Volume IV (2016) Issue 2

Russian Law Journal

Contacts:
www.russianlawjournal.org
rlj@russianlawjournal.org
russianlawjournal@gmail.com

ISSN 2309-8678
e-ISSN 2312-3605

Frequency of Publication: four issues per year

Published by LLC V. Em Publishing House,
92 Lobachevskogo str., Moscow, Russia, 119454

Subscription enquiries should be directed
to V. Em Publishing House

RUSSIAN LAW JOURNAL (RLJ)

An independent, professional peer-reviewed academic legal journal.

Aims and Scope

The *Russian Law Journal* is designed to encourage research especially in Russian law and legal systems of Eurasia countries. It covers recent legal developments not only of this region, but also on an international and comparative level.

The RLJ is not sponsored or affiliated with any university, it is an independent All-Russian interuniversity platform, initiated privately without any support from the government authorities.

It is published in English and appears four times per year. All articles are subject to professional editing by native English speaking legal scholars.

Notes for Contributors

The RLJ encourages comparative research by those who are interested in Russian law, but also seeks to encourage interest in all matters relating to international public and private law, civil and criminal law, constitutional law, civil rights, the theory and history of law, and the relationships between law and culture and other disciplines. A special emphasis is placed on interdisciplinary legal research.

Manuscripts must be the result of original research, not published elsewhere. Articles should be prepared and submitted in English. RLJ doesn't accept translations of original articles prepared not in English. The RLJ welcomes qualified scholars, but also accepts serious works of Ph.D. students and practicing lawyers.

Manuscripts should be submitted electronically via the website *www.russianlawjournal.org.* Articles will be subjected to a process of peer review. Contributors will be notified of the results of the initial review process within a period of two months.

Citations must conform to the *Bluebook: A Uniform System of Citation*.

TABLE OF CONTENTS

CHIEF EDITOR'S NOTE ON THE RUSSIAN JURY TRIAL

DMITRY MALESHIN,
Lomonosov Moscow State University
(Moscow, Russia)

DOI:10.17589/2309-8678-2016-4-2-4-5

Recommended citation: Dmitry Maleshin, *Chief Editor's Note on the Russian Jury Trial*, 4(2) Russian Law Journal 4-5 (2016).

Jury trial was first introduced to Russia in the second half of the 19th century. It was a part of the Great Judicial Reform of 1864, together with the introduction of the professional judges and attorneys; notary publics; civil procedural and criminal procedural reforms.

Anglo-Saxon legislation served as the model for the Russian jury at that time. These early jury trials were only implemented in Saint Petersburg and Moscow. Only men could be appointed as jury members. The court of jury had the power to consider 410 offences according to the Russian Criminal code. That is around 20% of all offences. In 1878, several offences were excluded from the competence of the jury, e.g., murders of officials and breaches of the peace, etc. A jury consisted of 12 persons. They were separated from the professional judge. Juries did not participate in civil cases.

In 1917, jury trials were abolished by the Soviet Government and lay assessors replaced juries. This model was borrowed from the German *Schöffen* model. Two lay assessors considered criminal and civil cases together with a single professional judge. They served for a term of 2.5 years. In contrast to the jury member, the Soviet lay assessor had the power to consider, together with a judge, not only the determination of a fact, but also the meaning of a law.

In 1993, jury trial was reintroduced in Russia by the Constitution (art. 20, 32, 47, 123). The current Russian jury system is a mix of the 19th century model and Anglo-Saxon legislation. A jury's jurisdiction is limited to aggravated murder, racketeering, aggravated bribery, crimes against justice. Juries are not involved in civil cases and cannot consider crimes against the state.

Jury trials consists of 12 jurors. They are selected from a list of 50 candidates that must be at least 25 years of age and must not have criminal records. The judge pronounces the decision on the basis of the jurors' verdict. In December 2015, President Putin proposed to reducing the number of jurors to between 5 and 7.

Here are some interesting jury-related statistics. Pilot juries were implemented in 1993–1994 in 9 federal regions. Currently, jury trials operate in all regions. The last region to introduce trial by jury was Chechnya in 2010. In 1993, juries considered 2 cases, in 1994, they considered 173 cases. Currently they consider around 500 cases annually, which is around 1% of all criminal cases.

ARTICLES

WHICH WAY IS THE RUSSIAN DOUBLE-HEADED EAGLE LOOKING?

VLADIMIR PRZHILENSKIY,
Kutafin Moscow State Law University
(Moscow, Russia)

MARIA ZAKHAROVA,
Kutafin Moscow State Law University
(Moscow, Russia)

DOI:10.17589/2309-8678-2016-4-2-6-25

The article examines the historical reasons for the unique relationship between the state and the law in Russia, which has a system-forming impact on all aspects of life in modern Russia. The authors analyze the duality of the Russian political and legal world – 'Athens' vs 'Jerusalem' – 'East vs West' – 'legal state vs state of obligation' – and reveal the philosophical and ethical maxims through which it became possible to talk about Russia's peculiar historical path and the modern image of Russia. In the latter case, the authors focus particular attention on the phenomenon of 'sobornost' ['the spiritual community of many people living in the same space'] establishing that, in the philosophy of the Slavophiles, this category played the role of both a religious and a national proto-symbol, which can be understood as a source of spiritual unity of the people, connecting them from the outset during the sacrament of communal prayer and then being transferred to everyday life, organizing and directing all social practices of the Orthodox society in a special way. It is pointed out that the philosophical reflection on Russia's peculiar historical path has found a certain continuation in the idea of the 'Slavic legal family' proposed by Professor V.N. Sinyukov.

The authors do not overlook the problems of legal nihilism as an attribute of the Russian political and legal practice. The instinctive distrust of complexity and inclination towards the utmost simplicity in solving social problems is named as one of the reasons for the legal nihilism of the Russian people.

In the final section, the authors address the issue of borrowing the political and legal experience from foreign sources. The 'pole points' of the analysis are the Eastern experience of the Chinese state and the Western experience of French law. Expansion

of the Anglo-American law is defined by the authors as the 'other kind of milk' for the 'Russian coffee' – which generally corresponds to the global trend in this sphere.

Keywords: law; state; east; west; Russia.

Recommended citation: Vladimir Przhilenskiy, Maria Zakharova, *Which way is the Russian Double-Headed Eagle Looking?* 4(2) Russian Law Journal 6-25 (2016).

Table of Contents

1. Introduction

Russia has always been a conglomerate of differently vectored values, ideas, origins and images, where the light is easily combined with the dark, the irrational[1] with the rational, the European with the Asian, the evolutionary with the revolutionary. The mosaicism of the Russian social life is articulated well by V.V. Rozanov. 'There are' – he wrote – 'two Russias: one is a Russia of appearances, a huge bulk of external forms with regular defined contours – the 'Empire' the history of which was 'depicted' by Karamzin and 'developed' by Solovyov, the laws of which were codified by Speransky. And there is another one – the 'Holy Russia', the 'Mother Russia', the laws of which are not known to anybody, having obscure forms, vague contours with an unpredictable end and an unclear beginning: a Russia of the essentialities, the living blood, the abundant faith, where each fact holds on due to the power of its own existence inherent in it rather than due to an artificial link to another one.'[2]

So what are the origins of the statehood of this polyphonic country? Let us try to answer this question while identifying the key vectors of its objective manifestations and value-related origins.

---

[1] N.A. Berdyaev described the irrational grain of the Russian soul as the 'dark wine' which 'upsets all the theories of political rationalism ... turning our history into fiction, into an improbable novel.'

Бердяев Н.А. Философия свободы [Berdyaev N.A. *Filosofiya svobody* [N.A. Berdyaev, *Philosophy of Freedom*]] 313 (Folio, AST, Moscow 2004).

[2] *Розанов В.В.* Религия, философия, культура [Rozanov V.V. *Religiya, filosofiya, kultura* [V.V. Rozanov, *Religion, Philosophy, Culture*]] 33 (Respublica, Moscow 1992).

2. 'Athens' vs 'Jerusalem'

The 'Athens or Jerusalem' worldview alternative was first formulated by St. Paul the Apostle, who used the names of the two cities to denote the radical difference between two kinds of truth: the truth of reason and the truth of revelation.

'For the Jews require a sign, and the Greeks seek after wisdom; But we preach Christ crucified, to the Jews a stumbling block, and to the Greeks foolishness.' The first principle, associated with the capital of Ancient Greek philosophy, focuses on the mind, reason, logic. It found its embodiment both in classical philosophy and in the building of Western political and legal institutions.

The second principle was formulated in the course of the debate of the early Christians with the Hellenistic culture. 'Jerusalem' denies the cult of reason, maintaining belief in a transcendent origin, in the power of faith and the truth of revelation. 'Jerusalem' is opposed to 'Athens' as an alternative theory of God, the world, the human being, the cognition. 'Beware (brothers) lest any man spoil you through philosophy and vain deceit, after the tradition of men, after the rudiments of the world, and not after Christ.' This is the warning of St. Paul the Apostle, picked up on by the early Christian theologian Tertullian who put forward the famous formula 'I believe because it is absurd.' Tertullian expressed the uselessness of the mind in cognition of God with the following words: 'Seek God in simplicity of heart.'

The ideas of St. Paul the Apostle and Tertullian were spelled out with more precision, developed and, to some extent, 'modernized' by S. Kierkegaard and L. Shestov. This was achieved through contrasting the essence and the existence which found its justification first in the philosophy of life and then in existentialism. According to this intellectual tradition, the mind comprehends only the universal whereas the life is always unique. The mind can grasp only the essence whereas the cognition of the truth is the cognition of existence. Lev Shestov, in discoursing about why the truth of the mind is not the real truth, expresses his regret about the fact that the new European philosophers divided the truth and the morality, saying that there is no truth in the Bible, but only morality. Therefore, it is necessary to make a choice in favor of philosophy and leave the Bible for the sake of intellectual honesty – he writes: 'But what if one should try for once to conclude otherwise and say: 'consequently', we must send intellectual honesty to the devil, in order to rid ourselves of Kant's postulates and learn to speak with God as our ancestors spoke with Him.'[3] All this leads the Russian thinker to a paradoxical conclusion: 'Intellectual honesty consists in submitting to reason not externally, through fear, but willingly, with all of one's heart. It is a virtue when the power of reason is legitimate. But what if reason has seized power illegally?'[4]

---

[3] Lev Shestov, *Athens and Jerusalem* 386 (Ohio University Press ed., Athens 1966).

[4] Lev Shestov, *Id*.

The conflict between Athens and Jerusalem is a conflict between two ideas of truth and between two doctrines of morality. The way in which they are woven into the social practice, into everyday life, is a special issue. Daily life is always richer and more diverse than principles and ideal types. However, following certain examples, acceptance or rejection of values is the organizing foundation both for reasoning and for action. On the other hand, historical and cultural experience has a very radical impact on the choice of principles and their subsequent revision. A vivid example of the change in principles and ideals is the transition of the Mediterranean from the stage of independent cities to the stage of empires, first Hellenistic and later Roman.

As noted by S.S. Averintsev, the birth of the Mediterranean empires produced two psychologies: the Caesarist and the Christian. Along with the empire, a new system of relations between the government and people entered into the life of society. This system seemed unusual only for the Greeks and the Romans, while in the Middle Eastern despotisms it had been long and thoroughly tried and tested. 'An Athenian sage knows full well that he can be killed but cannot be humiliated with severe physical violence, that his measured speech in court will last as long as it is guaranteed for him by the rights of the accused party and no one will make him shut up by hitting his face or his eloquent mouth (as happens in the New Testament story of Jesus and Paul the Apostle).'[5] The moral philosophy goes 'hand in hand' with the philosophy of law, since both the former and the latter are organic manifestations of social evolution, when a new kind of thinking and acting comes to replace the traditional society.

'An eastern scribe, a sage or a prophet, an eastern noble and even an eastern king (if we remember the put out eyes of Zedekiah, whose fate was the prototype of so many fates in the Byzantine ages!) – all of them were well aware that their bodies were not immune from such abuse, which just did not leave space for Socratic equanimity.'[6] This type of social relation inevitably leads to a situation where the moral experience is acquired outside of the legal one. The moral norm turns out to be the only kind of social norm and, within certain limits, it has to carry out not only its own functions, but also the functions of law.

Byzantium became the East at the same time remaining the West. Much of what was preserved in the social experience of the heirs of the Ancient Rome already existed as a form or a rite. But even if only the form is kept the trace is still there, since the form cannot be completely cleared of the content. The same is true for Russia, the history of which can be depicted as a series of westernizations and orientalizations or as a history of modernizations and archaizations. Curiously enough, each successive round of historical development did not lead either to

---

[5] *Аверинцев С.С.* Поэтика ранневизантийской литературы [Averintsev S.S. *Poetika rannevizantiyskoy literatury* [S.S. Averintsev, *Poetics of the Early Byzantine literature*]] 62 (Coda, Moscow 1997).

[6] *Аверинцев С.С. Id.*, at 63.

rapprochement with the West or to estrangement from it. Russian society has always lived a life of its own, following a logic of its own. This logic is clear enough: every time everything starts with realization of its own backwardness and inefficiency leading to the desire to transform all the structures and institutions in line with the Western model. This is followed by the phase of realizing the impossibility of successful westernization resulting in the next step along the so-called '*peculiar path*' which means strengthening the role of the state and transforming the institutional and value system, but now using the army as a model instead of the social systems actually existing abroad. These were exactly the actions of those who later would be placed in the cohort of the great reformers, not to mention the no less great 'counter-reformers' such as Ivan IV and Paul I, Peter I and Nicholas I, Lenin and Stalin, to say nothing of the twists and turns of the past decades.

Not so long ago, the motto 'Go, Russia!' literally burst into the Russian political and semantic space. But where exactly to go? Of course, towards the modern, i.e., towards modernization – where else? It can't be backwards, can it? Will it be successful? Why not? The way to modernization should be open to anyone who wants it. Just do it – modernize as much as you want. At least the direction is clear. However, with all this obviousness, there is a lingering sensation that, somehow, it is not happening the way it should and whatever is happening does not look very much like modernization. After becoming a part of the global market and getting an opportunity to import goods and services from different parts of the planet we really joined the world of modern technologies: computers and GPS navigation devices, mobile phones and social networks, exotic holiday resorts and innovative forms of leisure. But is this the modernization the Russian people are dreaming of while actually experiencing the country's de-industrialization and the loss of its once leading positions in the field of technology, science and education? Isn't the hope for a successful 'upgrade' to some extent mixed with a feeling that the alternative to such modernization is not stagnation or going round in circles? Isn't there a feeling that changes are going on, but in a different direction and rather quickly? Maybe it's time to talk about whether modernization – even rather successful modernization – can be a comprehensive process, i.e., the essence of all social changes. This must be done at least due to the fact that, despite all the going from one extreme to the other in the nineties, despite all the 'stability-seeking' caution of the noughties, a very different process is slowly but steadily going on in modern Russian society – the process of social archaization. It seems invisible against the background of the administrative and bureaucratic as well as political and legal stability, but its consequences can have a truly fateful effect. The argument in favor of the above statement may be the assumption that much (if not all) of what has been happening in society over the past two decades can be explained in terms of the yet non-existent archaization theory.

It is worth noting that the dilemma of Athens versus Jerusalem in this context means that the Russian national identity is defined in terms of a dichotomy of rational versus irrational. And it looks like the choice in favor of the irrational is motivated

both from the point of view of values and existentially. This idea has always haunted the minds of both the 'carriers' of such an identity consistently insisting on conscious irrationality and the Western intellectuals trying to solve the 'Russian enigma'. For example, the American sociologist T. McDaniel strongly emphasizes the inability, incapability and unwillingness of the Russian people to use the institutions of law, albeit not as developed as in the West, but still allowing one to defend one's rights legally and peacefully. And this fact is observed by him in different periods of Russian history. Assessing the actions of rebel workers, he points out that, on a subconscious level, their protest was based on an irrational, spontaneous and unformulated feeling of resentment. 'Action, particularity political action, was not necessary, for it was divisive and irrational; the government, representing truth, would determine the justice of the competing claims. Such a view of social groups and social action completely undercuts any idea of rights inherent in the subject; the subject is even deprived of the legitimacy of his or her own interests. Interest, after all, may be at the basis of society, but truth and justice are the roots of community.'[7]

However, it is not only the reaction of the society or certain groups within it to the actions of the authorities that seems deeply irrational to T. McDaniel, the Russian idea itself is interpreted by him not as a set of values, but as their irrational rejection and denial. Moreover, according to T. McDaniel, the reactive nature of the Russian idea is caused by Western institutions and values which are either periodically imposed by the authorities or permanently exist in the public consciousness as the reverse side of the prosperous West.

3. East vs West

Yes, exactly: the East and the West are the eternal suns of the Russian land. The Russian double-headed eagle alternately turned its gaze to the West and to the East. Let us remember the judicial reform of 1864, the attempts to create a pre-revolutionary Duma, the State Council and many other transformations in the sphere of state-building were dictated by the influence of the West on Russia. These transformations were difficult and, as a rule, did not last very long. The institutions and values did not manage to take root in the Russian soil and, after a while, found themselves decisively rejected. 'It is difficult to say whether the introduction of the jury system in Russia in 1864 reflected a national crisis comparable the enormity of serfdom, but almost all educated Russians of 1860s were aware of the glaring of disparity between justice and the law in the pre-reform system. Most would have argued that the critical disjunction between law and ethics in terms of the judicial system was far greater before 1864 then it was after the reforms, when Dostoevsky worked on *The Brothers Karamazov*. Dostoevsky, however, situated the great legal

[7] McDaniel Tim, *The Agony of the Russian Idea* 72 (Princeton University Press 1996).

crisis, the absolute bifurcation of morality and law after 1864.'[8] Of course, the minds burning with ideas and heated debates about the law, justice and morality arise immediately when a 'pre-revolutionary' situation forms within a society, irrespective of whether the revolution is controlled and guided from the top or is only initiated by the authorities but later goes on to destroy of the old order. And every time everything starts with an attempt to copy the experience of Western Europe or North America. Therefore, after the radical rethinking of the Soviet version of the state in the 1990s, we came to the conclusion that we once again actually need to follow the state-building theory found and practiced in the West. However, later on the reverse processes have invariably taken place and these processes have almost always been perceived as a movement towards the East, as the restoration of the institutions and values which are either brought from the East or (more often) are only associated with the East as a cultural and historical type.

When assessing the existence of two social and cultural archetypes at once in Russia, it should be pointed out that such a situation is not unique. Many empires united heterogeneous elements, but none of them connected them so deeply and organically, maybe with the exception of Byzantium. The impressive similarity of Russia and Byzantium is easily explained, for it was Constantinople that, through the spreading of its religion, had a formative influence on the Ancient Russian culture, political institutions and law enforcement practices.

However, Ancient Russia was a likeness of Byzantium neither in terms of scale, nor in terms of its historical role. The young society, the young state and the young culture of Kiev in the X or XI centuries was different from the 'Second Rome' that existed for about a thousand years just like from its historical predecessor. Therefore, Russia may have more grounds for claiming the status of a subsidiary civilization in relation to Byzantium. However, in the days of Ivan IV, Muscovy began to call itself the 'Third Rome'.

No matter how questionable the multiple historical parallels, no matter how big the number of speculations around Byzantism, which is understood sometimes as a type of mentality and sometimes as a kind of social order, there are some grounds for them. In order to determine the peculiarities of Byzantism, we need to refer to the classical 'East – West' model. This model is intended to highlight the sense of the civilization-based comparison, which equally explains the differences in economy and religion, science and art, state-building and the organization of private life.

These oppositions must not be seen as clear and unambiguous characteristics of social and cultural reality inevitably inherent in Western or Eastern countries during all periods of their history. Here we can speak only about the ideal types materialized in reality with greater or lesser degree of completeness. Moreover, large-scale mutual influences took place from time to time resulting in westernization of the countries and regions traditionally included in the orbit of the East.

