

Property liability was imposed for a theft (other than theft from an uncle or grandfather by their nephews and grandchildren), as well as corporal punishment of up to 60 swishes and arrest of up to a month. At the same time, it was believed that the imposition of complex severe punishment by a *biy* was mandatory. People who committed a repeated theft from their relatives could be punished at the request of the victim[20].

The humanistic nature of Abay's laws can be seen in a number of articles. *Yerezhe* (regulation) was aimed at raising and stimulating mutual assistance of people and their mutual support in difficult situations. Thus, according to paragraph 35, those guilty of not rendering help to a drowning man or during snowstorm, etc., should have been subjected to "collection of more than nine items of livestock"[21]. Its general social orientation was also evident in a number of paragraphs of *yerezhe*. Thus, paragraph 36 established responsibility for failure to take measures against the death, decline of livestock, measures preventing the spread of epizootic outbreaks, for damage to irrigation ditches, wells, bridges and other socially necessary constructions[22].

This normative document stipulated the provisions which had to protect the Kazakh population, courts, laws from oppressions of imperial administration, attraction of mullah as intermediaries and taking the oath, maintaining registers of

[17] Ibid. P. 71.
[18] *See*: ibid.
[19] Ibid. P. 72.
[20] Ibid. P. 73.
[21] Ibid. P. 72.
[22] Ibid. Pp. 72–73.

births "in Kyrgyz"[23], not recognition of professional lawyers in courts, but as persons empowered to act for someone not accepting Russians and Tatars (trusted Kazakhs from the same county were allowed)[24], etc.

In general, the above and many other provisions of the legal document prepared by Abay contributed to the solution of the set of tasks on regulation of social relations, synthesis of customary law and certain norms of the Russian legislation, as well as involvement of the potential of moral norms and perceptions of justice by the population in legal regulation.

Abay's critical political and legal ideas

Abay linked the emergence of the power of rulers to the natural desire of people to streamline social life, to self-realization, to protection against possible attacks on their life, property, and rights. At the same time, faith and power were connected in the minds of people. As Abay wrote, "they say, when everyone is a *biy* in himself, it is hard to get along the great outdoors, when there is a head of the community, it is hard to burn in fire". People who recognized this truth, sacrificed to the holy spirits, and praying, gave the reins of government to the general elect and continued to try to support him, hiding his shortcomings and glory his virtues". At the same time, "people protected and cherished unity. Once there was a call for help others, mentioning the names of ancestors, everyone went to the aid, forgetting all grievances and controversies, willingly making concessions and sacrificing"[25]. Since then, a lot was changed by Abay. Abay asked, "Where is this noble spirit of community and caring about honor now?"[26]

Abay criticized the orders that prevailed in the steppe, contrary, in his opinion, to both Allah's principles and humanity. In Abay's view, all people and all religions recognize that "God has love and justice"[27]. The same foundations as love and justice, according to him are "the beginning of humanity". "They are present in everything and solve everything. It is the Crowning Achievement of the Lord"[28]. Abay believed that this was what often lacked in real life. These were the things that contradicted

[23] *See*: ibid. P. 80 (Para 66).
[24] *See*: ibid. P. 81 (Para 71).
[25] *Abay.*Kniga slov. [Abay. The book of Words.] // As cited in: Abay.Kniga slov. Shakarim. Zapiski zabytogo. [Abay. The book of Words. Shakarim. The Notes about the Lost] Almata, 1992. P. 79.
[26] Ibid. P. 80.
[27] Ibid. P. 90.
[28] Ibid.

with the existing orders of custom. In the opinion of Abay, the most difficult thing is to raise humanity in people and teach them to follow the truth[29].

Abay wrote with bitterness that thefts and robberies did not stop in the steppe, that honest people were prosecuted unfairly. He wrote, "The honest sons of the steppe are incriminated the crimes by false denunciation, they are subjected to humiliating inquests, and false witnesses are found who are ready to confirm what they have not seen or heard"[30]. They seek to defame an honest man, to prevent him from electing for higher positions (they worked the angles against Ch. Valikhanov to hinder an honest and educated man from public service).

