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BUSINESS TRANSACTION INVALIDITY IN THE CONTEXT OF THE PRINCIPLE OF LEGALITY

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This paper explores business transactions in the context of the principle of legality. It will be argued that Article 168 of the Russian Civil Code, as a meta-rule, contains three types of rules: 1) rules dealing with the priority of special rule and exceptions (exclusive rules); 2) rules dealing with the interpretation of general, special and exclusive rules as well as with the requirements of statutes or other legal acts violated by a transaction and established outside Article 168 of the Civil Code; 3) rules dealing with the admissibility of special rule and exceptions, as well as with the conditions of admissibility of these rules.

With regard to the first group of the rules, the legislature and commercial courts consider Article 168 of the Civil Code a common base with respect to other grounds in the Civil Code and in certain other statutes for declaring transactions invalid. According to the second group of rules, the subject-matter (object) of legal interpretation consists of two elements: a) the text of Article 168 of the Civil Code; and b) the texts of legal acts, described by the generic term “statute or other legal act.” Article 168 of the Civil Code provides instructions not only for rules as objects of application of the article, but also for the methods of interpreting violated requirements. The rules of admissibility for special rule and exceptions, as well as the conditions of admissibility for these standards, are aimed at the numerous cases in which the legislature, in the Civil Code or in other legal acts, expressly establishes nullity (voidness), voidability and other legal consequences for illegal transactions. The paper also answers questions regarding the impact of recent amendments to the Russian Civil Code on using rules for business transaction invalidity in commercial courts.

JEL Classification: K12; K20

Keywords: business transactions; entrepreneurial activities; general, special and exclusive rules; invalidity (nullity or voidness, voidability) and other legal consequences of illegal transactions; principle of legality; sanctions; statute or other legal act.

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1. Introduction

In Russian judicial practice and doctrine, the invalidity of illegal transactions of business entities (entrepreneurs) is usually considered in terms of the application of the grounds of invalidity to particular transactions. Thus, authors focus on these grounds and the legal consequences that relate to them.³

The problems related to the actual grounds, the subject and the normative role of the rules governing the invalidity of transactions in the Russian legal system are not less important, however. These questions take on special significance in connection with recent amendments to Article 168 of the Civil Code adopted in May 2013 (the Federal Law of 07.05.2013 No. 100-FZ “On amendments to Subsections 4 and 5 of Section I of Part 1 and Article 1153 of Part 3 of the Civil Code of the Russian Federation”)⁴ and with the emergence of instructions from the Supreme Court of the Russian Federation approved in June 2015. What impact do these amendments have on use of the rules of invalidity of business transactions in commercial courts? The current paper examines recent Russian judicial practice and relevant foreign legal materials in order to suggest answers to these and other closely-related legal questions.

2. Two approaches to invalidity of transactions and their respective features

Traditionally, Russian and foreign debates about the invalidity (nullity, voidability) of illegal transactions of entrepreneurs reduce to one of two possible approaches. Supporters of the first approach view invalidation of an illegal transaction as a way to protect violated rights or as a sanction for violation of the duties established to encourage their observance.⁵ Jurisprudence identifies three types of sanctions: 1) punitive (focused on a person held responsible); 2) reparative or corrective (taking into account the interests of those for whose benefit responsibility is assigned); 3) preventive (orders prohibiting future illegal conduct).⁶

³ See, for example, Kondrat E.N. Pravovaia priroda nedeistvitelnykh sdelok [Legal nature of invalid legal transactions]// Zakonodatelstvo [Legislation], 2011, Issue No. 4, pp. 22-29; Grazhdanskoe pravo [Civil Law]. Edited by A.P. Sergeev, Y.K. Tolstoi, Volume 1, Moscow, 2003, pp. 297-310; Vitrianskii V.V. Nedeistvitelnost sdelok v sudebnoi praktike [Invalidity of legal transactions in judicial practice] // Grazhdanskii kodeks Rossii [Russian Civil Code]. Edited by A.L. Makovskii, Moscow, 1998, pp.131-153.

⁴ Sbornik zakonodatelstva RF [Collection of the Legislation of the Russian Federation], 2013, Issue No. 19, Article 2327.

⁵ See Hart H.L.A. The Concept of Law, Oxford, 1994, p.33; Bydlinski P. Bürgerliches Recht, Band I, Wien, 2005, S.132; Canaris C.-W. Gesetzliches Verbot und Rechtsgeschäft, Heidelberg, 1983, S.17; Cornu G. Vocabulaire juridique, Paris, 2003, p. 599; Fages B. Droit des obligations, Paris, 2007, p. 179; Mail-Fouilleul S. Les sanctions de la violation du droit communautaire de la concurrence, Paris, 2002, p.135-158; Pawlowski H.-M. Zum Umfang der Nichtigkeit bei Verstößen gegen “öffentlich-rechtliche” Verbotsgesetze // Juristenzeitung, 1966, Issue No. 21, S. 696; Karkhalev D.N. Okhranitelnoe grazhdanskoe pravootnoshenie [Protective civil legal relationship], Moscow, 2009, p. 211.

⁶ Cane P. Responsibility in Law and Morality, Oxford, 2002, p. 43.