---

[8] Rozhenshield Gary, *Western Law, Russian Justice. Dostoevsky, the Jury Trail and the Low* 7–8 (University Wisconsin Press, Madison 2005).

An example such westernization is the Hellenization of Syria and Egypt. This Hellenization was not just a short-term episode in the history of the Middle East. There are claims that 'the rise of Islam was a manifestation of the reaction of the East to invasion by an alien Western culture starting with the campaigns of Alexander of Macedon in the IV century BC. The previous attempts to break free 'from the Hellenic nightmare' manifested in the emergence of Judaism, Zoroastrianism and Christianity (in its various forms) were not successful, as the first two religions were of local significance and Christianity was 'kidnapped' by the West and became its property after being linked with Greek philosophy.'[9]

Equally obvious are the episodes of orientalization of the Western world in the course of expansion of Christianity. The West remains Christian, but the consequences of orientalization were overcome, though not immediately. The Renaissance, the Reformation and the Counter-Reformation are the most notable stages in this process. Eastern Christianity still remained a part of the Eastern world. But its Western roots will never be forgotten.

Even in the context of cultural interactions between the East and the West, the Russian experience is extraordinary. The interpenetration of two heterogeneous systems seems too organic. By no coincidence, this issue has become the central theme of Russian philosophy – and not just philosophy. Today, Russian political and journalistic thought continues raising questions which are directly related to the dispute that began in the XIX century. 'By and large, the most important ideas of Russian culture arose from an antagonistic dialogue between the radical intelligentsia and the great writers, with literary critics belonging to each group. On the one hand, we have the highly self-conscious tradition of intelligenty (members of the intelligentsia), whose patron saint was Chernyshevsky and which came to include Lavrov, Mikhailovsky, Nechaev, Lenin, Stalin and Trotsky. On the other, we have the counter-tradition of Tolstoy, Dostoevsky and Chekhov. Or again: Bakunin, Dobroliubov, Pisarev and Tkachev are answered by Solovev, Bakhtin....'[10]

4. Legal State vs State of Obligation

A peculiar 'middle-of-the-road' option of finding one's own statehood in the tangles of time was the movement of Eurasianism.[11] This social trend reached its

[9] Сравнительное изучение цивилизаций: Хрестоматия: Учебное пособие для студентов вузов [*Sravnitelnoye izucheniye tsivilizatsiy: Khrestomatiya: Uchebnoye posobiye dlya studentov vuzov* [Comparative Study of Civilizations: Chrestomathy: Textbook for university students]] 494 (Aspect Press, Moscow 1997).

[10] *A History of Russian Thought 95–96* (Ed. by William Leatherbarrow and Derek Offord, Cambridge University Press 2010).

[11] For more detailed information about this social movement, please see: Bassin, M.A., Glebov, S.B., Laruelle, M. *Between Europe and Asia: The origins, theories, and legacies of Russian eurasianism* (University of Pittsburgh Press 2015).

intellectual peak in Russia twice – at the beginning and at the end of the twentieth century. Both the first and the second case took place in the period when Russia passed the state-related break points and was urgently looking for its identity.

N.N. Alekseeev, P.N. Savitsky, N.S. Trubetskoy and G.V. Florovsky stood at the origins of Eurasianism.

The following declaration of the Eurasianists became widespread: 'The Russian people and the people of the 'Russian world' nations are neither Europeans nor Asians. Merging with the native environment of culture around us, we are not ashamed to avow ourselves Eurasians.'[12]

It is the Eurasianists that introduce the idea of the state of obligation which will seem alien to the people of the Western world.

The Eurasianist philosophy is based on the opposition between the organicist, holistic approach to society and history characteristic of the East and the mechanistic, 'atomic', 'individualistic', 'contract' approach characteristic of the West.

With some sarcasm, N.N. Alekseyev points to the fact that the Western jurists understand the 'General Theory of Law' as the 'general theory of Western law', leaving outside the scope of consideration all the alternative legal models which, however, are still common among the nations which make up the greater part of humankind, and, in addition, which existed in the West itself in other historical epochs.

But what is opposed to the concept of law in alternative social models? The concept of duty (obligation). Alekseyev looks at it in detail. Citing the example of the social history of Russia, he very precisely uses the old term 'servitude state', i.e., a state based on the principle of domination of duties.

In its purest form, the 'servitude system' does not know and does not recognize any rights at all, but asserts only duties everywhere. This follows from the philosophical precept of a traditional society that treats an individual as a part of a whole, as a non-self-maintained and non-self-sufficient projection on a single unit of the universal. The individual is treated only as a part of the integral whole – the church, the state, the people, the nation, the community. This is the community principle, the principle of precedence of the general in the formation of the whole.

In fact, two possible legal theories emerge. One deals with individuals as a private and contractual community, as a product of connections of the private. The interrelation between them as well as interrelations between individuals constitute the subject matter of law as understood by the West. The extreme manifestation of this structure is the theory of 'a state governed by the rule of law' and 'human rights' (the latter does not imply any state at all – in this case it can be replaced by some other form of association, which leads to the modern theories of 'mondialism', 'World Government', etc.).

---

[12] Евразийская хроника. Вып. VII [*Evraziyskaya khronika*. Vol. VII [7 *Eurasian Chronicle*]] 43 (Paris 1926–1928).

The second theory of law deals not with individuals (the 'indivisible'), but with persons, personalities, as the term 'person' in Greek means 'mask' and is used to characterize the participants of a tragedy. The Russian term for 'personality' ['lichnost'] is an etymological calque (loan translation) from Greek and means a 'function' and a 'role', a 'mask' rather than a self-maintained and independent, autonomous unit. These personalities/masks are discrete forms of the manifestation of the whole – the community, the nation, the state. They perform the 'burden-carrying' function, serve as a driving force while working through the daily grind of social existence, which is so difficult precisely because it is all about operating with the universal, the integral, the single. The public field of each individual in the 'servitude state' is inevitably linked to the entirety of substantial ontology. Here everybody serves everything, performing the role determined by the whole and having as a reward a constant ontological prospect of full co-participation in this whole, a possibility of unlimited drawing of existential forces and peace of mind from this whole.

There are no exceptions to this rule in the 'servitude state', not even for the sovereign himself, the basileus, who is the bearer of the priority right [right by priority] in the Western concept long before the Enlightenment and liberalism. The Eurasian tsar, the tsar of the organistic society, is the same person, the same mask, the same servitude (draft) figure as all the others. He is a servant of the general (public) being and, therefore, he is the first to feel the whole burden of ontological service. The tsar has more obligation than all his subjects. He is personally responsible for the smooth and uninterrupted functioning of all the other persons. He is not a collector of the servitude impost, but an overseer, a 'bishop' of the general (public) existence entity, which is entrusted to him by something higher than himself in relation to which he is just a mask and a role, a function and a servant.[13]

If we follow the logic of the Eurasianists, the authors of the 1993 Constitution of the Russian Federation are liars going against the historical past of their own country. They should have established the following declaration in Article 1 of the Constitution of the Russian Federation: 'Russia is a democratic federal state of obligation with a republican form of government'.

But is this possible practically and justified historically? Very unlikely. Although the Russian have survived innumerable hardships so severe that they might be unbearable to other peoples and nations.

5. A Peculiar Path

The supporters of the 'peculiar path' believe that caution should be exercised with regard to the calls for transformation of legal institutions into a universal means of resolving political and social problems. Among those who promote the position

[13] *Алексеев Н.Н.* Русский народ и государство [Alekseyev N.N. *Russkiy narod i gosudarstvo* [N.N. Alekseyev, *The Russian People and the State*]] 293–295 (Agraf, Moscow 1998).

of uniqueness and exclusivity, there are adherents of a peculiar Russian philosophy of law, which may lead to the conclusion about the special nature of law in the life of the Russian society. As V.V. Lapayeva points out, the understanding of law in Europe has always been based on social practices which were characterized by individualism. 'Whereas the Russian legal thought', she writes, 'developed largely under the influence of the inherently system-centered Byzantine spiritual tradition which interpreted law as some kind of form of spiritual unity of people standing above an individual and controlling an individual based on truth and justice, divine grace, Christian ethics, etc. The Western (Greco-Roman) approach to law as a way of regulating [bringing order to] social life based on individual freedom was intrinsically alien to the Russian mentality. All this gives grounds for speaking not just about the philosophy of law in Russia but specifically about the Russian philosophy of law as distinguished from the tradition of Western legal philosophy.'[14]

A special role in understanding the specifics of the Russian political and legal system is played by the concept of *sobornost* [the spiritual community of many people living in the same space]. After the introduction of *sobornost* by Russian philosopher and Slavophile, A.S. Khomyakov, the philosophical discourse immediately went beyond the boundaries of Cartesianism. This concept can be neither explicated nor operationalized by means of modern philosophy – it will remain forever tied to the religious understanding of the world.

The concept of *sobornost* is often translated into the language of modern philosophy and political science as collectivism, although this translation can only lead to confusion and prevent understanding. In fact, the Greek word καθολικότητα is translated into Latin as catholicity, while in English it should be translated as universality. Despite the fact that the birth of this concept was associated with social and political reasons, its further comprehension took place in the intellectual and mystical genre very characteristic of the late Byzantine spiritual life. And although the principle of *sobornost* in Justinian's times allowed quite effective regulation of the administrative and legal issues in the field of relations between the state and confessions as well as intraconfessional relations, its administrative and legal use in the West was rather limited and its interpretation was speculative and scholastic. However, A.S. Khomyakov made it a keystone of his own doctrine of a social ideal which was further developed in the works of almost all the major representatives of Russian religious philosophy.[15]

---

[14] *Лапаева В.В.* Российская философия права в контексте западной философско-правовой традиции // Вопросы философии. 2010. № 5. С. 3–14 [Lapayeva V.V. *Rossiyskaya filosofiya prava v kontekste zapadnoy filosofsko-pravovoy traditsii* // Voprosy filosofii. 2010. No 5. S. 3–14 [V.V. Lapayeva, *Russian Philosophy of Law in the Context of the Western Legal Philosophy Tradition,* 2010(5) Russian Studies in Philosophy 3–14]].

[15] For more detailed information about this Russian philosophy, please see:
Evert Van Der Zweerde, *La place de la philosophie russe dans l'histoire philosophique mondiale, 3*(223)

The concept of *sobornost* is closely linked to other concepts of the Eastern Christian theology and, first of all, to *symphony* (συμφωνία – consonance) and *synergy* (συνεργία – cooperation, support, assistance, partnership, complicity). 20th century critics of Soviet totalitarianism came up with another meaning which had a distinctly negative connotation – 'like-mindedness'. All the attempts to translate the word *sobornost* into European languages have not led to the possibility of conveying the semantics of the term satisfactorily. N.A. Berdyaev even pointed out the similarity of this concept with the European concept of communism creating a new concept of *'kommunotarnost'* ['*communitarity'*] (from the French *commune* [association, community]) for philosophical translation.

In the doctrine of A.S. Khomyakov, *sobornost* played the role of both a religious and national proto-symbol, which can be understood as a source of spiritual unity of the people, connecting them from the outset during the sacrament of communal prayer and then being transferred to everyday life, organizing and directing all the social practices of the Orthodox society in a special way. Another prominent philosopher and Slavophile, K.S. Aksakov, used this word as a synonym for choral beginning: people who can sing together can also live together; they lose selfishness, but keep the aspiration towards creativity. An individual aspiration to creativity merges with other aspirations – like voices in a symphonic and synergetic chorus.[16] The founder of the Russian cosmism, N. Fedorov, tied the concept of *sobornost* with the idea of the common cause which, in his opinion, included transformation not only of the whole society, but also of the whole nature and the whole cosmos based on his own doctrine. The students of N.F. Fedorov would later become the people coming up with the concept of the bio- and noosphere of the Earth, calculating the first and second cosmic speed [velocity], creating the theory of cosmonautics. The process of searching for an alternative to Western Cartesian rationalism was interrupted by the Bolshevik revolution and resumed by the new government in a completely different direction (and the very nature of the search was absolutely different).

The role of the concept of *sobornost* is striking in its assertion of consistent legal nihilism and justifying the revolution. 'But both Tolstoi and Dostoyevsky rebelled against the injustices of human laws; they expressed the Russian spirit of antinomianism; they were both enemies of the bourgeois world and its standards. Both of them, though in different ways, seek true Christianity as against the distortions of historical Christianity, and Tolstoi and Dostoyevsky were possible only in a society which was moving towards revolution, in which explosive materials were

Diogène (2008). DOI: 10.3917/dio.223.0115 <http://www.cairn.info/revue-diogene-2008-3-page-115.htm>.

Piama P. Gaidenko, *Philosophie russe et pensée européenne: le cas de Vladimir S. Soloviev*, 2(222) Diogène (2008). DOI: 10.3917/dio.222.0032 <http://www.cairn.info/revue-diogene-2008-2-page-32.htm>.

[16] Florovsky Georges, *Sobornost: the Catholicity of the Church*, The Church of God. An Anglo-Russian Symposium by Members of the Fellowship of St Alban and St Sergius 55 (ed. E.L. Mascall, London 1934).

accumulating. Dostoyevsky preached a spiritual communism, the responsibility of all for each that was how he understood Russian sobornost'.[17]

In addition to the idea of *sobornost*, the pillars, on which the philosophy of the uniqueness of the Russian political and legal experience rests, also include the maxims of reviving the idea of a genuine 'Russian truth' as a philosophical foundation of the national legal existence and the structure of legal nihilism. Criticizing the Marxist view on the essence of the ontological basis of the national legal order, N.N. Alekseev pointed out the following: 'If we look at the old, religious, Orthodox Russia, we will see that only the most general principles of the political and social system had religious and moral justification and became the subject of religious and moral theoretical reflections at that time. The tasks of the state and society building, of course, were also understood as a religious duty and an act of valor (Alexander Nevsky, Metropolitans Peter and Alexis, Patriarch Hermogenes), but they were not placed in the center of attention of the general public other than in the most general terms. The religious and moral ideal was understood mainly as belonging to the sphere of personal morality, as a personal valiant deed.... In terms of absence of purely political ideals, a typical member of the Russian intelligentsia of the last century (represented, for example, by many Russian populists [*narodniki*] as well as many revolutionaries and anarchists) was very much like a member of the Moscow intelligentsia of ancient Russia, promoting the ideals of Orthodox asceticism and not having any definite political program.... Coming back to the recognition of the old Moscow 'truth', a Russian person cannot help but get rid of the lies of the moral doctrine inculcated by Marxism.... Original political theories have never emerged in Russia the way they did in France and in England. The views of English philosopher Locke as well as the French philosophers Montesquieu and Rousseau left a mark on all the latest Western constitutional history. The modern Western states of the European and American cultures represent, in essence, practical applications of the theoretical reasoning of the aforementioned political writers. In Russia, the role of political ideas was not that significant and our state was built spontaneously, in a semi-conscious, 'organic' rush. Now is the time for free creativity in the sphere of Russian political ideas which certainly do not need to imitate the West by all means.'[18]

As for the legal nihilism as an attribute of the political and legal system of the Russian society, both in the past and at present[19], it should be recognized as a common issue the question about the causes of which remains open. Perhaps the origins of legal nihilism should be searched for in the religious, philosophical

[17] Berdyaev Nikolai, *The Origin of Russian Communism* 87 (Robert MacLehose and Company Ltd, The University Press, London 1948).

[18] *Алексеев Н.Н. Id.,* at 301.

[19] For further information on this issue, see, for example: Hendley, K. *Who are the legal nihilists in Russia?* 28(2) Post-Soviet Affairs 149–186 (2012) <http://www.tandfonline.com/doi/abs/10.2747/1060-586X.28.2.149>.

and cultural experience of Russian society. This point of view was at different times expressed by E.V. Solovyev, V.V. Bibikhin and many others. But there exists another supposition: the legal nihilism of the Russian people reflects their instinctive distrust of complexity and inclination towards utmost simplicity in solving social problems. The same tendency can be observed with the modern physicists for whom theoretical simplicity is the same as mathematically interpreted beauty, who are dreaming of building a unified theory of physical interaction, a unified field theory, superstring theory and other variants of the theory of everything. In contrast, the humanitarian scholars are able to enjoy the contemplation of complexity – they are attracted not so much by the universal as by the unique.

The philosophical reflection on Russia's peculiar path was to some extent continued by Professor V.N. Sinyukov,[20] who introduced the idea of existence of a 'Slavic legal family.'[21] In his monograph, he poses the following questions to himself as well as to the reader: Are there any elements in Russia's existing legal system which would allow one to speak of its cultural and historical regulatory originality? Is there some kind of unique, peculiar, logic in Russia's legal path? Does Russia need a typologically independent legal system? Professor Sinyukov gives unequivocally positive answers to all these questions. The unique character of Russian law was also stated in the research by R.S. Bayniyazov. In his opinion, the legal 'self' of the society is determined primarily by its own kind of legal consciousness and experience, by a special way of thinking and creative activity of the mind. Legal thinking incorporates a most complex psychological process of understanding, interpretation and mental modeling of the legal life of the society.[22] The legal mentality of Russian society has been characterized by a careless, negative attitude to law, by extreme politicization as well as by organically inherent etatism, as evidenced by the whole of Russian history.

---

[20] *Синюков В.Н.* Российская правовая система. Введение в общую теорию [Sinyukov V.N. *Rossiyskaya pravovaya sistema. Vvedeniye v obshchuyu teoriyu* [V.N. Sinyukov, *The Russian Legal System. Introduction to General Theory*]] (Norma, Moscow 2010).

[21] The term 'Slavic Law' may also be encountered in much earlier works. Fyodor Fyodorovich Siegel (1845–1921) wrote that the 'Slavic Law' is the law of the rural population and, since the Slavic people lived in accordance with their ancient customs which were maintained through tradition, it is closer to the English and American law than to the law of the Continental Europe. From this point of view, the norms of Slavic law are more independent from Roman and canon law than the continental ones. The Slavs developed their legal norms on their own. Unconditional and significant influence of foreign ideas was reduced to ideas only and did not affect the rules themselves. See: Sigel Fyodor, *Lectures on Slavonic Law* (London 1902).

[22] *Байниязов Р.С.* Правосознание и российский правовой менталитет // Правоведение. 2000. № 2. С. 31–40 [Bayniyazov R.S. *Pravosoznaniye i rossiyskiy pravovoy mentalitet // Pravovedenie.* 2000. No 2. S. 31–40 [R.S. Bayniyazov, *Legal Consciousness and the Russian Legal Mentality,* 2 Pravovedenie 31–40 (2000)]].

6. The Chinese trace, the French Track and Other 'Milk' for the 'Russian Coffee'

The Russian and, later, the Soviet historians argued for a long time that the impact of the Mongols on Russian society was destructive and absolutely negative, leading to its archaism and causing retardation as compared to Europe. Russian historians assessed the impact of the Mongols on the state structure which formed later differently, but it was very difficult to deny the fact of such impact. As noted by G.V. Vernadsky, 'when the Russians 'got acquainted with Mongolian criminal law and Mongolian courts, they turned out to be ready to accept some models of Mongolian jurisprudence. Even Vladimirsky-Budanov, who tends to minimize the Mongol influence on the Rus (Ancient Russia), admits that the death penalty (unknown to Russkaya Pravda ('Rus Truth [Law]') – the Russian code of laws of the Kievan period) and corporal punishment (in the Kievan period applied to slaves only) entered the law of Muscovy under the Mongol influence.'[23]

The course towards westernization of the Russian society from Peter the Great to Catherine and later Slavophile ideas characteristic of the Soviet period formed an ideology through the prism of which it was difficult to notice at least some significant traces of the influence of the nomadic tribes on the culture of the Rus or the Russian mentality. Works showing the influence of the Turkic-speaking peoples on modern Russian culture appeared only in the late Soviet period. First of all, these are the works by the philologist O. Suleymenov and 'non-academic' historian L.N. Gumilev who, during his life, was reckoned to be a part of the department of geography and after his death came to be associated with the branch of knowledge newly arisen in Russia– cultural studies (culturology). But they were also far from searching for the traces of the quickly 'disappeared' Mongols, insisting on the proximity of the Ancient Rus and the Great Steppe represented by Turkic-speaking ethnic groups.