Far ahead of those surrounded him, Abay was "an alien among these people", in many ways he remained misunderstood by the society, his contemporaries, what made the fate of the great Kazakh thinker tragic"[31]. The civic positions that Abay held as a judge, as an honest and authoritative man in the steppe, who could not be bribed or broken, sometimes were quite costly for Abay himself. This is evidenced, for example, by Abay's appeal (1900) against the decision of the regional court, which ceased the case and decided to transfer it to the court of *biys* the case of assault on Abay, by a group of Mukurians (representatives of the Mukur volost headed by its governor). Abay was attacked because he agreed to take part in determining the boundaries between the Mukur and Chingiz volosts, and promised to assist the county governor in catching exiled vagrants who escaped and were hiding away in the Mukur volost. They were kept by the county governor, apparently, as cheap labour force. In the appeal, Abay demanded the case revision in the Governing Senate and the punishment of those responsible for the assault on him. Abay presents the facts, reveals the logical failure of the court's decisions about the incident, taking into account the testimony, gives legal qualification to the case in accordance with the current legislation (perhaps, in this legal qualification he was assisted by a lawyer). Abay insisted that his case be heard by a state ("Russian") court as more "impartial and fair in this case"[32].

Abay noticed with regret that rulers in the volost achieve power by deception, and they care only about their own well-being and seek support from the same "cunning

[29] Ibid. P. 61.

[30] Ibid. P. 12.

[31] Abdildin Zh., Abdildina R. Opt. cit. Pp. 114–115.

[32] V pravitelstvuyushiy senat of Kirgiza Chingizskoi volosti, Semipalatinskoi oblasti, togo zhe uezda apellyatsionnyi otzyv Ibragima Kunanbayeva // Abay i Archiv. [To the Governing Senate of the Kirgiz-Chingiz volost, Semipalatinsk oblast, the appeal of Ibrahim Kunanbayev]. Almaty: "Gylym", 1995. Pp. 105–118.

as a shithouse rat" as themselves. They spent most of the effort on fighting rivals and maintaining power[33]. The thinker said, "Volost governors are elected for three years. For the first year of their governance they listen to grievances and reproaches from the people: "Didn't we elect you?" For the second year they fight against their future rivals. The third year they spend on their campaigns to be elected again. What is left?"[34]

In Abay's view, the circumstances of life, customs, established relations all together subordinate people to the existing system. Abay wrote, "This is how they live: the lord helps a bai and assists a thief, the poor plays nice for people in power, supporting them in disputes, joining one, then the other party, for no reason, selling wife, children, and relatives"[35]. The thinker stated that he could not respect the volost governor and *biy* with all the will in the world, as "there is no divine rule neither a court in the steppe. The power purchased for money is not worth much"[36]. Abay expressed regret that in the steppes a strong and smart man is rather ready for bad deeds than for good ones, that "there is no person whose mind was agile in serving for justice, but there are plenty of those who are cunning and ready for treachery"[37].

The thinker drew attention to the need for the thoughtful analysis of everything that is happening, respect for talent, the unacceptability of blind following the crowd and excusing oneself when doing bad things by the fact that everyone does the same. He asked, "What is the comfort to one fool that there are thousands of other stupid people nearby?"[38] Abay advocated the rule of enlightened and moral people. For him, these characteristics, his effectiveness and sensibility, were apparently above formal ones such as the number of people involved in decision-making. It was, apparently, a less important issue for him. Although Abay was more positive about the democratic forms of governance inherent to the customs of the steppe, especially if the decisions were competent and fair.

At the same time, Abay was against those who do not believe in a human being, opportunities for his development, and correction. He agreed that man is a child of his time, that his contemporaries and society were responsible for the bad qualities

[33] *See*: Abay. Kniga slov [Abay. The Book of Words]… Pp. 12–13.
[34] Ibid. P. 13.
[35] Ibid. P. 24.
[36] Ibid. P. 36.
[37] Ibid.
[38] Ibid. P. 38.

and actions of people. Nevertheless, Abay did not believe that human imperfections were evidence of a man's incorrigible and evil nature. He stated in the 'Word Thirty-Seven', "if power were in my hands, I would cut off the tongue to someone who says that a human being is incorrigible"[39]. Man for him was a central figure in historical development and he dreamed of cultivating a perfect man. The orientation towards the education of a man and his self-development are organically connected with the educational direction of Abay's works and cultural activity.