Establishing the invalidity (nullity, voidability) of a transaction as a sanction relates to the last two types of legal consequences for violations of legal rules, since these consequences involve the interests of those for whose benefit a transaction is declared invalid. For example, the function of Paragraph 134 of the German Civil Code (Bürgerliches Gesetzbuch or BGB)⁷ is considered a preventive measure against the conducting and mutual execution of an illegal transaction by its parties.⁸ The Russian legislature also provides arguments in favor of this approach to invalidating transactions. The term “consequences of violation” used in Article 168 of the Civil Code, for example, shows that the legislature considers invalidation of transactions to be a form of sanction.

In addition, on the basis of Paragraph 6 of Article 3 of the Federal Law of 07.05.2013 No. 100-FZ, “On amending Subsections 4 and 5 of Section I of Part 1 and Article 1153 of Part 3 of the Civil Code of the Russian Federation,”⁹ more recent provisions of the Civil Code concerning the grounds and the legal consequences of invalidity of transactions (Articles 166- 176 and 178-181 of the Civil Code of the Russian Federation) can be applied only to transactions conducted after the date the statute came into effect (the Federal Law of 07.05.2013 No. 100-FZ “On amending Subsections 4 and 5 of Section I of Part 1 and Article 1153 of Part 3 of the Civil Code of the Russian Federation” came into effect on September 1, 2013).

Commercial courts have followed this instruction and applied the new version of Article 168 of the Civil Code only to the transactions concluded after that date it took force.¹⁰ The legislature’s position and judicial practice have both been determined by observation of the general legal principle of the non-retroactivity of statutes that establish or aggravate responsibility: “a statute introducing or aggravating responsibility shall not have retrospective effect” (Part 1 of Article 54 of the Constitution of the Russian Federation, Paragraph 5 of the Resolution of the Constitutional Court of the Russian Federation of 20.07.2011 No. 20-P¹¹, Paragraph 1 of Article 4 and Paragraph 1 of Article 422 of the Civil Code). According to this constitutional principle, the legislature, when enacting new legal rules, is not allowed “to give the retroactive effect to the new regulation, if it worsens the legal status of individuals or restricts their subjective rights that already exist in specific legal relationships” (Paragraph 5 of the Resolution of the Constitutional Court of the Russian Federation of 20.07.2011 No. 20-P).¹²

⁷ Bürgerliches Gesetzbuch, 58.Auflage, München, 2006, S.28.

⁸ See Canaris C.-W. Gesetzliches Verbot und Rechtsgeschäft, Heidelberg, 1983, S. 17; Zerres T. Bürgerliches Recht, Berlin, 2010, S. 63.

⁹ Sobranie zakonodatelstva RF [Collection of the Legislation of the Russian Federation], 2013, Issue No. 19, Article 2327.

¹⁰ See Resolution of Commercial Court of East-Siberian District of 12.03.2015 No. F02-495/2015, case No. A33-12031/2014 and Resolution of Commercial Court of Far Eastern District of 01.06.2015 No. F03-1499/2015, case No. A51-19078/2014. Hereinafter the sources of publications of judicial decisions are Russian legal database “ConsultantPlus” and the website of commercial courts of the Russian Federation (www.arbitr.ru).

¹¹ Sobranie zakonodatelstva RF [Collection of the Legislation of the Russian Federation], 2011, Issue No. 33, Article 4948.

¹² Sobranie zakonodatelstva RF [Collection of the Legislation of the Russian Federation], 2011, Issue No. 33. Article 4948.

Proponents of the second approach argue that invalidating transactions is a limitation of the freedom of economic activity (private autonomy, freedom of contract) and is a form of control of the terms of transactions.¹³ The basis for this argument in Russian legislation is Article 168 in Chapter 9, “Transactions,” of the Civil Code, which defines the terms of fulfillment of actions by citizens and legal entities directed at the establishment, change, or termination of civil-law rights and duties (Article 153 of the Civil Code). The legal capacity to engage in entrepreneurial activities which are not prohibited by statute and to perform any transactions not contrary to statute, mentioned in Article 18 of the Civil Code (in connection with the legal capacity of citizens), complements this argument.

Despite significant differences, these two approaches possess two important common properties. In both approaches, the rule of invalidity (nullity, voidness) of illegal transactions is considered a legal rule for certain regulated behavior, and the invalidity itself and the restitution related to it figure as the legal consequences of application of the rule in a specific instance.

3. An alternative approach and its advantages

An alternative approach to Article 168 of the Civil Code has its basis in Paragraph 2.1 of the Ruling of the Constitutional Court of the Russian Federation of 15.07.2010 No. 948-O-O.¹⁴ In this ruling, Article 168 of the Civil Code was used to develop the rule formulated in Part 2 of Article 15 of the Constitution of the Russian Federation about the duty of citizens and their associations to observe the Constitution and statutes (they “...shall be obliged to observe the Constitution of the Russian Federation and statutes”). Although this conclusion was reached by the Constitutional Court on the basis of the previous version of Article 168 of the Civil Code, it is largely applicable to the article’s current formulation, as will be shown later. Thus, the Constitutional Court places Article 168 of the Civil Code in the context of the constitutional principle of legality (which states that the bodies of state authority, the bodies of local self-government, officials, private citizens and their associations shall be obliged to observe the Constitution and statutes).