At the same time, nobody has disputed the fact that the Mongols actually captured the Chinese state, making only very insignificant changes to the methods of government (state administration), attaching Mongolian supervisors to Chinese officials, leaving tax collection, courts and other issues to the competence of the mandarins. Moreover, this experience was far from being unique – a century before the Mongols, the Chinese state, or, more exactly, its northern part, had been conquered by another nomadic people called the Jurchens. They were later called the Manchus and the latter returned to rule in China immediately after the Mongols left, founding the last imperial dynasty. But the same Mongols actually seized control in the Chinese state system, having learned the values of statehood.

As a result, according to some researchers, we can observe the indirect influence of the Chinese political and legal experience on the formation of Russian statehood.

---

[23] *Вернадский Г.В.* Монголы и Русь [Vernadsky G.V. *Mongoly i Rus* [G.V. Vernadsky, *The Mongols and the Rus*]] 251 (Lomonosov, Moscow 2015).

The Chinese approach to the flow of government processes is based on Fa-Jia school of philosophy. 'Han Fei Tzu suggested encouraging less and punishing more severely. The unity of the state power and the strength of the ruler's power can be ensured by legislation, an elaborate system of rewards and punishments, a system of collective responsibility (frank pledge) and universal surveillance. This ideology played a significant role in the creation of a single, centralized state of Qin. Particular importance was placed by legists on the economic function of the state, its regulatory role in the economy, in maintaining prices in the market, etc. To strengthen the power of the ruler, they suggested introducing a state monopoly to exploit natural resources and handover of profits to the state treasury.'[24]

Were the Chinese the only exporters of state and legal values? Of course not. For example, the influence of the French law on the development of the Russian legal order can be traced at the levels of both the 'spirit' and the 'letter' of law. Even in the Instruction (Nakaz) to the Commission about drafting a New Law Code (the Instruction of Catherine II), written mostly in French, we can find numerous correlations between the ideas of Catherine II about the state and legal structure of the country and the concept of a political system by Ch. L. Montesquieu. Young L.N. Tolstoy, while being a student of the Department of Law at Kazan University, following a suggestion by Professor D.I. Meyer, prepared a comparative study of The Spirit of the Laws with Catherine's Instruction obviously showing determinant connections between these two conceptual documents. Catherine II herself wrote about the fact of borrowing from Ch. L. Montesquieu's The Spirit of the Laws in the Instruction as follows: 'For the sake of my empire I pillaged President Montesquieu, without naming him in the text. I hope that if he had seen me at work, he would have forgiven this literary theft if only for the good of 20 million people which it may bring about. He loved humanity too much to be offended; his book was my breviary.'[25]

The practices of reconstructing Russian civil law through the prism of the corresponding French experience became a story of its own, full of characters and events. For example, the French Civil Code (the ***FCC***) actually functioned in the Kingdom of Poland during the period of 1815–1914: first in a direct way (introduced by Napoleon in 1808) and later, since 1825, through the transfer of its provisions to the Civil Code of the Kingdom of Poland which was significantly influenced by the FCC. The Draft Civil Code of the Russian Empire, which also experienced a strong influence of the FCC should not be overlooked as well. It was submitted to the State Duma in 1913, but did not become a law due to war followed by revolution.

---

[24] Доступное объяснение Мо-цзы. [*Dosruonoye obysnenie Mo-chzu* [Understandable Explanation of Mozi]] 28 (Beijing 1956).

[25] Сборник Российского исторического общества. Т.10 [*Sbornik Rossiyskogo istoricheskogo obshchestva* [10 *Russian Historical Society Compilation*]] 30–31 (St. Petersburg 1872).

But when the New Economic Policy (NEP) by V.I. Lenin, which temporarily allowed the existence of a market economy, required proper legislation, the text of the pre-revolutionary Draft Civil Code was very widely (albeit without mentioning it much) used for the preparation of the first Soviet Civil Code – the 1922 RSFSR Civil Code. Later on, when creating the 1964 Civil Code, 'approximately 3/5 of the provisions contained in the first Civil Code of 1922 were used (as they were or in a redrafted form) in the new Civil Code.'[26] Finally, we should mention the planned but failed reception of the French Civil Code provisions – the draft codification by M.M. Speransky. The system of the draft Civil Code was brought in line with the system of the French 'Code Civil': it was to consist of three books – on persons (I), on property (II) and on contracts (III). The internal structure of the first book of the draft Code was almost identical to the structure of the first book of the 'Code Civil'. Most of the texts of specific provisions were also borrowed from the 'Code Civil' (albeit not always literally) – with the exception of the provisions of the draft Code chapters corresponding to titles II (On Acts of Civil Status), V (On Marriage) and VI (On Divorce) of the French Civil Code. M.M. Speransky' fall from grace (he had to resign in 1812) largely prevented the implementation of the reception of the French-style civil law in Russia. However, as eloquently mentioned by M.M. Vinaver in an article dedicated to the 100th anniversary of the 'Code Civil': 'And who knows: if it wasn't for the patriotic explosion leading to Speransky's fall from grace, perhaps, 'this book, put together by six or seven ex-lawyers and ex-Jacobins', would have ended up being openly put – despite Karamzin's emphatic indignation – on 'the holy altar of the Fatherland.'[27]

At the end of the 20th century, an intense search for political identity caused by the breakup of the Soviet Union also led the Russian political elite to look at the French models and images – this time it was a peculiar state structure model. We mean the partial reproduction in the 1993 Constitution of the Russian Federation of the French 'mixed republic' model. This model became the theoretical basis for the establishment and functioning of the state authorities in the French 5th Republic. A characteristic feature of this variant of republican government is in the established balance of political rule in the country: neither the President nor Parliament has a monopoly on forming a government.

The influence of French law on the Russian legal order can also be observed at the level of the 'spirit of law'. For example, we can see that the French sociological school of law had a significant influence on the formation of the doctrinal foundations of the Russian jurisprudence. Its origins lie in the works by the French civil jurist François Gény. It was he who, at the end of the 19th century, suggested a fundamentally new

---

[26] Развитие кодификации советского законодательства [*Razvitiye kodifikatsii sovetskogo zakonodatel'stva* [*Soviet Legislation Codification Development*]] 139 (Moscow 1968).

[27] *Маковский А.Л.* О кодификации гражданского права [Makovskii A.L. *O kodificachii gragdanskogo prava* [A.L. Makovskii, *Codification of Civil Law*]] 409 (Statut, Moscow 2010).

model of interpreting legal provisions – 'méthode de la libre recherche scientifique' (the method of 'free scientific research'[28]). In accordance with this method, 'in case of the incompleteness or unavailability of a law, a judge cannot refuse to administer justice and should find a solution through analyzing the facts outside law, i.e., based on the 'free law'. This method is widely used in the modern judicial systems of France and Russia together with the principles of traditional dogmatic jurisprudence.

As for the 'other milk' for the 'Russian legal coffee', it is mainly represented by the 'lactose' of the Anglo-American origin. The Anglo-American tones and shades are clearly visible both on the regulatory and the functional level of the legal system in the practice of the Russian judicial authorities. For example, in Ruling No. 16404/11 of 24 April 2012 of the Supreme Arbitration (Commercial) Court of the Russian Federation in the case of Parex banka, the Supreme Arbitration Court of the Russian Federation used the term 'corporate veil' and made the following note: 'the entrepreneurial activities on the territory of the Russian Federation are being carried out precisely by the defendants through affiliates (the doctrine of 'piercing the corporate veil'[29]).

Today, a Russian lawyer and (or) a statesman, who – very much like a hero of a famous play – is facing the dilemma: 'Law borrowing: to take or not to take: that is the question', sometimes without deliberation nods in consent to any donor infusions from the outside, forgetting the comparative principle of G. Rolin-Jaequemyns 'the unity should not destroy the variety.'[30]

7. Conclusion

The whole history of Eastern Europe after Batu Khan' can be described as a clash of two alternative types of statehood or as a competition between two social technologies. For ease of reference, they can be called the Western and the Eastern social technologies: the former was born and developed in China, while the latter grew and matured in Western Europe. The former has been investigated and described by European science and is an example of a model social self-description. The latter has been examined and qualified in terms of deviation. Eastern Europe became the ground for a collision of the two that continues to this day.

---

[28] See: Gény François, *Méthode d interprétation et source en droit privé positif* (Paris 1899).

[29] The doctrine of 'piercing the corporate veil' or 'lifting the corporate veil' was first used in the case of Salomon v. A. Salomon & Co (UK 1897).

[30] *Реннекампф Н.К.* О современной обработке сравнительного правоведения // Сборник Российского исторического общества. 1869. № 3. [Rennekampf N.K. *O sovremennoy obrabotke sravnitel'nogo pravovedeniya // Sbornik Rossiyskogo istoricheskogo obshchestva*. 1869. No. 3. [N.K. Rennekampf, *On Modern Treatment of Comparative Law,* 1869(3) Proceedings of the Russian Historical Society 177]] (Zarya).

References

A History of Russian Thought 95-96 (Ed. by William Leatherbarrow and Derek Offord, Cambridge University Press 2010).

Bassin, M.A., Glebov, S.B., Laruelle, M. *Between Europe and Asia: The origins, theories, and legacies of Russian eurasianism* (University of Pittsburgh Press 2015).

Berdyaev Nikolai, *The Origin of Russian Communism* 87 (Robert MacLehose and Company Ltd The University Press) (London 1948).

Florovsky Georges, *Sobornost: the Catholicity of the Church*, The Church of God. An Anglo-Russian Symposium by Members of the Fellowship of St Alban and St Sergius 55 (ed. E.L. Mascall, (London 1934).

François Gény, *Méthode d interprétation et source en droit privé positif* (Paris 1899).

Hendley, K. Who are the legal nihilists in Russia? 28(2) Post-Soviet Affairs 149–186 (2012) <http://www.tandfonline.com/doi/abs/10.2747/1060-586X.28.2.149>.

McDaniel Tim, *The Agony of the Russian Idea* 72 (Princeton University Press 1996).

Piama P. Gaidenko, Philosophie russe et pensée européenne: le cas de Vladimir S. Soloviev, 2(222) Diogène (2008). DOI: 10.3917/dio.222.0032 <http://www.cairn.info/revue-diogene-2008-2-page-32.htm>.

Rozhenshield Gary, *Western Law, Russian Justice. Dostoevsky, the Jury Trail and the Low*. 7–8 (University Wisconsin Press, Madison 2005).

Shestov Lev, *Athens and Jerusalem* 386 (Ohio University Press ed., Athens 1966).

Sigel Fyodor, *Lectures on Slavonic Law* (London 1902).

Zweerde Evert Van Der, *La place de la philosophie russe dans l'histoire philosophique mondiale, 3*(223) Diogène (2008). DOI: 10.3917/dio.223.0115 < http://www.cairn.info/revue-diogene-2008-3-page-115.htm>.

Аверинцев С.С. Поэтика ранневизантийской литературы [Averintsev S.S. *Poetika rannevizantiyskoy literatury* [S.S. Averintsev, *Poetics of the Early Byzantine literature*]] (Coda, Moscow 1997).

Алексеев Н.Н. Русский народ и государство [Alekseyev N.N. *Russkiy narod i gosudarstvo* [N.N. Alekseyev, *The Russian People and the State*]] 293–295 (Moscow 1998).

Байниязов Р.С. Правосознание и российский правовой менталитет // Правоведение. 2000. № 2. С. 31–40 [Bayniyazov R.S. *Pravosoznaniye i rossiyskiy pravovoy mentalitet // Pravovedenie.* 2000. No. 2. S. 31–40 [R.S. Bayniyazov, *Legal Consciousness and the Russian Legal Mentality,* 2 Pravovedenie 31–40 (2000)]].

Бердяев Н.А. Философия свободы [Berdyaev N.A. *Filosofiya svobody* [N.A. Berdyaev, *Philosophy of Freedom*]] 313 (Folio, AST, Moscow 2004).

Вернадский Г.В. Монголы и Русь [Vernadsky G.V. *Mongoly i Rus* [G.V. Vernadsky, *The Mongols and the Rus*]] 251 (Lomonosov, Moscow 2015).

Доступное объяснение Мо-цзы [*Dosruonoye obysnenie Mo-chzu* [Understandable Explanation of Mozi]] 28 (Beijing 1956).

Евразийская хроника. Вып. VII [*Evraziyskaya khronika.* Vol. VII [7 *Eurasian Chronicle*]] 43 (Paris 1926–1928).

Acknowledgments

The article was prepared within the framework of the draft of the government's research assignment of the Ministry of Education and Science, Project 942.

Information about the authors

Vladimir Przhilenskiy (Moscow, Russia) – Professor of Kutafin Moscow State Law University (9 Sadovaya-Kudrinskaya Street, Moscow, 123286, Russia; email: vladprnow@mail.ru).

Maria Zakharova (Moscow, Russia) – Kutafin Moscow State Law University, Associate Member of the International Academy of Comparative Law (9 Sadovaya-Kudrinskaya Street, Moscow, 123286, Russia; email: avis_777@mail.ru).

CRITERIA FOR COPYRIGHTABILITY IN RUSSIAN COPYRIGHT DOCTRINE AND JUDICIAL PRACTICE

ANDREY KASHANIN,
National Research University – Higher School of Economics
(Moscow, Russia)

DOI:10.17589/2309-8678-2016-4-2-26-61

This article analyzes the current state of the debate on the minimum level of creativity needed for works to be copyrightable, including dominant principles in Russian jurisprudence and judicial practice, principal trends and contradictions that arise in the course of the application of various criteria for copyrightability.

An analysis of the judicial practice of recent years warrants the conclusion that standards of creativity as a criterion for copyrightability have dropped drastically. Today's standards are similar to those of the former American 'sweat of the brow' doctrine.

But, unlike foreign legal systems that set comparatively low standards of protectability, the Russian judiciary has not yet evolved mechanisms of compensation for risks of monopolization of public domain content.

First of all, there is no practice of granting exclusive rights to a work that is similar to an earlier work but has been created independently. Secondly, the practice of refusing protection to non-unique, standard, generally known, and generally available content is dying out. Thirdly, there is currently a trend for giving a large scope of protection to works of low authorship.

As a result, exclusive rights are granted to standard or generally accessible content – content that must belong to the public domain – which puts unjustified restrictions on the creative activities of other authors. Moreover, it makes their legal status unpredictable as it establishes a basis for unintended copyright violations being penalized. This amounts to a classical case of overprotection.

Key words: copyright, intellectual property; intellectual rights; exclusive rights; copyrightable work; copyrightability; works of low authorship; originality; creativity.

Recommended citation: Andrey Kashanin, *Criteria for Copyrightability in Russian Copyright Doctrine and Judicial Practice,* 4(2) Russian Law Journal 26-61 (2016).

Table of Contents

1. Introduction

In 2012, I analyzed the current debate on the minimum requirements of creativity for a work to be copyrightable.[1] In doing so, I attempted to systematize points made in legal literature and principles followed by various tiers of the judiciary. My reason for resuming such studies has been a series of significant institutional reforms since 2012.

One of them is the emergence of the Court for Intellectual Property Rights (Russian acronym: *SIP*),[2] which is authorized to make cassationary reviews of court rulings on intellectual property cases.

Another reform was the abolition of the Supreme Arbitrazh Court on August 6, 2014, with its powers handed over to the Supreme Court of the Russian Federation, which includes a division for economic disputes.

These reforms have seriously changed the mechanism for reviewing court rulings on intellectual property cases in which the litigants were entities or sole traders. So control of judicial practice, including control of its consistency, has been vested in new institutions with different sets of powers. Furthermore, given the polarization of opinions among legal scholars, the appointment of specific persons as judges may seriously affect judicial practice.

It is the purpose of this study to analyze changes that have taken place in the positions of scholars and courts on minimum standards of copyrightability between 2012 and 2016.

---

[1] *See* Andrey Kashanin, *Debates on Criteria of Copyrightability in Russia,* 2(1) Russian Law Journal 57–80 (2014). DOI: 10.17589/2309-8678-2014-2-1-57-80.

[2] The SIP opened on July 3, 2013.

2. Debates in Legal Literature in Recent Years

Since 2012, advocates and opponents of lowering the minimum standards of copyrightability have been engaged in heated debates.

Those holding the traditional point of view insisted that the key condition for the protectability of a work should be that it is original and objectively novel (meaning that it should either be different from a work created before or similar to an earlier work that was unknown to all third parties), or even that it should be unique.[3]

Some scholarly papers formulated an alternative position, arguing that independent creation (subjectively perceived novelty or the absence of deliberate replication) should be a sufficient condition of protectability.[4] Two solutions to the problem of parallel creation that this would give rise to were put forward. Some scholars believed that, in dealing with two works created independently from each other, copyright should only be granted to the work that was the first to be published (this would have been similar to the application of the novelty criterion and would have not required the use of the criterion for independent creative activity).[5] Others believed that exclusive rights should be given to each such work.[6] But each solution

---

[3] *Гаврилов Э.П.* Комментарий к Закону об авторском праве и смежных правах: Судеб. практика // комментарий к пп. 4–6 ст. 6 [*Gavrilov E.P.* Kommentariy k Zakonu ob avtorskom prave i smejnih pravah; Sudeb. praktika // kommentariy k pp. 4–6 st. 6 [Eduard P. Gavrilov, *Commentary on the Law on Copyright and Related Rights: Court Practice*, commentary on Art. 6, Cls. 4–6]] (Pravovaya Kul'tura 1996); *Гаврилов Э.П.* Оригинальность как критерий охраны объектов авторских прав [Gavrilov E.P. *Original`nost` kak kriteriy ohrani ob`ektov avtorskih prav* [Eduard P. Gavrilov, *Originality as a Criterion of Copyrightability*]] (2005); *Сергеев А.П.* Право интеллектуальной собственности в Российской Федерации [Sergeev A.P. *Pravo intellektual`noy sobstvennosti v Rossiyskoy Federatsii* [Alexander P. Sergeyev, *Intellectual Property Law in the Russian Federation*]] 111 (2d ed., Velbi 2003).

[4] *Чиженок М.В.* Критика объективной новизны // Патенты и лицензии. 2004. № 6. С. 41 [Chijenok M.V. *Kritika ob`ektivnoy novizni* // Patenti i litsenzii. 2004. № 6. S. 41 [Mark V. Chizhenok, *Criticism of Objective Novelty*, 6 Patents and Licences 41 (2004)]]; *Лабзин М.В.* Оригинальность объектов авторского права // Патенты и лицензии. 2007. № 7. С. 16; № 8. С. 20 [Labzin M.V. *Original`nost` ob`ektov avtorskogo prava* // Patenti i litsenzii. 2007. № 7. S. 16; № 8. S. 20 [Maxim V. Labzin, *Originality of Copyrightable Works*, 7 Patents and Licences 16 (2007); 8 Patents and Licences 20 (2007)]]; *Лабзин М.В.* Еще раз об оригинальности объектов авторского права // Патенты и лицензии. 2008. № 4. С. 35–42 [Labzin M.V. *Esche raz ob original`nosti ob`ektov avtorskogo prava* // Patenti i litsenzii. 2008. № 4. S. 35–42 [Maxim V. Labzin, *Once Again on the Originality of Copyrightable Works*, 4 Patents and Licences 35–42 (2008)]]; *Корнеев В.А.* Программы для ЭВМ, базы данных и топологии интегральных микросхем как объект интеллектуальных прав [Korneev V.A. *Programmi dlya EVM, bazi dannih i topologii integral`nih mikroshem kak ob`ekt intellektual`nih prav* [Vladimir A. Korneyev, *Computer Programs, Databases and Integrated Circuit Topologies as Copyrightable Works*]] 37 (Statut 2010); *Савельев А.И.* Лицензирование программного обеспечения в России. Законодательство и практика. Гл. 1, § 3 [Savel`ev A.I. *Litsenzirovanie programmnogo obespecheniya v Rossii. Zakonodatel`stvo i praktika*. Gl. 1, § 3 [Alexander I. Savelyev, *Licensing Software in Russia. Legislation and Practice.* Ch. 1, § 3]] (Infotropic Media 2012).