The study of societal order and the critical attitude towards them were combined in his works with proposals to change the current state of affairs. In order to avoid enmity and arbitrariness in the steppe, he proposed to appoint persons as volost governors who had received Russian education, and if there were no such people, to appoint them at the discretion of the county superiors and the military governor. In his view, this would have encouraged to get education and avoid the influence of the local nobility on volost governors[40].

Abay offered to refuse form electing *biys* for a short term, noting that not everyone is capable of being a *biy*. "Not everyone can allot justice. In order to maintain the Council, as they say, on the "peak of Kultobe" (the area of the annual congresses of biys — S.U.), it is necessary to know the sets of laws that we inherited from our ancestors: the "bright way" by Kasim Khan, the "old way" of Yesim Khan, the "seven canons" in Az by Tauke Khan. They also became obsolete over time and require changes and infallible policy makers, who are either underrepresented or do not exist at all"[41]. Abay proposed to elect three *biys* from each volost among the "educated and motivated", "not to determine the term of their governance, and to remove only those who will find themselves involved in bad deeds"[42]. He believed that it was necessary to arrange a system of formation of courts in order to assign as judges only educated, trained and honest people, protecting them from claims of self-serving and ignorant competitors to these positions. He also believed that it was not necessary to overload *biys* with small cases that could be resolved by arbitral tribunals, and objected the delay in the consideration of cases in the courts[43].

For all that, Abay, as a man of faith, understood that human judgment, however perfect, was not comparable to the God's supreme judgment. In the view of Abay, by

[39] Ibid. P. 59.
[40] Ibid. P. 13.
[41] Ibid. P. 13.
[42] Ibid. P. 13–14.
[43] Ibid. P. 14.

giving a man the ability to hold an answer at the Last Judgment the God showed "justice and love towards a man"[44].

In the philosophy of law Abay is unique, but at the same time he belongs to the tradition of the synthesis of law and morality, which is traced in the history of legal thought and manifests itself, for example, in the views of Confucius in ancient China, in the doctrine by I. Kant in Germany, half a century before Abay. The various manifestations of this trend are united by the fact that law is understood as a phenomenon much wider than legislation. For Abay, in the structure of law, apart from legislation, above all are customary law, morality, and perceptions of justice. He is rather a supporter of a dynamic connection, an alloy of customary law and legislation but on the basis of customary law. In Abay's opinion, such a combination and proportions of the blend of the forms of law were probably the most acceptable for Kazakh society of the late 19th and early 20th centuries.

Abay Kunanbayev, by his criticism of feudal divisions and wars between clans in the steppes, played an outstanding role in realizing these shortcomings, and in forming a critical attitude towards them. Abay's liking towards the institutions of ancestral democracy reflected interests, and perceptions of the fair structure of broad segments of the Kazakh society. As A.N. Taukelev wrote, "For a good reason, the anti-feudal and anti-colonial movements of the Kazakh peasants of the late XVIII and the first half of the XIX centuries took place under the slogan of the struggle for the establishment of ancestral democracy, against the arbitrariness of the khans, sultans, as well as against the colonizing policy of destroying the ancestral division of the Kazakh society"[45].

However, Abay, while being deeply concerned about the people, expressing their fundamental interests, emphasized the difference between the people and the crowd. As noted above, he was very critical of the crowd. He wrote, "who poisoned Socrates, who burned down Joan of Arc, who executed Gaisa, and who buried our prophet in the remains of a camel?" The crowd. The crowd is reckless. Manage to put it on the right track"[46].

Promoting the achievements of the Russian culture and literature, calling for the study of the Russian language, the development of European education, Abay was far

[44] Ibid. P. 65.

[45] Taukelev A.N. Politicheskie vzgliady kazakhskogo prosvetitelia Aabaya Kunanbayeva [Political Beliefs of the Kazakh Educator Abay Kunanbayev] // Researcher's notes. KazGU named after S.M. Kirov. Series of legal T. XLIX, issue 6, Almata 1960. Pp. 97–98.