This principle is specified in Paragraph 2.2 of the Resolution of the Constitutional Court of 04.04.2002 No. 8-P¹⁵ and Paragraph 2 of the Resolution of the Constitutional Court of

¹³ See Larenz/Wolf. Allgemeiner Teil des Bürgerlichen Rechts, München, 2004, S. 630,723; Medicus D. Allgemeiner Teil des BGB, Heidelberg, 2006, S. 192; Hart H.L.A. The Concept of Law, Oxford, 1994, pp. 34-35; Blaise J.-B. Droit des affaires, 4-e édition, Paris, p. 548-551; Dictionnaire de la culture juridique. Sous la direction de D. Alland et S. Rials, Paris, 2003, p.1087-1091; Rochfeld J. Les grandes notions du droit privé, Paris, 2011, p. 438-447; Sinaiskii V.I. Russkoe grazhdanskoe pravo [Russian civil law], Moscow, 2002, p. 167.

¹⁴ An official publication is on the website of the Constitutional Court of the Russian Federation. See <http://doc.ksrf.ru/decision/KSRFDecision41347.pdf>.

¹⁵ Sobranie zakonodatelstva RF [Collection of the Legislation of the Russian Federation], 2002, Issue No. 15, Article 1497.

31.03.2015 No. 6-P,¹⁶ in which Part 2 of Article 15 of the Constitution is cited in connection with the legal force of rules and the grounds (and the consequences) of their inclusion in the legal system of the Russian Federation. It is no accident that the Constitutional Court used the above-mentioned constitutional provisions (see, for example, Paragraph 6 of the Resolution of the Constitutional Court of 17.02.2015 No. 2-P)¹⁷ in conjunction with Part 2 of Article 1, Part 1 of Article 11, as well as Articles 2, 10 and 18 of the Constitution, which establish the evaluation criterion, as well as the procedure for promulgation and application of legal norms. A similar approach to the content of Part 2 of Article 15 of the Constitution can be found in decisions of the commercial courts. According to one commercial court's decision,¹⁸ Part 2 of Article 15 of the Constitution should be considered a general legal principle, according to which the duty of economic entities to observe the public law requirements of economic legislation is established.

As a result, Article 168 of the Civil Code serves in the context of the constitutional principle of legality not so much as a standard for assessing entrepreneurial behavior as it does a rule about other legal norms. What rules are established and applied on the basis of a narrow understanding of Article 168 of the Civil Code? The analysis of the current practice of Russian commercial courts justifying their decisions with reference to Article 168 of the Civil Code corroborates the hypothesis that the three most important groups of such rules include: 1) rules governing the priority of special rule and exceptions (exclusive rules); 2) rules governing the interpretation of general, special and exclusive rules as well as the requirements of statutes or other legal acts violated by a transaction and established outside Article 168 of the Civil Code; 3) rules governing the admissibility of special rule and exceptions, as well as the conditions of admissibility of these rules. Let us consider each of these groups in more detail.

With regard to the first group of rules, Russian commercial courts universally recognize the existence of a general rule of voidability of a transaction (in Paragraph 1 of Article 168 of the Civil Code)¹⁹ that violates the requirements of a statute or other legal act, and often treat Paragraph 2 of Article 168 of the Civil Code as an exception to the general rule of voidability of such transactions (Paragraph 1 of Article 168 of the Civil Code).²⁰ In addition, taking into account the analysis of the place of Article 168 of the Civil Code in the structure of Chapter 9 of the Civil Code and Paragraph 1 of Article 431-1 of the Civil Code, it can be affirmed that the legislature and the commercial courts consider Article 168 of the Civil Code to be a general rule in relation to other articles which establish the invalidity of transactions, in particular with

¹⁶ *Sobranie zakonodatelstva RF* [Collection of the Legislation of the Russian Federation], 2015, Issue No. 15, Article 2301.

¹⁷ *Sobranie zakonodatelstva RF* [Collection of the Legislation of the Russian Federation], 2015, Issue No. 9, Article 1389.

¹⁸ Resolution of the Twelfth Commercial Appellate Court of 28.05.2013, case No. A06-27/2013.

¹⁹ See Paragraph 73 of the Resolution of the Plenum of the Supreme Court of 23.06.2015 No. 25 "On application by the courts of certain provisions of Section I of Part 1 of the Civil Code of the Russian Federation."

²⁰ See Resolution of Commercial Court of Far Eastern District of 09.09.2015 No. F03-3875/2015, case No. A04-5864/2014 and Resolution of Commercial Court of Moscow District of 20.08.2015 No. F05-7530/2015, case No. A40-171117/14.

Articles 170, 173, 173-1 and 174 of the Civil Code, as well as with certain statutes.²¹ Some of these articles of the Civil Code establish an internal structure of relations between general, special and exclusive rules.