[5] *See* Labzin, *Id.*; *Хохлов В.А.* Авторское право: законодательство, теория, практика [Hohlov V.A. *Avtorskoe pravo: zakonodatel`stvo, teoriya, praktika* [Vadim A. Khokhlov, *Copyright: Legislation, Theory and Practice*]] 51 (Gorodets 2008).

[6] Chizhenok, *Id.*, at 41; Korneyev, *Id.*, at 37.

would have meant a sharp lowering of standards of creativity. It appears that these proposals for lowering protectability standards were reactions to the increasingly prominent economic aspect of intellectual property of insignificant creative value.

Though those debates were far from over in 2012, and the points made during them needed clarification, the scholarly community has lost interest in the copyrightability standards problem.

It appears that the main reason for this is that judicial practice drastically lowered creativity standards as a protectability condition (I look into this below).[7] In turn, this turned the attention of scholarly literature to the problem of overprotection and monopolization of standard, routine and trivial content that normally belongs in the public domain. It was argued increasingly often that this expansion of the scope of protection seriously limited opportunities for creating new works, sparked copyright conflicts over identical works that were created independently of each other, and resulted in the uncertain legal status of authors of such works since, in the absence of a registration system similar to the system of registration of patents, it would not have been very clear for third parties whether such works of low authorship were protectable.[8] Besides, there has been growing interest in the foreign experience of

---

[7] There are only a few works in existence that discuss protectability criteria. *See Калятин В.О., Павлова Е.А.* Комментарий к Постановлению Пленума Верховного Суда РФ № 5, Пленума ВАС РФ № 29 от 26.03.2009 «О некоторых вопросах, возникших в связи с введением в действие части четвертой Гражданского кодекса Российской Федерации» / *Калятин В.О., Мурзин Д.В., Новоселова Л.А. и др.* Научно-практический комментарий судебной практики в сфере защиты интеллектуальных прав. Комментарий к п. 28 [Kalyatin V.O., Pavlova E.A. *Kommentariy k Postanovleniyu Plenuma Verhovnogo Suda RF No. 5, Plenuma VAS RF No. 29 ot 26.03.2009 'O nekotorih voprosah, voznikshih v svyazi s vvedeniem v deystvie chasti chetvertoy Grajdanskogo kodeksa Rossiyskoy Federatsii'* / Kalyatin V.O., Murzin D.V., Novoselova L.A. i dr. *Nauchno-prakticheskiy kommentariy sudebnoy praktiki v sfere zaschiti intellektual`nih prav*. Kommentariy k p. 28 [Kalyatin V.O., Pavlova Ye.A., *Commentary on Resolution No. 5/29 of the Supreme Court Plenary Session of March 26, 2009, 'On Issues Arising in Connection with the Entry into Force of Part Four of the Civil Code of the Russian Federation'*, commentary on Clause 28. In: V.O. Kalyatin, D.V. Murzin, L.A. Novoselova et al., *Scholarly and Practical Commentaries on Judicial Practice in the Protection of Intellectual Property Rights*]] (Ludmila A. Novoselova, ed., Norma, 2014) (explanation of the position stated in Clause 28); *Семенюта Б.Е.* Графический пользовательский интерфейс программы для ЭВМ: проблемы правового регулирования // Вестник Арбитражного суда Московского округа. 2015. № 2. С. 42–58 [Semenyuta B.E. *Graficheskiy pol`zovatel`skiy interfeys programmi dlya EVM: problemi pravovogo regulirovaniya* // Vestnik Arbitrajnogo suda Moskovskogo okruga. 2015. № 2. S. 42–58 [Bogdan Ye. Semenyuta, *Graphic User Interface for a Computer Program: Legal Regulation Problems,* 2 Bulletin of the Arbitrazh Court of the Moscow District 42–58 (2015)]] (the author cautiously suggests that the application of the novelty, originality and uniqueness criteria may be essential in many cases).

[8] *See*, e.g., *Савельев А.И.* Актуальные вопросы судебной практики в сфере оборота программного обеспечения в России // Вестник Высшего Арбитражного Суда Российской Федерации. 2013. № 4. С. 4–36 [Savel`ev A.I. *Aktual`nie voprosi sudebnoy praktiki v sfere oborota programmnogo obespecheniya v Rossii* // Vestnik Visshego Arbitrajnogo Suda Rossiyskoy Federatsii. 2013. № 4. S. 4–36 [Alexander I. Savelyev, *Key Issues of Judicial Practice in Dealing with the Software Market in Russia,* 4 Bulletin of the Supreme Arbitrazh Court of the Russian Federation 4–36 (2013)]] ('In the majority of computer programs, the content of audiovisual recordings … is quite often determined by considerations of effectiveness and convenience of use. Their creative components are insignificant – creativity and pragmatism are difficult to combine. Granting copyright monopoly to such recordings may heavily

detecting public domain content in a work, especially in copyright systems with minimum standards of protectability where this is particularly important.[9]

3. Judicial Practice

In this article, I analyze judicial practice for the period from June 2012 to February 2016. The main criterion for selecting court rulings for this study was whether or not they contained a reference to Article 1259 of the Civil Code of Russia. Our selection also included rulings which made references to Civil Code Articles 1257 and 1258 and contained the terms 'originality', 'novelty' and 'uniqueness' as key words and used phrases that included any of these terms. The rulings I selected came from the Supreme Court, the former Supreme Arbitrazh Court, the SIP, district arbitrazh courts, the arbitrazh courts of appeal of the city and region of Moscow, and the Moscow City Court.

3.1. Criteria for Copyrightability

Standards of creativity for works in Russia depend, to a significant extent, on which criteria for protectability are used in judicial practice. The first standard of creativity is the application of the novelty, originality and uniqueness criteria, and the second standard of creativity is the use of the independent creation criterion. The latter is assumed to represent a milder requirement and, therefore, a lower standard of protectability, although, strictly speaking, this is not always the case.

impede the development of other computer programs, forcing other market participants to re-invent the wheel, and may obstruct the standardization of software products, something that clearly runs against the objectives of copyright protection and public interests'); Bogdan Ye. Semenyuta, *Id.*, at 42–58 ('it needs to be taken into consideration that, without a detailed explanation of the notion of creativity, there will be a major risk that protection is granted to routine solutions that have been achieved through the investment of significant resources, have been attained independently and, strictly speaking, are new but that another person has achieved the same result with a comparable, or even different, amount of resources and by independent work'). The paper suggests that any solutions aiming to enhance functionality should be unprotectable; *Гаврилов Э.П.* Интеллектуальные права в современной России: некоторые теоретические проблемы // Правовые исследования: новые подходы: сб. статей факультета права НИУ ВШЭ [Gavrilov E.P. *Intellektual`nie prava v sovremennoy Rossii: nekotorie teoreticheskie problemi* // Pravovie issledovaniya: novie podhodi: sb. statey fakul`teta prava NIU VSHE [Eduard P. Gavrilov, *Intellectual Property Rights in Modern Russia: Some Theoretical Problems*. In: Legal Studies: New Approaches, a collection of articles]] 317–336 (Kontrakt, National Research University – Higher School of Economics 2012) (the article deals with the coexistence of, and conflicts between, exclusive rights to identical works); *Гришаев С.П.* Плагиат: вопросы теории и практики [Grishaev S.P. *Plagiat: voprosi teorii i praktiki* [Sergey P. Grishayev, *Plagiarism: Issues of Theory and Practice*]] (2014) (the article examines cases of independent parallel creation, cases of use of the same factual basis by different authors, and issues of limitations of means of expression).

[9] *See* B. Ye. Semenyuta, *Id.*; *Цветков Д.* Копирайт vs. свобода слова? // ЭЖ-Юрист. 2015. № 3. С. 5 [Tsvetkov D. *Kopirayt vs. svoboda slova?* // EJ-Yurist. 2015. № 3. S. 5 [Dmitry Tsvetkov, *Copyright vs. Freedom of Speech?* 3 EZh-Yurist 5 (2015)]].

Analysis reveals that, before 2012, judicial practice had, on the one hand, been insensitive to abstract arguments put forward in the course of scholarly debates but had, on the other hand, been forced to react to specific practical problems and contradictions, been evolving balanced positions on key aspects of copyrightability criteria, on creativity standards, and on the distribution of the burden of proof.

Despite its contradictory character, judicial practice had mainly and increasingly tended to apply the 'pigeonholing' method, i.e., qualifying a work as protectable if it fitted into any of the copyrightable types of work listed in Clause 1 of Article 1259 of the Civil Code, and, furthermore, tended to use the presumed creativity requirements under Clause 28 of Resolution 5/29[10] and the thesis that, *per se,* the absence of novelty, uniqueness and/or originality cannot be proof that the work is not the product of creative effort and, therefore, unprotectable.

Effectively, this meant the use of the independent creation (non-copying) criterion.

However, analysis of judicial practice reveals that 'pigeonholing' was the usual way of dealing with works of high authorship. It was also used for works of insignificant creative value and small elements of works that were likely to be reproductions of public domain content, but relatively seldom[11], and usually when the defendant in a litigation did not dispute the creative character of such a work or element.

---

[10] Постановление Пленума Верховного суда Российской Федерации № 5, Пленума Высшего арбитражного суда Российской Федерации № 29 от 26 марта 2009 года «О некоторых вопросах, возникших в связи с введением в действие части четвертой Гражданского кодекса Российской Федерации» [Postanovlenie Plenuma Verhovnogo suda Rossijskoj Federacii No. 5, Plenuma Vysshego arbitrazhnogo suda Rossijskoj Federacii No. 29 ot 26 marta 2009 goda 'O nekotoryh voprosah, voznikshih v svjazi s vvedeniem v dejstvie chasti chetvertoj Grazhdanskogo kodeksa Rossijskoj Federacii' [Resolution No. 5 of the plenary session of March 26, 2009, of the Supreme Court, Resolution No. 29 of the plenary session of March 26, 2009, of the Highest Arbitration Court of the Russian Federation, entitled 'On Issues Arising in Connection with the Entry into Force of Part Four of the Civil Code of the Russian Federation']], was published in *Rossiiskaia Gazeta* [Ros. Gaz.] April 22, 2009, in *Byulleten' Verkhovnogo Suda Rossiyskoi Federatsii* [BVS] [Bulletin of the Supreme Court of the Russian Federation] 2009. No. 6, and in *Vestnik Vysshego Arbitrazhnogo Suda Rossiyskoi Federatsii* [Vestnik VAS RF] [Bulletin of the Supreme Arbitrazh Court of the Russian Federation] 2009. No. 6.

[11] *See* Постановление Федерального арбитражного суда Московского округа от 28 марта 2011 года № КГ-А40/2047-11-4 [Postanovlenie Federal'nogo arbitrazhnogo suda Moskovskogo okruga ot 28 marta 2011 goda № KG-A40/2047-11-4 [Resolution No. KG-A40/2047-11-4 of the Federal Court of Arbitrazh of the Moscow District (March 28, 2011)]]; Постановление Федерального арбитражного суда Московского округа от 31 октября 2011 года № А40-7067/11-110-57 [Postanovlenie Federal'nogo arbitrazhnogo suda Moskovskogo okruga ot 31 oktjabrja 2011 goda № A40-7067/11-110-57 [Resolution No. A40-7067/11-110-57 of the Federal Court of Arbitrazh of the Moscow District (Oct. 31, 2011)]]; Постановления Девятого арбитражного апелляционного суда от 14 ноября 2011 года № 09АП-27804/2011-ГК, № 09АП-27909/2011-ГК [Postanovlenija Devjatogo arbitrazhnogo apelljacionnogo suda ot 14 nojabrja 2011 goda № 09AP-27804/2011-GK, № 09AP-27909/2011-GK [Resolutions No. 09AP-27804/2011-GK and No. 09AP-27909/2011-GK of the 9 Arbitrazh Court of Appeal (Nov. 14, 2011)]]; Постановление Федерального арбитражного суда Уральского округа от 19 марта 2012 года № Ф09-1009/12 [Postanovlenie Federal'nogo arbitrazhnogo suda Ural'skogo okruga ot 19 marta 2012 goda № F09-1009/12 [Resolution No. F09-1009/12 of the Federal Court of Arbitrazh of the Ural District (March 19, 2012)].

In difficult disputes over works of low authorship, courts just as frequently departed from Clause 28 of Resolution 5/29 and dismissed claims. In some cases of this kind, courts based their dismissal on Clause 5, Subclause 4 of Clause 8 and Clause 7 of Article 1259 of the Civil Code.[12] In others, courts directly claimed that a work was neither novel nor original nor unique. These criteria were used by courts of various tiers, including the highest courts.

All this means that, in effect, Clause 28 of Resolution 5/29 failed to completely achieve its main objective of lowering copyrightability standards; courts simply saw this clause as authorization not to raise protectability issues in dealing with works of high authorship.

Originality, novelty and uniqueness remained the usual criteria in complicated disputes over works of low creative value. Our interpretation was that, in the absence of effective means of identifying public domain content, works of high authorship were the only category to which the criterion for independent creation could be applied safely. Works or elements of works of relatively low creative value are mainly based on public domain content. Unconditionally qualifying such works as copyrightable would have entailed risks of unjustified monopolization of public domain content, or 'overprotection'. Resources employed by courts to dismiss claims of protection by authors of such works included the use of high standards of copyrightability and making it the claimant's responsibility to prove that their work meets such standards.

To sum up, the intention to minimize standards of copyrightability came up against a lack of criteria in the Russian legal system for identifying public domain content.[13]

---

[12] Under Cl. 5 of Art. 1259 of the Russian Civil Code, ideas, concepts, principles, methods, processes, systems, solutions to technical, organizational and other problems, discoveries, facts and programming languages are not copyrightable. Under Subcl. 4 of Cl. 6 of Art. 1259, reports on events or facts whose sole purpose is information (e.g., reports on current political events, television program listings in magazines, or train timetables) are not copyrightable either. Under Cl. 7 of the same article, part of a work, its title and the description of a character in a literary work are copyrightable if they are accepted as the result of the author's creative work.

[13] The public domain is a realm that embraces anything that is part of the general historical or cultural experience of humankind, an element of objective reality or a feature of human relationships, is available from publicly available resources such as nature and universal ideas, and can be reproduced by and expected from any person of average capabilities. This includes, e.g., language, facts, discoveries, generally known or standard images and ideas, and means of artistic expression. For an interpretation of the public domain concept used in this study *see, e.g.,* Max Kummer, *Das Urheberrechtlich Schutzbare werk* 47–48 (Stampfli & Cie 1968); Heinrich Hubmann, *Das Recht des schopferischen Geistes* 17 ff. (De Gruyter 1954); idem., *Urheber- und Verlagsrecht* 31 ff. (6 ed., C.H. Beck 1987); Britta Stamer, *Der Schutz der Idee unter besonderer Berucksichtigung von Unterhaltungsproduktionen fur das Fernsehen* 38–39 (Nomos 2007); Eugen Ulmer, *Urheber- und Verlagsrecht* 275 ff. (3d ed., Springer 1980).

Identification criteria for public domain content must be based on concepts of excessive or insufficient protection, and such concepts must, in turn, be based on the economic analysis of foreseen effects of such protection. For instance, if the objective is to promote science and art, copyright monopoly must not cover technical means used by artists, factual or standard data, or the like.

Therefore, it was logical to forecast that either the originality, novelty and uniqueness criteria would continue to be applied to works of low authorship or criteria for identifying public domain content would be developed in jurisprudence and through practice.

I have to admit that our forecast has proven to be off the mark.

The activities of the SIP, which exercised the determining influence on the practice of arbitrazh (commercial) courts, aimed to minimize standards of creativity. This trend is comparable to principles of the sweat of the brow doctrine, which was previously used in the American copyright system.[14]

Detailed court rulings on copyrightability have become much less frequent. This may be due to the SIP consistently repealing rulings that declare works to be unprotectable due to their lack of novelty, originality or uniqueness. This would discourage litigants from making objections to the effect that the lack of novelty, originality and uniqueness makes a work unprotectable.

The dominant trend today is to use the 'pigeonholing' method. According to practically all SIP rulings and to more than 90 percent of rulings of lower courts, it is sufficient to rely on Clause 1 of Article 1295 of the Civil Code to determine whether a work is copyrightable. This applies both to works of high authorship, e.g., works of literature,[15] music,[16] paintings,

[14] Sweat of the brow is an American doctrine according to which a simple diligent effort of putting together protectable and unprotectable content is copyrightable even if it is purely mechanical and involves no making of decisions or choices. *See Jeweler's Circular Publishing Co. v. Keystone Publishing Co.,* 281 F. 83, 88 (2d Cir. 1922).

[15] *See*, e.g., Постановление Суда по интеллектуальным правам от 4 сентября 2015 года № С01-336/2014 по делу № А40-141009/2012 [Postanovlenie Suda po intellektual'nym pravam ot 4 sentjabrja 2015 goda № S01-336/2014 po delu № A40-141009/2012 [SIP Resolution No. S01-336/2014 of September 4, 2015, on Case No. A40-141009/2012]]; Постановление Суда по интеллектуальным правам от 24 июня 2015 года № С01-463/2015 по делу № А56-8331/2014 [Postanovlenie Suda po intellektual'nym pravam ot 24 ijunja 2015 goda № S01-463/2015 po delu № A56-8331/2014 [SIP Resolution No. S01-463/2015 of June 24, 2015, on Case No. A56-8331/2014]]; Постановление Суда по интеллектуальным правам от 18 июня 2015 года № С01-289/2015 по делу № А56-13679/2014 [Postanovlenie Suda po intellektual'nym pravam ot 24 ijunja 2015 goda № S01-463/2015 po delu № A56-13679/2014 [SIP Resolution No. S01-289/2015 of June 18, 2015, on Case No. A56-13679/2014]]; Определение Суда по интеллектуальным правам от 28 июля 2015 года № С01-725/2015 по делу № А40-150413/2014 [Opredelenie Suda po intellektual'nym pravam ot 28 ijulja 2015 goda № S01-725/2015 po delu № A40-150413/2014 [SIP Court Judgment No. S01-725/2015 of July 28, 2015, on Case No. A40-150413/2014]].