[46] Abay. Kniga slov [Abay. The Book of Words]… P. 58.

from idealizing everything related to Russia and critical of the Russian officials who often pursued their own interests. "For censorship reasons, he does not express his views about tsarism and about reactionary colonial politics. Nevertheless, he mocked the servant of tsarism in the steppes, the puppets of the colonial administration among the Kazakhs, governors and heads of volosts, those who were ready "to sell the father, mother, all relatives and beloved ones to the first Russian official who patted them on the shoulder" or "gifted them a gown and a medal"[47]. At the same time, in geopolitical and historical and cultural terms, Abay saw the unity of historical fates of Russia and Kazakhstan and contributed to the strategic historical trend of rapprochement of their peoples.

In the Soviet times, some studies did not always correctly emphasize Abay's criticism of religion, as he criticized the illiterate mullahs he often met, the mindless practice of religious rites, but did not oppose God (Allah), did not reject religion as a whole. He was a devout believer. At the same time, he remained critical and philosophical, including the religious sphere, and in the sphere of Islam. In this respect, he was quite close to L.N. Tolstoy, who was highly critical about the Church and clergy and tried in his own way to understand the foundations of Christianity.

The need for improvement in faith and personal improvement of the believer Abay speaks in the "Word Twelfth". He recognized teaching others the Word of God as a good thing. However, he noted that the person who took up this cause should not forget two essential conditions: "he must establish himself in his faith" and "constantly improve" in understanding the faith and preserving its foundations in the soul[48].

Recognizing that everything was ultimately produced by God, Abay believed that many things depended on a person as well. Abay taught, "a reasonable man must know the duty of the believer is to do good. The right thing cannot be threatened by challenges for mind. If you do not give freedom to your mind, how to deal with the truth: "Let the one with knowledge and open mind know me". If there is a flaw in our religion, how to prohibit an educated and sensible man to think about it? What would religion be based on without the sense?"[49]

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[47] Taukelev A.N. Opt. cit. P. 99.

[48] Abay. Kniga slov [Abay. The Book of Words] … P. 25.

[49] Ibid. P. 47. Some published secret archived materials about rummage in his and his two sons' houses in 1903 reveal Abay's position concerning Islam and his relations with the government. Ibid.: Top secret. Ministry of Internal Affairs of the Governor of Semipalatinsk To Mr. Military Governor of Semipalatinsk oblast. The report // Abay and Archive. Almaty: «Gylym», 1995. P. 132.

With regard to the future development of society, Abay recognized that as it evolved, its fundamentals, including the canons of religion, could also change[50]. Future forms of life, its principles will determine those who will then live according to sense and faith. However, Abay was confident as well as in their times Aristotle, Al-Farabi and S.L. Montesquieu, that there should by harmony and the extent of expressing it, the extent to everything, including the good. He said, "Everything in the world has its own extent", "all that is beyond the extent is evil"[51].

Abay was not a utopian. He was aware of the subsequent evolution of society and its progressive overall focus, but it was also far from idealizing the future. He wrote, "Or after all, bright days will come when people will forget theft, deception, mischief, enmity and concentrate on knowledge, learn the crafts, begin to earn wealth in an honest, decent way", and, answering his question, he admitted, "Such days are unlikely to come"[52].

In general, Abay made a significant contribution to the spiritual, moral, political and legal development of the Kazakh people, with his ideas illuminated the new horizons of his future. He contributed to the change of public minds, social relations, and criticized the negative features of domestic psychology.

As a judge and legislator, Abay sought for optimal models of combining traditional customary law and state law, criticized the injustice and selfishness of many modern judges, and defended the idea of a court of *biys* possessing the potential of fair justice.

With his creativity and activities, Abay foreshadowed many of the ideas and positions that were made and followed by a generation later by representatives of Kazakhstan's brilliant group of liberal intellectuals who were the leaders of the Alash Party. They received from great educators the historical relay of awakening of national identity, protection and education of the people, further development of national culture, including political and legal ones. As well as Abay, they objectively sought to minimize losses for the people in the transition from the traditional society to the industrial one.

Despite the acceleration of social development, everything that was written by Abay more than a century ago remains relevant. Although society has changed significantly, many of Abay's critical ideas about morality, economics and politics still highlight new forms of some living prophets that he wrote about being ahead of his time.

[50] Abay. Kniga slov [Abay. The Book of Words] … P. 72.
[51] Ibid. P. 87.
[52] Ibid. P. 38–39.