The general rule in Paragraph 1 of Article 168 of the Civil Code describes the conditions of voidability of illegal transactions (“a transaction that violates the requirements of a statute or other legal act is voidable...”). The special rule in Paragraph 2 of Article 168 of the Civil Code establishes the nullity of a transaction which not only violates the requirements of a statute or other legal act, but also encroaches on the public interest or rights and legitimate interests of third parties (“...except in the cases provided for by Paragraph 2 of this Article”). In turn, the exclusive rule allows commercial courts not to exercise the special rule of Article 168 of the Civil Code under certain conditions (“...if from a statute it does not follow that such a transaction is voidable...”).

According to current judicial practice,²² the legal difference between general and special (and exclusive) rules, regardless of whether they are established in Article 168 of the Civil Code, is the priority of the latter over the former. However, the current practice of both the commercial courts and the legislature unreasonably confuses the distinct legal concepts of special rule and exceptional (exclusive) rule.

4. Rules of interpretation

According to the second group of rules which govern legal interpretation, the subject of interpretation consists of two elements – the text of Article 168 of the Civil Code, and the texts of other legal acts, described by the generic term “statute or other legal act” (the term “statute” is also used in special and exclusive rules of Article 168 of the Civil Code). Similar terminology was present in the previous version of Article 168 of the Civil Code, allowing partial use of judicial precedents. Paragraphs 1-2 of Article 2 and Paragraphs 2-6 of Article 3 of the Civil Code are aimed at establishing a proper understanding of the composition and the text of external (i.e. with respect to Article 168 of the Civil Code) legal acts in the field of entrepreneurship, as well as at establishing their legal force and normativity. According to these articles of the Civil Code: 1) the concept of statute in the interpretation of judicial practice includes, in addition to the Civil Code, federal statutes adopted in accordance with the Civil Code which regulate relations

²¹ See Ruling of the Supreme Court of the Russian Federation of 10.04.2015 No. 306-ES15-998 and Resolution of Commercial Court of North Caucasian District of 28.11.2014 No. F08-8264/2014, case No. A53-2371/2014.

²² See Resolution of Commercial Court of Moscow District of 23.07.2015 No. F05-9286/2015, case No. A40-152987/14 and Resolution of Commercial Court of North Caucasian District of 21.07.2015 No. F08-4695/2015, case No. A53-20624/2014.

between or involving entrepreneurs; 2) the term “other legal acts” covers decrees of the President of the Russian Federation and regulations of the Government of the Russian Federation.²³

In this connection, the role that Paragraph 2 of Article 3 of the Civil Code plays in clarifying the structure of legislative acts can be observed in Paragraph 90 of the Resolution of the Plenum of the Supreme Court of 23.06. 2015 No. 25 “On application by the courts of certain provisions of Section I of Part 1 of the Civil Code of the Russian Federation,”²⁴ and in the Ruling of the Supreme Court of 15.07. 2015 No. 33-APG15- 13. Therefore, these legislative acts can be identified by direct indications from the legislature that a specific statute is based on the provisions of the Civil Code (for example, according to Part 1 of Article 2 of the Federal Law of 05.04.2013 No. 44-FZ “On the contract system in the procurement of goods, works and services for state and municipal needs”).²⁵

Uncertainty and disagreements over the significance of the term “statute,” as it appears in Paragraph 2 of Article 3 of the Civil Code, in relation to Article 168 of the Civil Code have been resolved by the Supreme Court of the Russian Federation in favor of a broader interpretation of the term (Paragraphs 73 and 75 of the Resolution of the Plenum of the Supreme Court of 23.06.2015 No. 25 “On application by the courts of certain provisions of Section I of Part 1 of the Civil Code of the Russian Federation”). This interpretation considers the term “statute” as including the Civil Code of the Russian Federation. On the other hand, in Paragraph 2 of Article 3 of the Civil Code the legislature does not mention any general legal principles which differ from the principles of civil law directly enumerated in Article 1 of the Civil Code that would contribute to a broader concept of statute. However, the commercial courts still rely on the general principles of law (for example, the principle of legality) not only in connection with Article 169 of the Civil Code (it establishes the grounds for invalidity of a transaction concluded for a purpose contrary to the principles of public order or morality), but also in connection with Article 168 of the Civil Code.²⁶

When interpreting the term “other legal acts,” judicial practice sometimes reaches more broadly than the literal meaning of Paragraph 6 of Article 3 of the Civil Code, and includes the acts of ministries and other federal executive bodies.²⁷ However, there are examples of judicial practice (developed mainly on the basis of the previous version of Article 168 of the Civil Code) not including in the legal concept “other legal acts” the acts of various organs of the subjects of the Russian Federation and local self-governing bodies, as well as the acts of ministries and other

²³ See Resolution of the Presidium of the Higher Commercial Court of the Russian Federation of 20.07.2010 No. 2142/10, case No. A51-10815/2009 and Resolution of the Presidium of the Higher Commercial Court of the Russian Federation of 14.04.2009 No. 17468/08, case No. A40-1027/08-60-9.

²⁴ Byulleten Verkhovnogo Suda RF [Bulletin of the Supreme Court of the Russian Federation], 2015, Issue No. 8.

²⁵ Sbornik zakonodatelstva RF [Collection of the Legislation of the Russian Federation], 2013, Issue No. 14, Article 1652.

²⁶ Resolution of Commercial Court of Moscow District of 07.07.2015 No. F05-7370/2015, case No. A40-129135/12.