[16] *See*, e.g., Постановление Суда по интеллектуальным правам от 14 января 2016 года № С01-1060/2014 по делу № А19-18151/2014 [Postanovlenie Suda po intellektual'nym pravam ot 14 janvarja 2016 goda № S01-1060/2014 po delu № A19-18151/2014 [SIP Resolution No. S01-1060/2014 of January 14, 2016, on Case No. A19-18151/2014]]; Постановление Суда по интеллектуальным правам от 18 декабря 2015 года № С01-33/2013 по делу № А40-144511/2012 [Postanovlenie Suda po intellektual'nym pravam ot 18 dekabrja 2015 goda № S01-33/2013 po delu № A40-144511/2012 [SIP Resolution No. S01-33/2013 of December 18, 2015, on Case No. A40-144511/2012]]; Постановление Суда по интеллектуальным правам от 9 декабря 2015 года № С01-823/2015 по делу № А70-12794/2014 [Postanovlenie Suda po intellektual'nym pravam ot 9 dekabrja 2015 goda № S01-823/2015 po delu № A70-12794/2014 [SIP Resolution No. S01-823/2015 of December 9, 2015, on Case No. A70-12794/2014]]; Постановление Суда по интеллектуальным правам от 15 октября 2015 года № С01-758/2015 по делу № А76-2795/2015 [Postanovlenie Suda po intellektual'nym pravam ot

sculptures[17] and audiovisual works,[18] and to works of what is often considered low

15 oktjabrja 2015 goda № S01-758/2015 po delu № A76-2795/2015 [SIP Resolution No. S01-758/2015 of October 15, 2015, on Case No. A76-2795/2015]]; Постановление Суда по интеллектуальным правам от 23 сентября 2015 года № C01-793/2015 по делу № A25-1946/2014 [Postanovlenie Suda po intellektual'nym pravam ot 23 sentjabrja 2015 goda № S01-793/2015 po delu № A25-1946/2014 [SIP Resolution No. S01-793/2015 of September 23, 2015, on Case No. A25-1946/2014]];

Постановление Суда по интеллектуальным правам от 23 июля 2015 года № C01-310/2015 по делу A45-9472/2014 [Postanovlenie Suda po intellektual'nym pravam ot 23 ijulja 2015 goda № S01-310/2015 po delu A45-9472/2014 [SIP Resolution No. S01-310/2015 of July 23, 2015, on Case No. A45-9472/2014]]; Постановление Суда по интеллектуальным правам от 18 июня 2015 года № C01-145/2015 по делу № A45-8706/2014 [Postanovlenie Suda po intellektual'nym pravam ot 18 ijunja 2015 goda № S01-145/2015 po delu № A45-8706/2014 [SIP Resolution No. S01-145/2015 of June 18, 2015, on Case No. A45-8706/2014]].

[17] *See*, e.g., Постановление Суда по интеллектуальным правам от 25 декабря 2015 года № C01-1076/2015 по делу № A51-5983/2015 [Postanovlenie Suda po intellektual'nym pravam ot 25 dekabrja 2015 goda № S01-1076/2015 po delu № A51-5983/2015 [SIP Resolution No. S01-1076/2015 of December 25, 2015, on Case No. A51-5983/2015]]; Постановление Суда по интеллектуальным правам от 25 декабря 2015 года № C01-1060/2014 по делу A40-124255/2013 [Postanovlenie Suda po intellektual'nym pravam ot 25 dekabrja 2015 goda № S01-1060/2014 po delu A40-124255/2013 [SIP Resolution No. S01-1060/2014 of December 25, 2015, on Case No. A40-124255/2013]] (an image used for a logo); Постановление Суда по интеллектуальным правам от 15 декабря 2015 года № C01-985/2014 по делу № A76-1534/2014 [Postanovlenie Suda po intellektual'nym pravam ot 15 dekabrja 2015 goda № S01-985/2014 po delu № A76-1534/2014 [SIP Resolution No. S01-985/2014 of December 15, 2015, on Case No. A76-1534/2014]] (a picture of a literary character); Постановление Суда по интеллектуальным правам от 27 октября 2015 года № C01-860/2015 по делу № A40-181203/2014 [Postanovlenie Suda po intellektual'nym pravam ot 27 oktjabrja 2015 goda № S01-860/2015 po delu A40-181203/2014 [SIP Resolution No. S01-860/2015 of October 27, 2015, on Case No. A40-181203/2014]]; Постановление Суда по интеллектуальным правам от 16 марта 2015 года № C01-186/2014 по делу № A60-10411/2013 [Postanovlenie Suda po intellektual'nym pravam ot 16 marta 2015 goda № S01-186/2014 po delu № A60-10411/2013 [SIP Resolution No. S01-186/2014 of March 16, 2015, on Case No. A60-10411/2013]].

[18] *See*, e.g., Постановление Верховного суда РФ от 4 марта 2015 года № 9-АД15-2 [Postanovlenie Verhovnogo suda RF ot 4 marta 2015 goda № 9-AD15-2 [Russian Federation Supreme Court Resolution No. 9-AD15-2 of March 4, 2015]]; Постановление Суда по интеллектуальным правам от 3 февраля 2016 года № C01-1/2016 по делу № A40-72653/2015 [Postanovlenie Suda po intellektual'nym pravam ot 3 fevralja 2016 goda № S01-1/2016 po delu № A40-72653/2015 [SIP Resolution No. S01-1/2016 of February 3, 2016, on Case No. A40-72653/2015]]; Постановление Суда по интеллектуальным правам от 9 февраля 2016 года № C01-1425/2014 по делу № A70-3995/2014 [Postanovlenie suda po intellektual'nym pravam ot 9 fevralja 2016 goda № S01-1425/2014 po delu № A70-3995/2014 [SIP Resolution No. S01-1425/2014 of February 9, 2016, on Case No. A70-3995/2014]]; Постановление Суда по интеллектуальным правам от 4 февраля 2016 года № C01-1217/2015 по делу № A50-3186/2015 [Postanovlenie suda po intellektual'nym pravam ot 4 fevralja 2016 goda № S01-1217/2015 po delu № A50-3186/2015 [SIP Resolution No. S01-1217/2015 of February 4, 2016, on Case No. A50-3186/2015]]; Постановление Суда по интеллектуальным правам от 25 января 2016 года № C01-1038/2015 по делу № A17-6168/2014 [Postanovlenie suda po intellektual'nym pravam ot 25 janvarja 2016 goda № S01-1038/2015 po delu № A17-6168/2014 [SIP Resolution No. S01-1038/2015 of January 25, 2016, on Case No. A17-6168/2014]]; Постановление Суда по интеллектуальным правам от 14 января 2016 года № C01-128/2015 по делу № A76-3355/2014 [Postanovlenie Suda po intellektual'nym pravam ot 14 janvarja 2016 goda № S01-128/2015 po delu № A76-3355/2014 [SIP Resolution No. S01-128/2015 of January 14, 2016, on Case No. A76-3355/2014]]; Постановление Суда по интеллектуальным правам от 15 декабря 2015 года № C01-985/2014 по делу № A76-1534/2014 [Postanovlenie Suda po intellektual'nym pravam ot 15 dekabrja 2015 goda № S01-985/2014 po

authorship, such as computer programs,[19] photographs,[20] works of architecture, urban

delu № A76-1534/2014 [SIP Resolution No. S01-985/2014 of December 15, 2015, on Case No. A76-1534/2014]];

Постановление Суда по интеллектуальным правам от 25 ноября 2015 года № C01-988/2015 по делу № A45-9538/2015 [Postanovlenie Suda po intellektual'nym pravam ot 25 nojabrja 2015 goda № S01-988/2015 po delu № A45-9538/2015 [SIP Resolution No. S01-988/2015 of November 25, 2015, on Case No. A45-9538/2015]]; Постановление Суда по интеллектуальным правам от 29 октября 2015 года № C01-784/2015 по делу № A40-148107/2014 [Postanovlenie Suda po intellektual'nym pravam ot 29 oktjabrja 2015 goda № S01-784/2015 po delu № A40-148107/2014 [SIP Resolution No. S01-784/2015 of October 29, 2015, on Case No. A40-148107/2014]; Постановление Суда по интеллектуальным правам от 28 октября 2015 года C01-740/2015 по делу № A68-5875/2014 [Postanovlenie Suda po intellektual'nym pravam ot 28 oktjabrja 2015 goda S01-740/2015 po delu № A68-5875/2014 [SIP Resolution No. S01-740/2015 of October 28, 2015, on Case No. A68-5875/2014]].

[19] *See*, e.g., Определение Высшего арбитражного суда от 14 сентября 2012 года № ВАС-8654/12 по делу № A32-29617/2011 [Opredelenie Vysshego arbitrazhnogo suda ot 14 sentjabrja 2012 goda № VAS-8654/12 po delu № A32-29617/2011 [Supreme Arbitrazh Court Judgment of 14.09.2012 No. VAS-8654/12 on Case No. A32-29617/2011]; Постановление Суда по интеллектуальным правам от 2 февраля 2016 года № C01-1255/2015 по делу № A63-1829/2015 [Postanovlenie Suda po intellektual'nym pravam ot 2 fevralja 2016 goda № S01-1255/2015 po delu № A63-1829/2015 [SIP Resolution No. S01-1255/2015 of February 2, 2016, on Case No. A63-1829/2015]]; Постановление Суда по интеллектуальным правам от 1 февраля 2016 года № C01-1224/2015 по делу A60-14106/2015 [Postanovlenie Suda po intellektual'nym pravam ot 1 fevralja 2016 goda № S01-1224/2015 po delu A60-10362/2015 [SIP Resolution No. S01-1224/2015 of February 1, 2016, on Case No. A60-10362/2015]]; Постановление Суда по интеллектуальным правам от 20 января 2016 года № C01-1163/2015 по делу A60-10362/2015 [Postanovlenie Suda po intellektual'nym pravam ot 20 janvarja 2016 goda № S01-1163/2015 po delu A60-10362/2015 [SIP Resolution No. S01-1163/2015 of January 20, 2016, on Case No. A60-10362/2015]]; Постановление Суда по интеллектуальным правам от 15 января 2016 года № C01-1170/2015 по делу A76-7663/2015 [Postanovlenie Suda po intellektual'nym pravam ot 15 janvarja 2016 goda № S01-1170/2015 po delu A76-7663/2015 [SIP Resolution No. S01-1170/2015 of January 15, 2016, on Case No. A76-7663/2015]]; Постановление Суда по интеллектуальным правам от 22 декабря 2015 года № C01-1041/2015 по делу № A08-8467/2014 [Postanovlenie Suda po intellektual'nym pravam ot 22 dekabrja 2015 goda № S01-1041/2015 po delu № A08-8467/2014 [SIP Resolution No. S01-1041/2015 of December 22, 2015, on Case No. A08-8467/2014]]; Постановление Суда по интеллектуальным правам от 16 декабря 2015 года № C01-1040/2015 по делу № A32-36970/2014 [Postanovlenie Suda po intellektual'nym pravam ot 16 dekabrja 2015 goda № S01-1040/2015 po delu № A32-36970/2014 [SIP Resolution No. S01-1040/2015 of December 16, 2015, on Case No. A32-36970/2014]]; Постановление Суда по интеллектуальным правам от 16 ноября 2015 года № C01-955/2015 по делу № A42-6076/2014 [Postanovlenie Suda po intellektual'nym pravam ot 16 nojabrja 2015 goda № S01-955/2015 po delu № A42-6076/2014 [SIP Resolution No. S01-955/2015 of November 16, 2015, on Case No. A42-6076/2014]].

[20] *See*, e.g., Определение Высшего арбитражного суда от 10 сентября 2012 года № ВАС-9300/12 по делу № A60-39303/2010 [Opredelenie Vysshego arbitrazhnogo suda ot 10 sentjabrja 2012 goda № VAS-9300/12 po delu № A60-39303/2010 [Ruling No. VAS-9300/12 of the Supreme Court of Arbitrazh of the Russian Federation of September 10, 2012, on Case No. A60-39303/2010]]; Постановление Суда по интеллектуальным правам от 18 января 2016 года № C01-1286/2014 по делу № A40-169281/2013 [Postanovlenie Suda po intellektual'nym pravam ot 18 janvarja 2016 goda № S01-1286/2014 po delu № A40-169281/2013 [SIP Resolution No. S01-1286/2014 of January 18, 2016, on Case No. A40-169281/2013]]; Постановление Суда по интеллектуальным правам от 12 ноября 2015 года № C01-910/2015 по делу № A40-98130/2014 [Postanovlenie Suda po intellektual'nym pravam ot 12 nojabrja 2015 goda № S01-910/2015 po delu № A40-98130/2014 [SIP Resolution No. S01-910/2015 of November 12, 2015, on Case No. A40-98130/2014]]; Постановление Суда по интеллектуальным правам от 7 сентября 2015 года № C01-739/2015 по делу № A34-7366/2014 [Postanovlenie Suda po intellektual'nym pravam ot 7 sentjabrja 2015 goda № S01-739/2015 po

planning and landscaping,[21] websites,[22] maps,[23] and works of industrial design.[24]

However, it should be taken into consideration that litigants cannot provide new evidence of copyrightability in the cassationary court. There also are restrictions on the assessment of evidence and the processing of complaints. A court cannot initiate any protectability/unprotectability case – any such case must be based on a suit brought by someone disputing the protectability or unprotectability of the work.

Therefore, it can be deduced that the use of the 'pigeonholing' method *per se* may not necessarily be evidence of the lowering of protectability standards. It may imply that issue of protectability has not been the subject of judicial review and that the work in question was the source of protectability ligitations in lower courts.

However, this appears to be a misinterpretation. Analysis of Articles 286-288, Clause 1 of Article 281.11, Clauses 2 and 3 of Article 291.14, and Clauses 2 and 3 of Article 308.11 of the Arbitrazh Procedure Code and studies of judicial practice make clear that, on the whole, the abovementioned restrictions cannot prevent a cassationary court from initiating a copyrightability case because cassationary

delu № A34-7366/2014 [SIP Resolution No. S01-739/2015 of September 7, 2015, on Case No. A34-7366/2014]]; Постановление Суда по интеллектуальным правам от 15 июня 2015 года № C01-484/2015 по делу № A57-2146/2014 [Postanovlenie Suda po intellektual'nym pravam ot 15 ijunja 2015 goda № S01-484/2015 po delu № A57-2146/2014 [SIP Resolution No. S01-484/2015 of June 15, 2015, on Case No. A57-2146/2014]]; Постановление Суда по интеллектуальным правам от 26 мая 2015 года № C01-403/2015 по делу № A57-14087/2014 [Postanovlenie Suda po intellektual'nym pravam ot 26 maja 2015 goda № S01-403/2015 po delu № A57-14087/2014 [SIP Resolution No. S01-403/2015 of May 26, 2015, on Case No. A57-14087/2014]].

[21] *See*, e.g., Определение Высшего арбитражного суда от 6 августа 2012 года № ВАС-7697/12 по делу № A60-10618/2011 [Opredelenie Vysshego arbitrazhnogo suda ot 6 avgusta 2012 goda № VAS-7697/12 po delu № A60-10618/2011 [Ruling No. VAS-7697/12 of the Supreme Court of Arbitrazh of the Russian Federation of August 6, 2012, on Case No. A60-10618/2011]]; Постановление Суда по интеллектуальным правам от 18 декабря 2015 года № C01-383/2014 по делу № A60-10618/2011 [Postanovlenie Suda po intellektual'nym pravam ot 18 dekabrja 2015 goda № S01-383/2014 po delu № A60-10618/2011 [SIP Resolution No. S01-383/2014 of December 18, 2015, on Case No. A60-10618/2011]]; Постановление Суда по интеллектуальным правам от 14 августа 2015 года № C01-173/2013 по делу № A82-15456/2012 [Postanovlenie Suda po intellektual'nym pravam ot 14 avgusta 2015 goda № S01-173/2013 po delu № A82-15456/2012 [SIP Resolution No. S01-173/2013 of August 14, 2015, on Case No. A82-15456/2012]].

[22] *See*, e.g., Постановление Суда по интеллектуальным правам от 9 декабря 2015 года № C01-1000/2015 по делу № A40-52455/2015 [Postanovlenie Suda po intellektual'nym pravam ot 9 dekabrja 2015 goda № S01-1000/2015 po delu № A40-52455/2015 [SIP Resolution No. S01-1000/2015 of December 9, 2015, on Case No. A40-52455/2015]].

[23] *See*, e.g., Постановление Суда по интеллектуальным правам от 30 сентября 2015 года № C01-803/2015 по делу № A56-55409/2014 [Postanovlenie Suda po intellektual'nym pravam ot 30 sentjabrja 2015 goda № S01-803/2015 po delu № A56-55409/2014 [SIP Resolution No. S01-803/2015 of September 30, 2015, on Case No. A56-55409/2014]].

[24] *See*, e.g., Постановление Суда по интеллектуальным правам от 20 сентября 2014 года № C01-1128/2014 по делу № A40-13480/2014 [Postanovlenie Suda po intellektual'nym pravam ot 20 sentjabrja 2014 goda № S01-1128/2014 po delu № A40-13480/2014 [SIP Resolution No. S01-1128/2014 of November 20, 2014, on Case No. A40-13480/2014]].

courts are authorized to verify whether a lower court has correctly applied and interpreted substantive and other law in dealing with the same case.[25]

In cases where it is essential to depart from the practice of using the originality and novelty criteria, the SIP directly declares such criteria irrelevant.[26]

Protectability litigations in lower courts may, to some extent, provide the basis for interpreting the practice of the use of the 'pigeonholing' method; the fact that the copyrightability of an independently created (non-copied) work is disputed may *per se* be evidence of higher standards of protectability.

Analysis of SIP practice corroborates this. The issue of proving the protectability of works of high authorship, e.g., works of literature or music, or audiovisual works, and some works of low authorship, primarily computer programs, practically never arises.[27]

However, increasingly, SIP rulings on works of low authorship contain references to their authors trying to prove their copyrightability, e.g., references to the distribution of the burden of proof (see below) or to a lower court ruling declaring the work protectable, which implies that the opposite could have been proven.[28] The question is what criteria are used.

---

[25] Before the SIP was set up, district arbitrazh courts often issued copyrightability rulings.

[26] *See*, e.g., Постановление Суда по интеллектуальным правам от 18 января 2016 года № С01-1286/2014 по делу № А40-169281/2013 [Postanovlenie Suda po intellektual'nym pravam ot 18 janvarja 2016 goda № S01-1286/2014 po delu № A40-169281/2013 [SIP Resolution No. S01-1286/2014 of January 18, 2016, on Case No. A40-169281/2013]; Постановление Суда по интеллектуальным правам от 9 апреля 2014 года № С01-239/2014 по делу № А40-15537/2012 [Postanovlenie Suda po intellektual'nym pravam ot 9 aprelja 2014 goda № S01-239/2014 po delu № A40-15537/2012 [SIP Resolution No. S01-239/2014 of April 9, 2014, on Case No. A40-15537/2012]; Постановление Суда по интеллектуальным правам от 29 июля 2014 года № С01-658/2014 по делу № А12-30345/2013 [Postanovlenie Suda po intellektual'nym pravam ot 29 ijulja 2014 goda № S01-658/2014 po delu № A12-30345/2013 [SIP Resolution No. S01-658/2014 of July 29, 2014, on Case No. A12-30345/2013]].

[27] The reason for this is the presumed creative character of such works under Clause 28 of Resolution 5/29. See references to judicial practice in above footnotes on such works.

As regards computer programs, it is usually only piracy cases (i.e., unauthorized copying of a program in full, without processing it, and not the separate copying of any of its elements) that are taken to court. In one dispute over a deciphering key, the SIP simply ruled that such a key was part of a copyrightable program and was itself protectable until proven otherwise. *See* Постановление Суда по интеллектуальным правам № С01-675/2015 от 10 сентября 2015 года № А40-105604/2013 [Postanovlenie Suda po intellektual'nym pravam № S01-675/2015 ot 10 sentjabrja 2015 goda № A40-105604/2013 [SIP Resolution No. S01-675/2015 of September 10, 2015, on Case No. A40-105604/2013]].

[28] *See*, e.g., Постановление Суда по интеллектуальным правам от 21 сентября 2015 года № С01-557/2015 по делу А10-343/2014 [Postanovlenie Suda po intellektual'nym pravam ot 21 sentjabrja 2015 goda № S01-557/2015 po delu A10-343/2014 [SIP Resolution No. S01-557/2015 of September 21, 2015, on Case No. A10-343/2014]]; Постановление Суда по интеллектуальным правам от 24 сентября 2015 года № С01-669/2015 по делу № А60-7894/2014 [Postanovlenie Suda po intellektual'nym pravam ot 19 janvarja 2016 goda № S01-669/2015 po delu № A40-7894/2014 [SIP Resolution No. S01-669/2015 of September 14, 2015, on Case No. A60-7894/2014]] (architectural designs); Постановление Суда по интеллектуальным правам от 19 января 2016 года № С01-1109/2015 по делу № А40-156890/2013 [Postanovlenie Suda po intellektual'nym pravam ot 19 janvarja 2016 goda № S01-1109/2015 po delu № A40-156890/2013 [SIP Resolution No. S01-1109/2015 of January 19, 2016, on Case No. A40-

Therefore, in relation to works of high authorship – and works of low authorship as I demonstrate below – the use of the 'pigeonholing' method in the absence of further debates on copyrightability issues means the use of the criterion for independent creation (non-copying), i.e., the minimum creativity criterion.