²⁷ See Ruling of the Supreme Court of the Russian Federation of 13.12.2011 No. 5-B11-116.

federal executive bodies,²⁸ since they are not covered along with charters of business entities by a strict reading of Paragraph 6 of Article 3 of the Civil Code.²⁹

But the commercial courts have highlighted a situation in which the provisions of a charter coincide with requirements of the legislation.³⁰ This can lead to the invalidation of a business transaction due to non-conformance with the statute, not with the charter. The individual legal acts of organs of state authority are, furthermore, not part of other legal acts. In this respect, the Russian legislature and the commercial courts are largely in agreement with foreign practice. For example, in Germany, Paragraph 134 of the German Civil Code does not cover administrative orders directed against the method in which a transaction is implemented).³¹

The application of Article 168 of the Civil Code of the Russian Federation in interpreting the requirements of statutes or other legal acts, established beyond Article 168 of the Civil Code and violated by an illegal transaction, implies (unlike Article 169 of the Civil Code of the Russian Federation or Paragraph 138 of the German Civil Code) that the content of the violated statute or other legal act should be determined. The requirements of the acts regulated by Article 168 of the Civil Code of the Russian Federation and used by the commercial courts for assessing the legality of transactions depend on the subjects (addressees) of the requirements and the relations regulated by the statutes or other legal acts.

In the field of business transactions assessed by commercial courts in accordance with Articles 1-2 of the Commercial Procedure Code of the Russian Federation of 24.07.2002 No. 95-FZ,³² the class (composition) of addressees may be identified on the basis of Subparagraph 3 of Paragraph 1 of Article 2, Paragraph 1 of Article 23, Paragraph 1 of Article 50 and Article 153 of the Civil Code, and may include commercial organizations and individual entrepreneurs. In a number of statutes, the addressees of prohibitions and other requirements are determined with the help of special categories which are different from the standard civil-law concepts of “natural person” or “legal person” (for instance, according to Article 14 of the Federal Law of 28.12.2009 No. 381-FZ “On the basic principles of state regulation of trading activities in the Russian Federation,” they include economic entities).³³

In addition, on the basis of specific instructions from the legislature, the scope of persons to whom certain legal requirements are addressed can be further expanded. Relying on Paragraph 3 of Article 23 of the Civil Code, the commercial courts have also applied the legal requirements

²⁸ See Resolution of the Presidium of the Higher Commercial Court of the Russian Federation of 20.07.2010 No. 2142/10, case No. A51-10815/2009 and Ruling of the Supreme Court of the Russian Federation of 25.06.2013 No. 5-KG13-63.

²⁹ Resolution of the Presidium of the Higher Commercial Court of the Russian Federation of 10.04.2007 No. 13104/06, case No. A60-33044/2005-S3.

³⁰ See Resolution of Commercial Court of Moscow District of 28.01.2015 No. F05-14162/2014, case No. A40-160185/13.

³¹ Zertes T. Bürgerliches Recht, Berlin, 2010, S. 63.

³² Sobranie zakonodatelstva RF [Collection of the Legislation of the Russian Federation], 2002, Issue No. 30, Article 3012.

³³ Sobranie zakonodatelstva RF [Collection of the Legislation of the Russian Federation], 2010, Issue No. 1, Article 2.

addressed at commercial organizations to individual entrepreneurs (Subparagraph 4 of Paragraph 1 of Article 575 of the Civil Code of the Russian Federation).³⁴

In turn, the subject-matter (object) of violated requirements should be related to the transactions. In other words, a transaction should be mentioned in the text of statutory requirements as the basis for a legal relationship. For example, a commercial court has refused to apply a statutory prohibition and Article 168 of the Civil Code to a transaction because a certain requirement was related to the charter of a company, not to its transactions.³⁵ If the issue of invalidity arises from a sham transaction (Paragraph 2 of Article 170 of the Civil Code), the legal requirement, which the parties of a transaction try to bypass, should concern the transaction that the parties actually have in mind, because the actual transaction can be invalidated on the grounds specified in the relevant statute.³⁶ It should be emphasized that Article 168 of the Civil Code of the Russian Federation allows the possibility of narrowing the scope of legal requirements on the basis of legal exceptions (provided, for example, in Paragraph 11 of Article 21 of the Federal Law of 08.02.1998 No.14-FZ “On Limited Liability Companies”).³⁷ Certainly, the legal exceptions must be taken into account in order to recognize a particular transaction as invalid and in order to apply the legal consequences of its invalidity based on Article 167 of the Civil Code of the Russian Federation.

Article 168 of the Civil Code indicates both rules that are the objects of its application, as well as methods of legal interpretation for violated requirements. These methods can be identified by comparing Paragraphs 1-2 of Article 15 of the Constitution of the Russian Federation and Article 168 of the Civil Code, which expands on the constitutional principle of legality. Thus, although constitutional provisions require correspondence not only to statutes, but also to the Constitution of the Russian Federation (the constitutional principles), Article 168 of the Civil Code refers only to statutes and other legal acts (Paragraphs 2-6 of Article 3 of the Civil Code). Thereby, it gives priority to the legislative intent with respect to the relative normative provision, and assumes that it is possible to identify legislative intent on the basis of the literal interpretation of the text of a statute. In turn, jurisprudence argues that the question of legislative intent hinges on “the meaning of words used in a particular context”.³⁸

5. The role of judicial practice

³⁴ Resolution of Commercial Court of East-Siberian District of 19.02.2015 No. F02-141/2015, case No. A33-5297/2014.