Another dominant trend is the direct invoking of the *presumption of the creative character of a work* (and, consequently, its protectability) as established by Clause 28 of Resolution 5/29 and the rejection of the novelty, originality and uniqueness criteria as irrelevant.[29]

In view of the above, the issue of the basis on which the creativity presumption can be overridden is fundamental. In previous practice, such presumptions could have been overturned, either by invoking Clause 5, Subclause 4 of Clause 6 and Clause 7 of Article 1259 of the Civil Code, which list unprotectable types of work, or by ignoring Resolution 5/29, i.e., if a work was found to fail to meet the novelty, originality, and uniqueness criteria.[30]

156890/2013]]; Постановление Суда по интеллектуальным правам от 30 сентября 2015 года № С01-803/2015 по делу № А56-55409/2014 [Postanovlenie Suda po intellektual'nym pravam ot 30 sentjabrja 2015 goda № S01-803/2015 po delu № A56-55409/2014 [SIP Resolution No. S01-803/2015 of September 30, 2015, on No. A56-55409/2014]] (works of cartography); Постановление Суда по интеллектуальным правам от 15 июня 2015 года № С01-484/2015 по делу № А57-2146/2014 [Postanovlenie Suda po intellektual'nym pravam ot 15 ijunja 2015 goda № S01-484/2015 po delu № A57-2146/2014 [SIP Resolution No. S01-484/2015 of June 15, 2015, on Case No. A57-2146/2014]]; Постановление Суда по интеллектуальным правам от 18 января 2016 года № С01-1286/2014 по делу № А40-169281/2013 [Postanovlenie Suda po intellektual'nym pravam ot 18 janvarja 2016 goda № S01-1286/2014 po delu № A40-169281/2013 [SIP Resolution No. S01-1286/2014 of January 18, 2016, on Case No. A40-169281/2013]] (photographs).

[29] Обзор судебной практики по делам, связанным с разрешением споров о защите интеллектуальных прав. Пункт 3 (утвержден Президиумом Верховного Суда Российской Федерации 23 сентября 2015 года) [Obzor sudebnoj praktiki po delam, svjazannym s razresheniem sporov o zashhite intellektual'nyh prav. Punkt 3 (utverzhden Prezidiumom Verhovnogo Suda Rossijskoj Federacii 23 sentjabrja 2015 goda) [Clause 3 of *Review of Judicial Practice in Dealing with Disputes on the Protection of Intellectual Rights,* approved by the Presidium of the Supreme Court on September 23, 2015]].

See also, e.g., Постановление Суда по интеллектуальным правам от 18 января 2016 года № С01-1286/2014 по делу № А40-169281/2013 [Postanovlenie Suda po intellektual'nym pravam ot 18 janvarja 2016 goda № S01-1286/2014 po delu № A40-169281/2013 [SIP Resolution No. S01-1286/2014 of January 18, 2016 on Case No. A40-169281/2013]]; Постановление Суда по интеллектуальным правам от 9 апреля 2014 года № С01-239/2014 по делу № А40-15537/2012 [Postanovlenie Suda po intellektual'nym pravam ot 9 aprelja 2014 goda № S01-239/2014 po delu № A40-15537/2012 [SIP Resolution No. S01-239/2014 of April 9, 2014, on Case No. A40-15537/2012]]; Постановление Суда по интеллектуальным правам от 21 марта 2014 года № С01-506/2013 по делу № А56-27251/2013 [Postanovlenie Suda po intellektual'nym pravam ot 21 marta 2014 goda № S01-506/2013 po delu № A56-27251/2013 [SIP Resolution No. S01-506/2013 of March 21, 2014, on Case No. A56-27251/2013]]; Постановление Суда по интеллектуальным правам от 29 июля 2014 года № С01-658/2014 по делу № А12-30345/2013 [Postanovlenie Suda po intellektual'nym pravam ot 29 ijulja 2014 goda № S01-658/2014 po delu № A12-30345/2013 [SIP Resolution No. S01-658/2014 of July 29, 2014, on Case No. A12-30345/2013]]; Постановление Суда по интеллектуальным правам от 24 апреля 2015 года № С01-257/2015 по делу № А40-19843/2014 [Postanovlenie Suda po intellektual'nym pravam ot 24 aprelja 2015 goda № S01-257/2015 po delu № A40-19843/2014 [SIP Resolution No. S01-257/2015 of April 24, 2015 on Case No. A40-19843/2014]].

[30] *See*, e.g., Постановление Федерального арбитражного суда Московского округа от 27 марта 2012 года по делу № А40-133968/09-27-952 [Postanovlenie Federal'nogo arbitrazhnogo suda

This was usually the case with works of low authorship, whose protection would have carried the risk of monopolization of public domain content.

The SIP consistently follows Clause 28 of Resolution 5/29 in seeking to put an end to this practice and abandon the use of the *novelty, originality and uniqueness* criteria. The SIP does not only do this in relation to works of high authorship but also, and even more commonly, with works of insignificant creative value, including works that, according to one of the parties to a litigation, are neither novel nor original nor unique, e.g., photographs,[31] works of industrial design,[32] or architectural designs.[33] The SIP has no objection to attempts to prove that works of those types are non-creative but prohibits invoking the novelty, originality and uniqueness criteria for this purpose, though it does not explain in what way non-creativeness can be proven. This effectively makes it impossible for litigants and lower courts to contest the presumption that a work is creative.

The SIP's logic suggests that a creativity presumption can be overridden by proving that a work is not an independent creation, in other words, that it is a deliberate replication of another work, or by proving that it is uncopyrightable under Clause 5, Subclause 4 of Clause 6 and Clause 7 of Article 1259 of the Civil Code.

However, judicial practice is yet to develop effective principles for dealing with cases in which *independent parallel creation of a work* is possible in principle, i.e., there is no mechanism for determining whether independent parallel creation or unfair replication has taken place. Insufficient attention to the parallel creation issue is the cause of the contradictory nature of today's practice.

Logically, there should be several ways of dealing with such cases.

Moskovskogo okruga ot 27 marta 2012 goda po delu № A40-133968/09-27-952 [Resolution of March 27, 2012, of the Federal Arbitrazh Court of the Moscow District on Case No. A40-133968/09-27-952]], Постановление Девятого арбитражного апелляционного суда от 7 ноября 2011 № 09АП-27014/2011-ГК [Postanovlenie Devjatogo arbitrazhnogo apelljacionnogo suda ot 7 nojabrja 2011 № 09AP-27014/2011-GK [Resolution of the Ninth Arbitrazh Court of Appeal No. 09AP-27014/2011-GK of November 7, 2011]].

[31] Постановление Суда по интеллектуальным правам от 9 апреля 2014 года № С01-239/2014 по делу № А40-15537/2012 [Postanovlenie Suda po intellektual'nym pravam ot 9 aprelja 2014 goda № S01-239/2014 po delu № A40-15537/2012 [SIP Resolution No. S01-239/2014 of April 9, 2014, on Case No. A40-15537/2012]].

[32] *See*, e.g., Постановление Суда по интеллектуальным правам от 18 января 2016 года № С01-1286/2014 по делу № А40-169281/2013 [Postanovlenie Suda po intellektual'nym pravam ot 18 janvarja 2016 goda № S01-1286/2014 po delu № A40-169281/2013 [SIP Resolution No. S01-1286/2014 of January 18, 2016, on Case No. A40-169281/2013]], Постановление Суда по интеллектуальным правам от 1 августа 2014 года № С01-541/2014 по делу № А78-6109/2012 [Postanovlenie Suda po intellektual'nym pravam ot 1 avgusta 2014 goda № S01-541/2014 po delu № A78-6109/2012 [SIP Resolution No. S01-541/2014 of August 1, 2014, on Case No. A78-6109/2012]].

[33] Постановление Суда по интеллектуальным правам от 24 апреля 2014 года № С01-257/2015 по делу № А40-19843/2014 [Postanovlenie Suda po intellektual'nym pravam ot 24 aprelja 2014 goda № S01-257/2015 po delu № A40-19843/2014 [SIP Resolution No. S01-257/2015 of April 24, 2015, on Case No. A40-19843/2014]].

One way is to qualify a work that is similar to another but is the result of independent and parallel creation as non-unique and, therefore, uncopyrightable. This would mean the use of the uniqueness or originality criterion, and, consequently, relatively high standards of protectability. However, if standards are to be lowered and non-unique works can be qualified as copyrightable, it would seem logical to use one of the following two methods.

One of these is to recognize the rights of the first creator, which would mean the use of the novelty (non-replication) criterion.

The other is to grant rights to both creators if each work was created independently from the other. However, this would require the development of methods to distinguish independent parallel creation from mere copying.[34]

The parallel creation issue has almost never been raised in practice.[35]

Despite its drastic lowering of creativity criteria, the Russian law enforcement system effectively disregards the possibility of independent parallel creation of similar works. When two works are identical or similar (or when an element of one work is identical or similar to an element in another work), a court will practically always declare one of them a mere replication of the other and hence a violation of

---

[34] In legal systems that authorize the protection of parallel creation, various intermediary rules, some stricter than others, are used in practice. In Germany, for example, such works are granted protection in exceptional situations where the author is assumed to have been unaware, and could not have been expected to be aware, of the existence of the work he has replicated. In all other cases, replication is presumed to have been deliberate. *See* Thomas Dreier, Gernot Schulze, *Urheberrechtsgesetz Kommentar* § 2, Rn. 17 (C.H. Beck 2004). In the United States, special mechanisms have been developed through practice for verifying whether replication has been deliberate or not. *See* Melville Nimmer, David Nimmer, *Nimmer on Copyright,* § 13.03, LEXIS 10441 (2004). Christina Berking, *Die Unterscheidung von Form und Inhalt im Urheberrecht* 75 ff., 83–84 (Nomos 2002).

[35] There have been very rare instances of replication cases being taken up by courts, usually at the insistence of defendants. *See* Постановление Суда по интеллектуальным правам от 19 января 2016 года № С01-1109/2015 по делу № А40-156890/2013 [Postanovlenie Suda po intellektual'nym pravam ot 19 janvarja 2016 goda № S01-1109/2015 po delu № A40-156890/2013 [SIP Resolution No. S01-1109/2015 of January 19, 2016 on Case No. A40-156890/2013]]; Постановление Федерального арбитражного суда Волго-Вятского округа от 30 августа 2012 по делу № А11-7029/2011 [Postanovlenie Federal'nogo arbitrazhnogo suda Volgo-Vjatskogo okruga ot 30 avgusta 2012 po delu № A11-7029/2011 [Resolution of August 30, 2012, of the Federal Arbitrazh Court of the Volga-Vyatka District on Case No. A11-7029/2011]]; Постановление Федерального арбитражного суда Дальневосточного округа от 16 сентября 2011 № Ф03-4356/2011 по делу № А04-1179/2011 [Postanovlenie Federal'nogo arbitrazhnogo suda Dal'nevostochnogo okruga ot 16 sentjabrja 2011 № F03-4356/2011 po delu № A04-1179/2011 [Resolution of the Federal Arbitrazh Court of the Far Eastern District No. F03-4356/2011 of September 16, 2011, on Case No. A04-1179/2011]]; Постановление Девятого арбитражного апелляционного суда от 04 сентября 2015 № 09АП-14070/2015-ГК по делу № А40-5706/14 [Postanovlenie Devjatogo arbitrazhnogo apelljacionnogo suda ot 04 sentjabrja 2015 № 09AP-14070/2015-GK po delu № A40-5706/14 [Resolution of the Ninth Arbitrazh Court of Appeal No. 09AP-14070/2015-GK of September 3, 2015, on Case No. A40-5706/14]]; Определение Московского городского суда от 3 ноября 2015 года по делу № 4г/8-11086/2015 [Opredelenie Moskovskogo gorodskogo suda ot 3 nojabrja 2015 goda po delu № 4g/8-11086/2015 [Moscow City Court Judgment No. 4g/8-11086/2015 of November 3, 2015]].

exclusive rights.[36] There are very few exceptions – cases where two identical or similar works or elements are declared by court to be unprotectable due to their belonging to the public domain under Clause 5 and Subclause 4 of Clause 6 of Article 1259 of the Civil Code[37] (see below for more details).

This would suggest that courts do not yet use the independent creation (non-copying) criterion and interpret independent creative activity as creation of a new work.

However, this directly contradicts the above-cited thesis in Clause 28 of Resolution 5/29 that the non-novelty of a work cannot *per se* be proof that it is not the result of creative effort. The Russian judiciary avoids the use of the novelty criterion, and the SIP consistently repeals rulings based on it, and, in some cases, grants exclusive rights to a work or elements of it that were widely known before their publication under the claimant's name.[38] Such rigid application of Clause 28 effectively results in the granting of exclusive rights to content that was first published under the name of a specific person even if it is not new and was known before. However, it remains unclear how one can prove any such case to be a case of deliberate replication and contest the presumed creative nature of such content.

---

[36] *See*, e.g., Постановление Суда по интеллектуальным правам от 29 июля 2014 года № С01-658/2014 по делу № А12-30345/2013 [Postanovlenie Suda po intellektual'nym pravam ot 29 ijulja 2014 goda № S01-658/2014 po delu № A12-30345/2013 [SIP Resolution No. S01-658/2014 of July 29, 2014, on Case No. A12-30345/2013]]; Определение Московского городского суда от 3 ноября 2015 года по делу № 4г/8-11086/2015 [Opredelenie Moskovskogo gorodskogo suda ot 3 nojabrja 2015 goda po delu № 4g/8-11086/2015 [Moscow City Court Judgment No. 4g/8-11086/2015 of November 3, 2015]]; Постановление Суда по интеллектуальным правам от 18 декабря 2015 года № С01-383/2014 по делу № А60-10618/2011 [Postanovlenie Suda po intellektual'nym pravam ot 18 dekabrja 2015 goda № S01-383/2014 po delu № A60-10618/2011[SIP Resolution No. S01-383/2014 of December 18, 2015, on Case No. A60-10618/2011]].

[37] Постановление Федерального Арбитражного суда Дальневосточного округа от 16 сентября 2011 года № Ф03-4356/2011 по делу № А04-1179/2011 [Postanovlenie Federal'nogo Arbitrazhnogo suda Dal'nevostochnogo okruga ot 16 sentjabrja 2011 goda № F03-4356/2011 po delu № A04-1179/2011 [Resolution No. F03-4356/2011 of the Federal Court of Arbitrazh of the Far Eastern District of September 16, 2011, on Case No. A04-1179/2011]]; Постановление Девятого арбитражного апелляционного суда от 3 сентября 2015 года № 09АП-14070/2015-ГК по делу № А40-5706/14 [Postanovlenie Devjatogo arbitrazhnogo apelljacionnogo suda ot 3 sentjabrja 2015 goda № 09AP-14070/2015-GK po delu № A40-5706/14 [Resolution of the Ninth Arbitrazh Court of Appeal No. 09AP-14070/2015-GK of September 3, 2015, on Case No. A40-5706/14]]; Апелляционное определение Московского городского суда от 18 апреля 2014 года по делу № 33-12780 [Apelljacionnoe opredelenie Moskovskogo gorodskogo suda ot 18 aprelja 2014 goda po delu № 33-12780 [Moscow City Court judgment of April 18, 2014, on Appeal Case No. 33-12780]].

[38] *See* Постановление Суда по интеллектуальным правам от 29 июля 2014 года № С01-658/2014 по делу № А12-30345/2013 [Postanovlenie Suda po intellektual'nym pravam ot 29 ijulja 2014 goda № S01-658/2014 po delu № A12-30345/2013 [SIP Resolution No. S01-658/2014 of July 29, 2014, on Case No. A12-30345/2013]];

Постановление Суда по интеллектуальным правам от 18 декабря 2015 года № С01-383/2014 по делу № А60-10618/2011 [Postanovlenie Suda po intellektual'nym pravam ot 18 dekabrja 2015 goda № S01-383/2014 po delu № A60-10618/2011 [SIP Resolution No. S01-383/2014 of December 18, 2015, on Case No. A60-10618/2011]].

To sum up, analysis of SIP practice prompts the conclusion that this amounts to a model maximally close to the theory of presentation.[39] In other words, practically any content belonging to any of the protectable types ['of work'?] listed in Part 1 of Article 1259 of the Civil Code will be granted protection if it has first been published under the name of a specific author regardless of whether it has or has not been known before or whether use was made in it of any non-unique elements that would have been available for independent creation.

One can dispute the exclusive rights of such an author only by proving that they acquired such rights after someone else did. In such a case, the coincidence or similarity of content is a sufficient reason to accuse the defendant of violation of exclusive rights, e.g., of copying the content, where there is no legitimate possibility of parallel independent creation. It is now only possible to dismiss a claim of violation of exclusive rights in the very rare cases when a court finds that uncopyrightable content has been replicated (Clause 5 and Subclause 4 of Clause 6 and Clause 7 of Article 1259 of the Civil Code).

Saying that this is somewhat like the appropriation of unclaimed property is only a slight exaggeration – one may acquire copyright to practically any content by publishing it under one's own name regardless of whether it is the result of creative work and is novel, original or unique, or whether elements of it are in the public domain. Strictly speaking, it is a model that is not based on the independent creation criterion since parallel creation does not come into account at all. Nor can it be said that comprehensive use is made of the criterion for novelty and non-replication as the novelty criterion is in effect only applied when one claims rights to content to which someone else owns rights and is not applied to publicly accessible and replicable content (content that is *vorgegeben,* to use the German term).

With its low requirements of creativity, the American sweat of the brow doctrine is the system to which the SIP strategy is closest, except that non-acceptance of the possibility of parallel creation and the absence of a methodology for identifying public domain content make the SIP approach even more radical and a potential basis for the monopolization of public domain content because presenting such content as one's own creation is usually enough for the acquisition of exclusive rights to it.[40]

This amounts to a classical case of overprotection and the consequent monopolization of public domain content, and puts heavy restrictions on public resources for the creation of new content.

---

[39] On the theory of presentation, a doctrine that one should be granted exclusive rights to any object that one merely claims to be one's own, see, Max Kummer, *Id.,* at 75. Peter Girth, *Individualitat und Zufall im Urheberrecht*, 48 UFITA 25–26, 39–41 (1974). Hans-Heinrich Schmieder, *Geistige Schöpfung als Auswahl und Bekenntnis*, 52 UFITA 107–114 (1969).

[40] There exist SIP rulings that are directly based on the typical American copyright criterion that, to be protectable, a work needs to be non-borrowed content that is not a replication of something that had been publicly accessible before. *See* Постановление Суда по интеллектуальным правам от 14 мая 2015 года № С01-277/2015 по делу № А40-51226/2014 [Postanovlenie Suda po intellektual'nym pravam ot 14 maja 2015 goda № S01-277/2015 po delu № A40-51226/2014 [SIP Resolution No. S01-277/2015 of May 14, 2015, on Case No. A40-51226/2014]].

It is the general logic behind the model that is currently extensively applied by the SIP, the body whose conduct determines the practice of lower arbitrazh courts. Nevertheless, it would be incorrect to claim that no alternatives to this model are used. First of all, lower arbitrazh courts, which are forced to react to the problem of monopolization of public domain content, still issue rulings based on the originality, uniqueness and novelty criteria,[41] though less frequently than before. Besides, the SIP itself uses these criteria[42] on rare occasions, usually in a bid to prevent the monopolization of public domain content.

These criteria are also used by courts of general jurisdiction, which are outside the jurisdiction of the SIP.[43]

---

[41] *See*, e.g., Постановление Девятого арбитражного апелляционного суда от 23 сентября 2015 года № 09АП-14070/2015-ГК по делу № А08-1560/2014 [Postanovlenie Devjatogo arbitrazhnogo apelljacionnogo suda ot 23 sentjabrja 2015 goda № 09AP-14070/2015-GK po delu № A08-1560/2014 [Resolution No. 09AP-14070/2015-GK of the Nineteenth Arbitrazh Court of Appeal of September 23, 2015, on Case No. A08-1560/2014]] (a work of cartography; the resolution was repealed afterwards); Постановление Девятого арбитражного апелляционного суда от 3 сентября 2015 года № 09АП-14070/2015-ГК по делу № А40-5706/14 [Postanovlenie Devjatogo arbitrazhnogo apelljacionnogo suda ot 3 sentjabrja 2015 goda № 09AP-14070/2015-GK po delu № A40-5706/14 [Resolution of the Ninth Arbitrazh Court of Appeal of September 3, 2015, on Case No. A40-5706/14]] (jewelry design); and Постановление Девятого арбитражного апелляционного суда от 29 октября 2015 года № 09АП-41914/2015-ГК по делу № А40-70695/13 [Postanovlenie Devjatogo arbitrazhnogo apelljacionnogo suda ot 29 oktjabrja 2015 goda № 09AP-41914/2015-GK po delu № A40-70695/13 [Resolution No. 09AP-41914/2015-GK of the Ninth Arbitrazh Court of Appeal of October 29, 2015, on Case No. A40-70695/13]] (a literary character).

[42] *See*, e.g., Постановление Суда по интеллектуальным правам от 6 ноября 2013 года № С01-162/2013 по делу № А73-14263/2012 [Postanovlenie Suda po intellektual'nym pravam ot 6 nojabrja 2013 goda № S01-162/2013 po delu № A73-14263/2012 [SIP Resolution No. S01-162/2013 of November 6, 2013, on Case No. A73-14263/2012]] – 'to receive legal protection, a work [of literature – *A.K.*] must be creative, i.e., original (unique)'; Постановление Суда по интеллектуальным правам от 25 августа 2014 года № С01-543/2014 по делу № А12-18806/2013 [Postanovlenie Suda po intellektual'nym pravam ot 25 avgusta 2014 goda № S01-543/2014 po delu A12-18806/2013 [SIP Resolution No. S01-543/2014 of August 25, 2014, on Case No. A12-18806/2013] – 'the main criterion for distinguishing a creative work from a work of manufacturing or production is the uniqueness of its result' (a work of cartography);

Постановление Суда по интеллектуальным правам от 12 августа 2015 года № С01-632/2015 по делу № А56-55404/2014 [Postanovlenie Suda po intellektual'nym pravam ot 12 avgusta 2015 goda № S01-632/2015 po delu № A56-55404/2014 [SIP Resolution No. S01-632/2015 of August 12, 2015 on Case No. A56-55404/2014] (a work of cartography); Постановление Суда по интеллектуальным правам от 23 января 2015 года № С01-7/2014 по делу № А60-17048/2013 [Postanovlenie Suda po intellektual'nym pravam ot 23 janvarja 2015 goda № S01-7/2014 po delu № A60-17048/2013 [SIP Resolution No. C01-7/2014 of January 23, 2015, on Case No. A60-17048/2013]] – 'to receive legal protection, a work must be creative, i.e., original (unique)' (indices of changes to construction costs); Решение Суда по интеллектуальным правам от 29 августа 2014 года по делу № СИП-615/2014 [Reshenie Suda po intellektual'nym pravam ot 29 avgusta 2014 goda po delu № SIP-615/2014 [SIP Decision of August 29, 2014, on Case No. SIP-615/2014]] (invented title of a scholarly work).

[43] *See*, e.g., Определение Московского городского суда от 3 ноября 2015 года № 4г/8-11086/2015 [Opredelenie Moskovskogo gorodskogo suda ot 3 nojabrja 2015 goda № 4g/8-11086/2015 [Moscow City Court Judgment No. 4g/8-11086/2015 of November 3, 2015]]; Апелляционное определение Московского областного суда от 16 апреля 2014 года по делу № 33-6628/2014 [Apelljacionnoe opredelenie Moskovskogo oblastnogo suda ot 16 aprelja 2014 goda po delu № 33-6628/2014 [Appellate Judgment of the Moscow Regional Court of April 16, 2014, on Case No. 33-6628/2014]]; Кассационное определение Московского гордоского суда от 23 сентября 2013 года № 4г/2-9280/13 [Kassacionnoe opredelenie Moskovskogo gordoskogo suda ot 23 sentjabrja 2013 goda № 4g/2-9280/13 [Moscow City Court Cassationary Judgment No. 4g/2-9280/13 of September 23, 2013]].

Finally, there have been indications that the Supreme Court has recently begun to use higher standards of protectability than those used by the SIP.[44] However, one should not overestimate this trend as references to Clause 28 of Resolution 5/29 occur in the rulings of top-level courts more often.

3.2. Standards of Creativity for Individual Types of Work

There are comparatively few instances in which courts use specific detailed creativity criteria for specific types of work, and so a court usually has to base its conclusions on indirect data such as the character of a work and its possible inclusion of content belonging to the public domain.

Analysis of practice reveals the following trends.

First of all, the overall tendency to lower creativity standards as a result of the use of the abovementioned general criteria for protectability remains in place and is gaining momentum. The drastic lowering of copyrightability standards and the increasingly wide-scale rejection of suits based on allegations of use of non-original and non-novel content with references to Clause 28 of Resolution 5/29 eliminates any need for setting detailed standards of this kind. For this reason, rulings that directly try to establish minimal standards of copyrightability have become much less frequent.

Rulings of this kind are extremely rare and are usually motivated by a desire to avoid the monopolization of content belonging to the public domain. However, on the whole, they represent a contradictory and unsystematic practice.

Courts extremely rarely set special protectability requirements for works of high authorship, primarily *works of literature, music, painting and sculpture, and audiovisual works.* Normally, there is no need to prove that such works are creative. However, there are instances where higher protectability standards are used for such works.

---

[44] *See*, e.g., Обзор судебной практики по делам, связанным с разрешением споров о защите интеллектуальных прав. Секция 3, 9 (утвержден Президиумом Верховного Суда Российской Федерации 23 сентября 2015 года) [Obzor sudebnoj praktiki po delam, svjazannym s razresheniem sporov o zashhite intellektual'nyh prav. Cekcija 3, 9 (utverzhden Prezidiumom Verhovnogo Suda Rossijskoj Federacii 23 sentjabrja 2015 goda) [Sections 3 and 9 of *Review of the Judicial Practice for Dealing with Disputes over the Protection of Intellectual Rights,* approved by the Presidium of the Supreme Court on September 23, 2015]]; Определение Судебной коллегии по гражданским делам Верховного суда РФ от 23 июня 2015 года № 5-КГ15-58 [Opredelenie Sudebnoj kollegii po grazhdanskim delam Verhovnogo suda RF ot 23 ijunja 2015 goda № 5-KG15-58 [Supreme Court Judgment No. 5-KG15-58 of June 23, 2015 (Division for Civil Cases)]]; Определение Судебной коллегии по административным делам Верховного Суда РФ от 22 сентября 2014 года № 117-АПГ 14-2 [Opredelenie Sudebnoj kollegii po administrativnym delam Verhovnogo Suda RF ot 22 sentjabrja 2014 goda № 117-APG 14-2 [Supreme Court Judgment No. 117-APG 14-2 of September 22, 2014 (Division for Administrative Cases)]]; Определение Судебной коллегии по экономическим спорам Верховного Суда РФ от 11 июня 2015 года № 309-ЭС14-7875 по делу № А50-21004/2013 [Opredelenie Sudebnoj kollegii po jekonomicheskim sporam Verhovnogo Suda RF ot 11 ijunja 2015 goda № 309-ES14-7875 po delu № A50-21004/2013 [Supreme Court Judgment No. 309-ES14-7875 of June 11, 2015, on Case No. A50-21004/2013 (Division for Economic Disputes)]].

This usually happens if there is a significant non-creative aspect to such a work with a consequent risk of monopolization of public domain content. A literary work cannot be protected if it is just a media article with brief factual information, e.g., a description of a city.[45] One ruling stated that Subclause 4 of Clause 6 of Article 1259 of the Civil Code, which prohibits the protection of factual reports, only applies to what is essentially media information and, for that reason, is neither original nor unique, and not the result of creative effort. However, this rule does not extend to creative forms of presenting such information, including presenting it in the form of a compilation, e.g., a collection of indices of revised construction costs.[46] At the same time, a ruling on a similar dispute says that, as there exist numerous organizations that create similar content, the claimant should have proven that their content was original and unique as distinct from content produced by others. A claim that unique calculation methods had been used in compiling indices of revised construction costs was dismissed.[47]

In a new trend, lower standards of protectability are used for works of low authorship. It happens much less frequently that special requirements of creativity are set for such works, whose creation is based on considerations of functionality, on generally accepted standards of various kinds, on public domain content, or on other factors ruling out creativity. Works of this kind are usually *a priori* considered protectable, and no proof is required of their copyrightability. They are assumed to belong to some of the listed protectable types and presumed to be creative, and the novelty, uniqueness and originally criteria are considered to be irrelevant in dealing with them. There are very rare instances where courts examine suspected

---

[45] Постановление Суда по интеллектуальным правам от 24 апреля 2015 года № С01-305/2015 по делу № А46-10011/2014 [Postanovlenie Suda po intellektual'nym pravam ot 24 aprelja 2015 goda № S01-305/2015 po delu № A46-10011/2014 [SIP Resolution No. S01-305/2015 of April 24, 2015, on Case No. A46-10011/2014]].

[46] *See* Постановление Девятого арбитражного апелляционного суда от 1 августа 2014 года № 09АП-13978/2014-ГК, 09АП-27393/2014-ГК по делу № А40-96413/2012 [Postanovlenie Devjatogo arbitrazhnogo apelljacionnogo suda ot 1 avgusta 2014 goda № 09AP-13978/2014-GK, 09AP-27393/2014-GK po delu № A40-96413/2012 [Resolution of the Ninth Arbitrazh Court of Appeal No. 09AP-13978/2014-GK, 09AP-27393/2014-GK of August 1, 2014, on Case No A40-96413/2012]]. The SIP upheld this resolution by Постановление Суда по интеллектуальным правам от 25 ноября 2014 года № С01-1132/2014 [Postanovlenie Suda po intellektual'nym pravam ot 25 nojabrja 2014 goda № S01-1132/2014 [Resolution No. S01-1132/2014 of November 25, 2014]]. See also Постановление Девятого арбитражного апелляционного суда от 19 марта 2013 года № 09АП-5127/2013-ГК, 09АП-5128/2013-ГК по делу № А40-132543/11-26-1032 [Postanovlenie Devjatogo arbitrazhnogo apelljacionnogo suda ot 19 marta 2013 goda № 09AP-5127/2013-GK, 09AP-5128/2013-GK po delu № A40-132543/11-26-1032 [Resolution of the Ninth Arbitrazh Court of Appeal No. 09AP-5127/2013-GK, 09AP-5128/2013-GK of March 19, 2013, on Case No. A40-132543/11-26-1032]].

[47] Постановление Суда по интеллектуальным правам от 23 января 2015 года № С01-7/2014 по делу № А60-17048/2013 [Postanovlenie Suda po intellektual'nym pravam ot 23 janvarja 2015 goda № S01-7/2014 po delu № A60-17048/2013 [SIP Resolution No. S01-7/2014 of January 23, 2015, on Case No. A60-17048/2013]].

monopolization of public domain content – this happens if a defendant provides evidence of this.

As regards *works of design,* reproducing essential characteristics of such a work (e.g., a font design) is a violation of exclusive rights.[48]

Hence, the presence of differences is insufficient for a work to be considered an independent creation. On the other hand, use of standard fonts in a work of graphic design cannot be a reason to qualify such a work as non-creative.[49]

As I can see, protection is only granted to works of design if they possess distinctive characteristics. A conclusion on whether a disputed design is creative must be based on the examination of individual elements, their mutual arrangement, their distance from one another, etc., but not on the overall similarity or dissimilarity of this design to another. The stylistic similarity of two designs cannot *per se* be evidence that one of them is not creative.[50] Nor can the confusing similarity of designs be *per se* evidence of violation of exclusive rights.[51]

In disputes over *works of architecture, urban planning and landscaping,* functionality and general standards are factors that come into play much less frequently today. On the one hand, it is not a design documentation as a whole that is granted protection but the design itself (e.g., in an architectural project, the architectural design and the 'architectural part' of the documentation). Neither functional nor technological nor engineering solutions can be copyrightable *per se*.[52]

---

[48] *See*, e.g., Постановление Девятого арбитражного апелляционного суда от 8 сентября 2014 года № 09АП-32019/2014-ГК по делу № А40-20099/2014 [Postanovlenie Devjatogo arbitrazhnogo apelljacionnogo suda ot 8 sentjabrja 2014 goda № 09AP-32019/2014-GK po delu № A40-20099/2014 [Resolution of the Ninth Arbitrazh Court of Appeal No. 09AP-32019/2014-GK of September 8, 2014, on Case No. A40-20099/2014]], upheld by Постановление Суда по интеллектуальным правам от 12 декабря 2014 года № С01-1268/2014 [Postanovlenie Suda po intellektual'nym pravam ot 12 dekabrja 2014 goda № S01-1268/2014 [SIP Resolution No. S01-1268/2014 of December 12, 2014]].

[49] Ruling No. VAS-9457/13 of the Supreme Court of Arbitrazh of the Russian Federation of September 2, 2013, on case A40-92833/2011.

[50] Постановление Девятого арбитражного апелляционного суда от 3 сентября 2015 года № 09АП-14070/2015-ГК по делу № А40-5706/14 [Postanovlenie Devjatogo arbitrazhnogo apelljacionnogo suda ot 3 sentjabrja 2015 goda № 09AP-14070/2015-GK po delu № A40-5706/14 [Resolution of the Ninth Arbitrazh Court of Appeal No. 09AP-14070/2015-GK of September 3, 2015, on Case No. A40-5706/14]].

[51] *See*, e.g., Постановление Суда по интеллектуальным правам от 1 июля 2015 года № С01-468/2015 по делу № А76-2656/2014 [Postanovlenie Suda po intellektual'nym pravam ot 1 ijulja 2015 goda № S01-468/2015 po delu № A76-2656/2014 [SIP Resolution No. S01-468/2015 of July 1, 2015, on Case No. A76-2656/2014]] (website designs) and Постановление Суда по интеллектуальным правам от 18 мая 2015 года № С01-265/2015 по делу № А76-12136/2014 [Postanovlenie Suda po intellektual'nym pravam ot 18 maja 2015 goda № S01-265/2015 po delu № A76-12136/2014 [SIP Resolution No. S01-265/2015 of May 18, 2015, on Case No. A76-12136/2014]] (furniture design).

[52] Постановление Суда по интеллектуальным правам от 22 июля 2014 года № С01-661/2014 по делу № А40-97747/2012 [Postanovlenie Suda po intellektual'nym pravam ot 22 ijulja 2014 goda № S01-661/2014 po delu № A40-97747/2012 [SIP Resolution No. S01-661/2014 of July 22, 2014, on Case No. A40-97747/2012]].

In a dispute over an architectural design, the architectural solution underlying a disputed design must be compared with the solution underlying the earlier design in order to detect possible unauthorized borrowing, regardless of the character of the existing or planned physical embodiment of either solution.[53]

However, architectural solutions are only required to meet comparatively low standards in order for them to be protectable. Coincidences in the 'architectural parts' of documentation on two construction projects are sufficient to qualify one of the architectural designs as a deliberate replication of the other and a violation of exclusive rights. Differences and possibilities of parallel creation are not taken into account.[54] In one case, the defendant claimed that they had had no access to the architectural solution that was partially replicated by their own solution and that it was non-unique solutions that coincided. But the court neither verified those claims nor checked whether the coinciding solutions were public domain content (an architectural solution is essentially an idea). This means that a disputable work that is likely to have an insignificant creative aspect receives quite extensive protection with consequent risks of monopolization of public domain content.[55]

Another trend that remains is that of setting minimal standards of copyrightability for *works of cartography*.[56] Until now, the SIP has denied protection to maps that stated facts purely and simply. Only maps that are stylized depictions and are products of creative effort are copyrightable. Therefore, the fact that two maps record the same factual data does not represent a violation of exclusive rights.[57] Maps based purely on geodetic data are considered the results of technical work and are not copyrightable.[58] However, in a recent judgment, the Supreme Court said that

---

53 *Id*.

54 Постановление Суда по интеллектуальным правам от 18 декабря 2015 года № С01-383/2014 по делу № А60-10618/2011 [Postanovlenie Suda po intellektual'nym pravam ot 18 dekabrja 2015 goda № S01-383/2014 po delu № A60-10618/2011 [SIP Resolution No. S01-383/2014 of December 18, 2015, on Case No. A60-10618/2011]].

55 On the other hand, in some cases lower courts set relatively high creativity standards for architectural works. See, e.g., Апелляционное определение Московского областного суда от 16 апреля 2014 года по делу № 33-6628/2014 [Apelljacionnoe opredelenie Moskovskogo oblastnogo suda ot 16 aprelja 2014 goda po delu № 33-6628/2014 [Moscow Regional Court's Appellate Judgment of April 16, 2014 on Case No. 33-6628/2014]].

56 *See*, e.g., Постановление Суда по интеллектуальным правам от 30 сентября 2015 года № С01-803/2015 по делу № А56-55409/2014 [Postanovlenie Suda po intellektual'nym pravam ot 30 sentjabrja 2015 goda № S01-803/2015 po delu № A56-55409/2014 [SIP Resolution No. S01-803/2015 of September 30, 2015, on Case No. A56-55409/2014]].

57 Постановление Суда по интеллектуальным правам от 12 августа 2015 года № С01-632/2015 по делу № А56-55404/2014 [Postanovlenie Suda po intellektual'nym pravam ot 12 avgusta 2015 goda № S01-632/2015 po delu № A56-55404/2014]].

58 Постановление Суда по интеллектуальным правам от 25 августа 2014 года № С01-543/2014 по делу А12-18806/2013 [Postanovlenie Suda po intellektual'nym pravam ot 25 avgusta 2014 goda № S01-543/2014 po delu № A12-18806/2013 [SIP Resolution No. S01-543/2014 of August 25, 2014, on Case No. A12-18806/2013]].

geodetic and cartographic activities may involve both technical work and scientific research, i.e., creative effort. This means that the coordinates systems of the State Geodetic Network and maps based on them may be copyrightable.[59] This represents a drastic lowering of creativity standards for cartographic content.

Creativity standards have also been lowered in relation to *photographs,* with neither the *vorgegebenheit* ('pre-givenness') factor nor the possibility of independent parallel creation being taken into account. It is the dominant principle that any photograph or video recording is creative work, that the author of a photograph or video recording is to automatically and unconditionally acquire copyright to it regardless of its esthetic value, unless the exclusive rights to it are challenged successfully.