³⁵ See Resolution of the Presidium of the Higher Commercial Court of the Russian Federation of 02.08.2005 No. 2601/05.

³⁶ Resolution of Commercial Court of Moscow District of 23.07.2015 No. F05-9286/2015, case No. A40-152987/14.

³⁷ *Sobranie zakonodatelstva RF* [Collection of the Legislation of the Russian Federation], 1998, Issue No. 7, Article 785.

³⁸ Cross R. *Statutory Interpretation*, Oxford, 2006, p. 26. See also Barak A. *Purposive Interpretation in Law*, Princeton, 2005, p. 97; Dworkin R., *A Matter of Principle*, Harvard, 1985, pp. 14,19; Shapiro S.J., *Legality*, Cambridge, 2011, p. 304; Vogenauer S., *Statutory interpretation* // *Elgar Encyclopedia of Comparative Law*. Edited by J.M. Smits, Cheltenham, 2012, pp.833-835.

For the interpretation of legal requirements Russian judicial practice allows use of the rules of interpretation contained not only in Article 168 of the Civil Code, but in decisions of the higher courts (despite the fact that many of these decisions were issued before September 1, 2013, the courts often apply these decisions to the new version of Article 168 of the Civil Code). The rules governing responses to violated requirements are established in two ways. One of them is by indicating the specific paradigmatic cases (examples) related to the relevant concept (composition). Using this method, the scope of the violated requirements may be expanded or narrowed down. For example, the Constitutional Court in its Ruling of 17.11.2011 No. 1600-O-O concluded that it is impossible to apply the prohibition provided in Article 956 of the Civil Code “to cases in which the beneficiary replacement occurs voluntarily by virtue of the norms of Chapter 24 of the Civil Code.”³⁹ Given this restrictive interpretation, the court may reject a petition to recognize a contract as invalid.⁴⁰

Moreover, the Presidium of the Higher Commercial Court of the Russian Federation in Paragraph 9 of the Informational letter of 30.10.2007 No. 120 regarding the prohibition of donations from commercial organizations (Subparagraph 4 of Paragraph 1 of Article 575 of the Civil Code) agreed with the court of cassation that the absence of conditions concerning the price of transferred rights (claims) in an agreement regarding assignment of rights “[...] is not itself evidence of the donation of the right.”⁴¹ Thus, the Presidium of the Higher Commercial Court defined the external limits of the term “donation” by reference to a situation which is not covered by the legal concept of donation.

An attempt to systematize similar situations, which are important for the interpretation of violated requirements, has been undertaken in Paragraphs 73-76 of the Resolution of the Plenum of the Supreme Court of 23.06. 2015 No. 25 “On application by the courts of certain provisions of Section I of Part 1 of the Civil Code of the Russian Federation,” as well as in previously adopted decisions of higher courts (for example, in Paragraph 9 of the Resolution of the Plenum of the Supreme Court No. 10 and the Plenum of the Higher Commercial Court of 29.04.2010 No. 22 “On some issues arising in judicial practice while litigating the controversies relating to the protection of property rights”).

Another way to establish the rules of interpretation of the violated requirements used in decisions of higher courts is connected with the elaboration of the common features of the

³⁹ Official publication is on the website of the Constitutional Court of the Russian Federation. See <http://doc.ksrf.ru/decision/KSRFDecision82434.pdf>.

⁴⁰ Resolution of Commercial Court of Moscow District of 25.02.2015 No. F05-16038/2014, case No. A40-6069/14.

⁴¹ Vestnik VAS RF [Bulletin of the Higher Commercial Court the Russian Federation], 2008, Issue No. 1.

interpreted concept contained in the text of the legal rule. For example, the commercial courts,⁴² taking into account Paragraph 75 of the Resolution of the Plenum of the Supreme Court of 23.06.2015 No. 25 “On application by the courts of certain provisions of Section I of Part 1 of the Civil Code of the Russian Federation,” have ascertained the nullity of a transaction (for example, in connection with infringement of the public interest) which violates a clearly expressed legal prohibition (explicit prohibition).

As indicated in Paragraph 2 of the Resolution of the Plenum of the Higher Commercial Court of the Russian Federation of 14.03.2014 No. 16 “On freedom of contract and its limits,”⁴³ the clearly expressed legal prohibition (explicit prohibition) against parties to an agreement establishing terms which differ from those envisaged by the legal rule has force if the explicit prohibition is unequivocally expressed in the text of the rule (for instance, if there is a direct reference to the nullity, illegality or inadmissibility of an agreement, as in Article 928 of the Civil Code). But this prohibition allows teleologically restrictive interpretations of a statute. Therefore the discrepancy between the transaction and the requirements of the legislation or the violation of rights of a public-law entity does not automatically entail the nullity of the transaction (Paragraph 75 of the Resolution of the Plenum of Supreme Court of 23.06.2015 No. 25 “On application by the courts of certain provisions of Section I of Part 1 of the Civil Code of the Russian Federation” and Paragraph 4 of the Resolution of the Plenum of the Higher Commercial Court of the Russian Federation of 14.03.2014 No. 16 “On freedom of contract and its limits”).

Finally, rules governing the admissibility of special rule and exceptions, as well as the conditions of admissibility of these standards, constitute the third group of rules in Article 168 of the Civil Code. This group is aimed not only at the numerous cases in which the legislature, by means of the Civil Code or in other legal acts, expressly establishes nullity (for example, Paragraph 3 of Article 1007, Paragraph 1 of Article 1028, Paragraph 2 of Article 1033 of the Civil Code and Article 122 of the Inland Water Transport Code of the Russian Federation of 07.03.2001 No. 24-FZ),⁴⁴ voidability (in particular, the rules which are established in Paragraphs 1-2 of Article 449 of the Civil Code and Paragraph 4 of Article 17 of the Federal Law of 26.07.2006 No. 135-FZ “On Protection of Competition,” and considered by the commercial courts as special rules with respect to Paragraph 2 of Article 168 of the Civil Code)^{45 46} or other legal consequences (for example, Paragraph 4 of Article 23 or Paragraph 2 of Article 431-1 of

⁴² See Resolution of Commercial Court of North-West District of 09.09.2015 No. F07-6059/2015, case No. A05-14808/2014.

⁴³ Vestnik VAS RF [Bulletin of the Higher Commercial Court of the Russian Federation], 2014, Issue No. 5.

⁴⁴ Sobranie zakonodatelstva RF [Collection of the Legislation of the Russian Federation], 2001, Issue No. 11, Article 1001.

⁴⁵ Sobranie zakonodatelstva RF [Collection of the Legislation of the Russian Federation], 2006, Issue No. 31 (Part 1), Article 3434.

⁴⁶ See Resolution of Commercial Court of Volga District of 08.04.2015 No. F06-21936/2013, case No. A65-20418/2014 and Resolution of Commercial Court of Volga District of 09.07.2015 No. F06-24808/2015, case No. A65-25934/2014.

the Civil Code) for illegal transactions in general or for particular terms which arise in these transactions. The fact is that Article 168 of the Civil Code and Paragraphs 2-4 of the Resolution of the Plenum of the Higher Commercial Court of the Russian Federation of 14.03.2014 No. 16 “On freedom of contract and its limits” require that the commercial courts, when determining the legal consequences of illegal transactions, take into account and assess the legislature’s position regarding the intent (purpose) of the rule that protects certain categories of legal entities.

The purpose of the protection of violated rules is also taken into account in German and Austrian law,⁴⁷ in which the absence of direct legislative establishment of nullity leads to a need to determine whether nullification complies with the sense (purpose) of extant statutes. The purpose of extant statutes can be formulated with the help of the clearly expressed legal prohibition (explicit prohibition) that allows the courts according to Paragraph 75 of the Resolution of the Plenum of Supreme Court of the Russian Federation of 23.06.2015 No. 25 “On application by the courts of certain provisions of Section I of Part 1 of the Civil Code of the Russian Federation” to apply Paragraph 2 of Article 168 of the Civil Code of the Russian Federation, even if there is no direct indication of nullity (as appears in Article 383 of the Civil Code of the Russian Federation). However, the commercial courts often pay attention only to the legislator's silence concerning the consequences of an illegal transaction, and do not sufficiently analyze violated requirements and their purposes (in these cases applying the general rule of voidability of a transaction).⁴⁸

6. Conclusion

The new version of Article 168 of the Civil Code of the Russian Federation, considered in the context of the constitutional principle of legality, not only regulates the behavior of entrepreneurs and other private legal entities, but acts as a rule of legal rules (in other words, as a meta-rule). In this sense Article 168 of the Civil Code corresponds to foreign analogues. The general, special and exclusive rules, as well as the violated requirements of economic legislation, are the object of the Civil Code standards established in Article 168. In turn, the content of the meta-rule includes rules of priority, interpretation and admissibility, which are formed not only by the legislature, but also, to a large extent, by the courts.

Judicial practice is only beginning to take the new version of Article 168 of the Civil Code of the Russian Federation into account. However, it is already clear that Article 168

⁴⁷ See Flume W. Allgemeiner Teil des Bürgerlichen Rechts, Heidelberg, 1979, S.341; Boemke B., Ulrici B. BGB. Allgemeiner Teil, Heidelberg, 2009, S. 184; Bydlinski P. Bürgerliches Recht, Band I, Wien, 2005, S. 119, 132.

⁴⁸ Resolution of Commercial Court of Far Eastern District of 11.08.2015 No. F03-2678/2015, case No. A73-12783/2014.

contains contradictions which open new horizons in the field of modernization of the legal content of Article 168 of the Civil Code and the legal rules related to the article as a means of implementing the constitutional principle of legality.

References

1. Adomeit K. *Rechtstheorie für Studenten*, Heidelberg, 1979.
2. Altman A. *Arguing about Law*, Belmont, 2001.
3. Barak A. *Purposive interpretation in law*, Princeton, 2005.
4. Bingham T. *The Rule of Law*, London, 2010.
5. Blaise J.-B. *Droit des affaires*, 4-e edition, Paris, 2007.
6. Boemke B., Ulrici B. *BGB. Allgemeiner Teil*, Heidelberg, 2009.
7. Bydlinski P. *Bürgerliches Recht*, Band I, Wien, 2005.
8. Canaris C.-W. *Gesetzliches Verbot und Rechtsgeschäft*, Heidelberg, 1983.
9. Cane P. *Responsibility in Law and Morality*, Oxford, 2002.
10. *Civil Law*. Edited by Sergeev A.P., Tolstoi Y.K. Volume 1, Moscow, 2003.
11. Cross R. *Statutory Interpretation*, Oxford, 2006.
12. De Leyssac C.L., Parleani G. *Droit du marché*, Paris, 2002.
13. *Dictionnaire de la culture juridique*. Sous la direction de D. Alland et S. Rials, Paris, 2003.
14. Dworkin R. *Taking rights seriously*, Harvard, 1978.
15. Dworkin R. *A Matter of Principle*, Harvard, 1985.
16. *Elgar Encyclopedia of Comparative Law*. Edited by J.M. Smits, Cheltenham, 2012.
17. Flume W. *Allgemeiner Teil des Bürgerlichen Rechts*. Heidelberg, 1979.
18. Gordley J. *Foundations of Private Law*. Oxford, 2007.
19. Graziano T.K. *Comparative Contract Law*, Basingstoke, 2009.
20. *Grazhdanskoe pravo [Civil Law]*. Edited by A.P. Sergeev, Y.K. Tolstoi, Volume 1, Moscow, 2003.
21. Guyon Y. *Droit des affaires*, Tome 1, Paris, 1998.
22. Hart H.L.A. *The Concept of Law*. Oxford, 1994.
23. Karkhalev D.N. *Okhranitelnoe grazhdanskoe pravootnoshenie [Protective civil legal relationship]*, Moscow, 2009.
24. Kondrat E.N. *Pravovaia priroda nedeistvitelnykh sdelok [Legal nature of invalid legal transactions]*// *Zakonodatelstvo [Legislation]*, 2011, Issue No. 4, pp. 22-29
25. Larenz/Wolf. *Allgemeiner Teil des Bürgerlichen Rechts*, München, 2004.
26. Markesinis B.S., Unberath H., Johnston A. *The German Law of Contract*, Oxford, 2006.

27. Mazeaud H., Mazeau J., Chabas F. *Leçons de droit civil. Tome II. Obligations: théorie générale*, 9-e edition, Paris, 1998.
28. *Methods of Comparative Law*. Edited by P.G. Monateri, Cheltenham, 2012.
29. Molfessis N. *Le Conseil constitutionnel et le droit privé*, Paris, 1997.
30. Fages B. *Droit des obligations*, Paris, 2007.
31. Mail-Fouilleul S. *Les sanctions de la violation du droit communautaire de la concurrence*, Paris, 2002
32. Medicus D. *Allgemeiner Teil des BGB*, Heidelberg, 2006.
33. Morgan J. *Contract Law*, London, 2012.
34. Pawlowski H.-M. Zum Umfang der Nichtigkeit bei Verstößen gegen «öffentlich-rechtliche» Verbotsgesetze // *Juristenzeitung*, 1966, Issue No. 21.
35. Riesenhuber K. *Europäisches Vertragsrecht*, Berlin, 2004.
36. Rochfeld J. *Les grandes notions du droit privé*, Paris, 2011.
37. Schulze R. *Bürgerliches Gesetzbuch. Handkommentar*, 6.Auflage, Baden-Baden, 2009.
38. Shapiro S.J. *Legality*, Cambridge, 2011.
39. Sinaiskii V.I. *Russkoe grazhdanskoe pravo [Russian civil law]*, Moscow, 2002.
40. *The Theory of Contract Law*. Edited by P. Benson, Cambridge, 2001.
41. Totyev K.Yu. Nedeistvitelnost sdelok predprinimatelei v kontekste printcipa zakonnosti [Business transaction invalidity in the context of the principle of legality], *Zakony Rossii [Laws of Russia]*. (Forthcoming, 2016).
42. Totyev K.Yu. Sdelki, narushaiushchie antimonopolnoe zakonodatelstvo: nichtozhnost ili osporimost? [Legal transactions that violate the competition law: nullity or voidability?], *Zakony Rossii [Laws of Russia]*, 2012, Issue No.5, pp.68-73.
43. Vitrianskii V.V. Nedeistvitelnost sdelok v sudebnoi praktike [Invalidity of legal transactions in judicial practice] // *Grazhdanskii kodeks Rossii [Russian Civil Code]*. Edited by A.L. Makovskii, Moscow, 1998, pp.131-153.
44. Vogenauer St. Statutory interpretation // *Elgar Encyclopedia of Comparative Law*. Edited by J.M. Smits, Cheltenham, 2012, pp.833-835.
45. Zippelius R., *Juristische Methodenlehre*, 10.Auflage, München, 2006.
46. Zerres T. *Bürgerliches Recht*, Berlin, 2010.
47. Weinberger O., *Rechtslogik*, Berlin, 1989.

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