The following operations represent a photographer's creative work: choice of exposure; the spatial positioning of the person or object to be photographed; the photographer's own spatial positioning; the choice of lighting and/or adjustment of the photographer or object of photography to available lighting; the choice of the light filter for the camera lens; setting the shutter speed; aperture control; setting the definition level; film development (for film cameras); and photoshopping (for digital cameras).[60]

3.3. Factors Ruling Out the Creative Character of a Work. Public Domain Content

With the significant lowering of creativity standards and consequent risks of monopolization of public domain content and overprotection, one would have expected that a wider range of works would be denied protection and that a more

[59] Определение Верховного Суда РФ от 8 апреля 2015 года № 306-ЭС14-5432 по делу № А12-18806/2013 [Opredelenie Verhovnogo Suda RF ot 8 aprelja 2015 goda № 306-ES14-5432 po delu № A12-18806/2013 [Supreme Court Judgment No. 306-ES14-5432 of April 8, 2015, on Case No. A12-18806/2013]]; *see* also Обзор судебной практики по делам, связанным с разрешением споров о защите интеллектуальных прав. Секция 60 (утвержден Президиумом Верховного суда Российской Федерации 23.09.2015) [Obzor sudebnoj praktiki po delam, svjazannym s razresheniem sporov o zashhite intellektual'nyh prav. Sektsija 60 (utv. Prezidiumom Verhovnogo Suda RF 23.09.2015) [Section 60 of *Review of Judicial Practice in Dealing with Disputes on the Protection of Intellectual Rights,* approved by the Presidium of the Supreme Court on September 23, 2015]].The subsequent practice of the SIP has complied with this judgment of the Supreme Court (*see* Постановление Суда по интеллектуальным правам от 9 декабря 2015 года № С01-1034/2015 по делу № А08-1560/2014 [Postanovlenie Suda po intellektual'nym pravam ot 9 dekabrja 2015 goda № S01-1034/2015 po delu № A08-1560/2014 [SIP Resolution No. S01-1034/2015 of December 9, 2015, on Case No. A08-1560/2014]]).

[60] Постановление Суда по интеллектуальным правам от 21 марта 2014 года № С01-506/2013 по делу № А56-27251/2013 [Postanovlenie Suda po intellektual'nym prvam ot 21 marta 2014 goda № S01-506/2013 po delu № A56-27251/2013 [SIP Resolution No. S01-506/2013 of March 21, 2014, on Case No. A56-27251/2013]]; Апелляционное определение Московского городского суда от 26 июня 2014 года по делу № 33-23351 [Apelljacionnoe opredelenie Moskovskogo gorodskogo suda ot 26 ijunja 2014 goda po delu № 33-23351 [Moscow City Court judgment of June 26, 2014, on Appeal Case No. 33-23351]].

sophisticated methodology would be developed to detect public domain content in intellectual property.[61]

However, neither has happened. In many cases, the rigid application of the creativity presumption under Clause 28 of Resolution 5/29 and the thesis of irrelevance of the novelty, uniqueness and originality criteria leave no room for claims that public domain content has been used.[62]

One outcome of this practice is the significant reduction in the number of rulings that deny protection to a work for the above reasons, that deal with factors excluding the creative character of a work, and that are attempts to develop protection to a level where there is an optimum balance between monopolized intellectual property and public domain content and there remain guarantees of sufficient resources for third parties to create new works.

Another effect is that the range of content identifiable as belonging to the public domain has narrowed as a result of a methodological revision. For instance, the SIP gives a narrow interpretation of Subclause 4 of Clause 6 of Article 1259 of the Civil Code by arguing that it only applies to media reports and does not apply to possible creative characteristics of such reports.[63]

Courts argue that the reasons for content to be qualified as non-creative include the informational character of a text;[64] the possibility of qualifying identical elements in two works as parts of their subject matter[65] or as methods, ideas or effects of actions

---

[61] In the past, in denying protection to works, courts have either cited the thesis in Clause 5 of Article 1259 of the Civil Code that expression of general ideas in a work is uncopyrightable or qualified a work or an element of it as a simple record of events or facts and hence unprotectable under Subclause 4 of Clause 6 of Article 1259, or simply cited what was assumed to be evidence of the non-creative character of a work.

[62] *See,* e.g., Постановление Суда по интеллектуальным правам от 18 декабря 2015 года № С01-383/2014 по делу № А60-10618/2011 [Postanovlenie Suda po intellektual'nym pravam ot 18 dekabrja 2015 goda № S01-383/2014 po delu № A60-10618/2011 [SIP Resolution No. S01-383/2014 of December 18, 2015, on Case No. A60-10618/2011]]; Постановление Суда по интеллектуальным правам от 24 апреля 2015 года № С01-257/2015 по делу № А40-19843/2014 [Postanovlenie Suda po intellektual'nym pravam ot 24 aprelja 2015 goda № S01-257/2015 po delu № A40-19843/2014 [SIP Resolution No. S01-257/2015 of April 24, 2015, on Case No. A40-19843/2014]]; Постановление Суда по интеллектуальным правам от 24 апреля 2015 года № С01-658/2014 по делу № А12-30345/2013 [Postanovlenie Suda po intellektual'nym pravam ot 24 aprelja 2015 goda № S01-658/2014 po delu № A12-30345/2013 [SIP Resolution No. S01-658/2014 of July 29, 2014, on Case No. A12-30345/2013]].

[63] Постановление Суда по интеллектуальным правам от 25 ноября 2014 года № С01-1132/2014 по делу № А40-96413/2012 [Postanovlenie Suda po intellektual'nym pravam ot 25 nojabrja 2014 goda № S01-1132/2014 po delu № A40-96413/2012 [SIP Resolution No. S01-1132/2014 of November 25, 2014, on Case A40-96413/2012]].

[64] Постановление Федерального арбитражного суда Московского округа от 10 сентября 2012 по делу № А40-83853/11-51-730 [Postanovlenie Federal'nogo arbitrazhnogo suda Moskovskogo okruga ot 10 sentjabrja 2012 po delu № A40-83853/11-51-73 [Resolution of the Federal Court of Arbitrazh of the Moscow District of September 10, 2012, on Case A40-83853/11-51-730]].

[65] Апелляционное определение Московского городского суда от 18 апреля 2014 года по делу № 33-12780 [Apelljacionnoe opredelenie Moskovskogo gorodskogo suda ot 18 aprelja 2014 goda po delu № 33-12780 [The Moscow City Court judgment of April 18, 2014, on Appeal Case No. 33-12780]].

that were needed for the creation of a work;[66] the general availability of a work;[67] the existence of identical works created by a significant number of persons;[68] use of universally known facts as the basis for a work;[69] the purely functional or technical character of content; the use of a strict algorithm based on statutory standards for the creation of a work;[70] and the use of techniques that are normally used in creating any work of decorative or applied art.[71]

This is not the full list. Court rulings citing such factors tend to be extremely casuistic and the judgments they contain cannot always be used in similar disputes. If any content was widely known[72] and popular[73] before its publication under the claimant's name, it cannot be refused protection for that reason alone.

There is also the problem of indirect monopolization of public domain content, i.e., situations where some specific content may take only one standard form or a limited number of standard forms, and so protecting such content, which may have been created independently and may even be novel, would limit public

---

66 Постановление Суда по интеллектуальным правам от 8 мая 2015 года № С01-320/2015 по делу № А40-84902/2014 [Postanovlenie Suda po intellektual'nym pravam ot 8 maja 2015 goda № S01-320/2015 po delu № A40-84902/2014 [SIP Resolution No. S01-320/2015 of May 8, 2015, on Case No. A40-84902/2014]].

67 Решение Верховного суда РФ от 23 июня 2015 года № 5-КГ15-58 [Reshenie Verhovnogo suda RF ot 23 ijunja 2015 goda № 5-KG15-58 [Supreme Court Judgment No. 5-KG15-58 of June 23, 2015]].

68 Постановление Суда по интеллектуальным правам от 23 января 2015 года № С01-7/2014 по делу № А60-17048/2013 [Postanovlenie Suda po intellektual'nym pravam ot 23 janvarja 2015 goda № S01-7/2014 po delu № A60-17048/2013 [SIP Resolution No. S01-7/2014 of January 23, 2015, on Case No. A60-17048/2013]].

69 Постановление Суда по интеллектуальным правам от 12 августа 2015 года № С01-632/2015 по делу № А56-55404/2014 [Postanovlenie Suda po intellektual'nym pravam ot 12 avgusta 2015 goda № S01-632/2015 po delu № A56-55404/2014 [SIP Resolution No. S01-632/2015 of August 12, 2015 on Case No. A56-55404/2014]].

70 Постановление Суда по интеллектуальным правам от 22 июля 2014 года № С01-661/2014 по делу № А40-97747/2012 [Postanovlenie Suda po intellektual'nym pravam ot 22 ijulja 2014 goda № S01-661/2014 po delu № A40-97747/2012 [SIP Resolution No. S01-661/2014 of July 22, 2014, on Case No. A40-97747/2012]].

71 Постановление Девятого арбитражного апелляционного суда от 3 сентября 2015 года № 09АП-14070/2015-ГК по делу № А40-5706/14 [Postanovlenie Devjatogo arbitrazhnogo apelljacionnogo suda ot 3 sentjabrja 2015 goda № 09AP-14070/2015-GK po dely A40-5706/14 [Resolution of the Ninth Arbitrazh Court of Appeal No. 09AP-14070/2015-GK of September 3, 2015, on Case No. A40-5706/14]].

72 Постановление Суда по интеллектуальным правам от 29 июля 2014 года № С01-658/2014 по делу № А12-30345/2013 [Postanovlenie Suda po intellektual'nym pravam ot 29 ijulja 2014 goda № S01-658/2014 po delu № A12-30345/2013 [SIP Resolution No. S01-658/2014 of July 29, 2014, on Case No. A12-30345/2013]].

73 Определение Верховного Суда РФ от 9 сентября 2014 года № 30-АПГ14-6 [Opredelenie Verhovnogo Suda RF ot 9 sentjabrja 2014 goda № 30-APG14-6 [Supreme Court Judgment No. 30-APG14-6 of September 9, 2014]].

opportunities to make use of it.[74] This problem is still not yet clearly formulated in Russian judicial practice.

To sum up, the methodology for determining whether particular content belongs to the public domain is thin on the ground, and courts do not have any hard-and-fast guidelines for detecting factors ruling out the creative character of a work. I believe that this, on top of the exclusion of the possibility of parallel creation, often results in overprotection in the form of granting exclusive rights to standard or generally accessible, non-creative content, which, in turn, puts unjustified restrictions on genuinely creative activities. Moreover, it makes the legal status of genuinely creative authors unpredictable as it lays the basis for unintended copyright violations with consequent penalties.

3.4. Protection of Minor Works of Art and Literature and of Parts of Works. Scopes of Protection

The protection of minor works of art and literature and of parts of works such as the title of a novel or individual phrases acquires fundamental importance because, on top of the general lowering of creativity criteria, the exclusion of non-creative elements such as art techniques, individual words or set phrases from protectable categories makes it possible to avoid the monopolization of public domain content. A similar problem may arise in disputes over allegedly borrowed content if there are differences between two works and it is alleged that one of them, or part of it, is content that has been borrowed and revised.

In analyzing earlier Russian practice, I pointed out that, regardless of whether the author of such allegedly borrowed content was able to prove that they had created that content independently, courts would often deny it protection, arguing that the claimant had failed to prove that the content was the result of their independent creative effort and, therefore, met the novelty, originality or uniqueness criteria. This setting of a relatively high standard of protectability could have prevented the monopolization of public domain content.

The practice of recent years cannot be called either uncontradictory or consistent. Nevertheless, its rigid and unselective lowering of creativity criteria on top of inadequate methodology for detecting public domain content has brought two trends into being. One of them is the lowering of the protectability standards for minor works of art and literature or parts of such works, with no account taken of their possible originality, novelty or uniqueness or, alternatively, of their possible derivative character. The other is a tendency to monopolize generally accessible content, including ideas expressed in a work. This has resulted in works of low

---

[74] In the United States, the chief means of averting such risks is 'merger doctrine' (see *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9 Cir. 1971); Melville Nimmer, David Nimmer, *Id.,* § 13.03 [B] [3]. In Germany, the method is the above-described doctrine on the range of an author's resources to create an original work (see Christina Berking, *Id*., at 75).

authorship receiving unjustifiably large scopes of protection, so that a court will quite often find that mere coincidence or similarity between two works represents a violation of copyright and will not even attempt to find out whether the work qualified as an unauthorized replication has involved any independent creative effort or whether the matching or similar content belongs to the public domain.

As regards creativity standards for parts of works, courts of general jurisdiction have normally been more demanding than arbitrazh courts. On the one hand, *titles of works of literature* and *individual phrases* that may be used independently are considered creative and original, and hence copyrightable.[75] *Separate words* are not considered copyrightable.[76]

On the other hand, the SIP qualifies titles of literary works as protectable if they cannot be qualified as either borrowed content or publicly accessible content or deliberate replications.[77]

Special, comparatively high standards are set for *characters in works of art and literature.* Copyright disputes over characters are some of the SIP's most frequent cases. Until recently, minimal creativity standards had been set for characters – they were usually granted protection under Clause 7 of Article 1259 of the Civil Code. However, the Supreme Court said in a judgment that a claim for the protection of a character as an element of a work must be based on proof that such a character is an independent result of intellectual effort. For instance, protection may be given to the hero of a novel that possesses a set of characteristics distinguishing him or her from the other characters in it and making him or her original and recognizable.[78] Nevertheless, there is no record of lower courts checking characters for such characteristics.[79]

---

[75] *See* Определение Верховного суда РФ от 23 июня 2015 года № 5-КГ15-58 [Opredelenie Verhovnogo suda ot 23 ijunja 2015 goda № 5-KG15-58 [Supreme Court Judgment No. 5-KG15-58 of June 23, 2015]] (Judgment of the Civil Cases Division).

[76] *See* Определение Верховного суда РФ от 13 октября 2012 года № 29-АПГ12-4 [Opredelenie Verhovnogo suda ot 13 oktjabrja 2012 goda № 29-APG12-4 [Supreme Court Judgment No. 29-APG12-4 of October 13, 2012]] (Judgment of the Administrative Cases Division).

[77] Постановление Суда по интеллектуальным правам от 14 мая 2015 года № С01-277/2015 по делу № А40-51226/2014 [Postanovlenie Suda po intellektual'nym pravam ot 14 maja 2015 goda № S01-277/2015 po delu № A40-51226/2014 [SIP Resolution No. S01-277/2015 of May 14, 2015, on Case No. A40-51226/2014]].

[78] Обзор судебной практики по делам, связанным с разрешением споров о защите интеллектуальных прав. Пункт 9 (утвержден Президиумом Верховного суда Российской Федерации 23.09.2015) [Obzor sudebnoj praktiki po delam, svjazannym s razresheniem sporov o zashhite intellektual'nyh prav. Punkt 9 (utv. Prezidiumom Verhovnogo Suda RF 23.09.2015) [Clause 9 of *Review of Judicial Practice in Dealing with Disputes on the Protection of Intellectual Rights,* approved by the Presidium of the Supreme Court on September 23, 2015]]; Определение Верховного суда РФ от 11 июня 2015 года № 309-ЭС14-7875 по делу № А50-21004/2013 [Opredelenie Verhovnogo suda ot 11 ijunja 2015 goda № 309-ES14-7875 po delu № A50-21004/2013 [Supreme Court Judgment No. 309-ES14-7875 of June 11, 2015, on Case No. A50-21004/2013]].

[79] Постановление Суда по интеллектуальным правам от 4 августа 2015 года № С01-948/2014 по делу № А50-21004/2013 [Postanovlenie Suda po intellektual'nym pravam ot 4 avgusta 2015 goda № S01-948/2014 po delu № A50-21004/2013 [SIP Resolution No. S01-948/2014 of August 4, 2015, on the case No. A50-21004/2013]], on which the Supreme Court issued the above-cited judgment is an exception.

Drawings showing literary characters that are likely to be confused with each other cannot be qualified as violations of exclusive rights. Such criterion does not apply here in the sense it is used in trademark disputes. If two drawings are similar but are not identical coherent systems of images, the copyright to the original drawing cannot be considered violated.[80] At the very least, a court would have to find out which specific elements, e.g., the character's image or the theme, had been borrowed and base its qualification on this.[81] As I can see, relatively low creativity standards are set for a newly created character to be protectable (the existence of differences).

Essentially the same principles are used for *photographs*. The majority of copyright disputes over photographs stem from the replication of photographs. Elements of a photograph cannot be the sources of such disputes, and a photograph is protectable if it is not an exact copy of another. So photographs receive minimal scopes of protection.[82]

---

[80] Постановление Суда по интеллектуальным правам от 25 декабря 2015 года № С01-1076/2015 по делу № А51-5983/2015 [Postanovlenie Suda po intellektual'nym pravam ot 25 dekabrja 2015 goda № S01-1076/2015 po delu № A51-5983/2015 [SIP Resolution No. S01-1076/2015 of December 25, 2015, on Case No. A51-5983/2015]].

[81] Постановление Суда по интеллектуальным правам от 30 июля 2014 года № С01-670/2014 по делу № А40-108107/2013 [Postanovlenie Suda po intellektual'nym pravam ot 30 ijulja 2014 goda № S01-670/2014 po delu № A40-108107/2013 [SIP Resolution No. S01-670/2014 of July 30, 2014, on Case No. A40-108107/2013]].

[82] *See*, e.g., Определение Высшего арбитражного суда РФ от 10 сентября 2012 года № ВАС-9300/12 по делу № А60-39303/2010 [Opredelenie Vysshego arbitrazhnogo suda RF ot 10 sentjabrja 2012 goda № VAS-9300/12 po delu № A60-39303/2010 [Ruling No. VAS-9300/12 of the Supreme Court of Arbitrazh of the Russian Federation of September 10, 2012, on Case No. A60-39303/2010]]; Постановление Суда по интеллектуальным правам от 18 января 2016 года № С01-1286/2014 по делу № А40-169281/2013 [Postanovlenie Suda po intellektual'nym pravam ot 18 janvarja 2016 goda № S01-1286/2014 po delu № A40-169281/2013 [SIP Resolution No. S01-1286/2014 of January 18, 2016, on Case No. A40-169281/2013]]; Постановление Суда по интеллектуальным правам от 12 ноября 2015 года № С01-910/2015 по делу № А40-98130/2014 [Postanovlenie Suda po intellektual'nym pravam ot 12 nojabrja 2015 goda № S01-910/2015 po delu № A40-98130/2014 [SIP Resolution No. S01-910/2015 of November 12, 2015, on Case No. A40-98130/2014]]; Постановление Суда по интеллектуальным правам от 20 ноября 2012 года № 8953/12 по делу № А40-82533/11-12-680 [Postanovlenie Suda po intellektual'nym pravam ot 20 nojabrja 2012 goda № 8953/12 po delu № A40-82533/11-12-680 [SIP Resolution No. 8953/12 of November 20, 2012, on Case No. A40-82533/11-12-680]]; Постановление Суда по интеллектуальным правам от 7 сентября 2015 года № С01-739/2015 по делу № А34-7366/2014 [Postanovlenie Suda po intellektual'nym pravam ot 7 sentjabrja 2015 goda № S01-739/2015 po delu № A34-7366/2014 [SIP Resolution No. S01-739/2015 of September 7, 2015, on Case No. A34-7366/2014]]; Постановление Суда по интеллектуальным правам от 15 июня 2015 года № С01-484/2015 по делу № А57-2146/2014 [Postanovlenie Suda po intellektual'nym pravam ot 15 ijunja 2015 goda № S01-484/2015 po delu № A57-2146/2014 [SIP Resolution No. S01-484/2015 of June 15, 2015, on Case No. A57-2146/2014]]; Постановление Суда по интеллектуальным правам от 26 мая 2015 года № С01-403/2015 по делу № А57-14087/2014 [Postanovlenie Suda po intellektual'nym pravam ot 26 maja 2015 goda № S01-403/2015 po delu № A57-14087/2014 [SIP Resolution No. S01-403/2015 of May 26, 2015, on Case No. A57-14087/2014]]; Постановление Суда по интеллектуальным правам от 30 сентября 2015 года № С01-757/2015 по делу № А43-23561/2014 [Postanovlenie Suda po intellektual'nym pravam ot 30 sentjabrja 2015 goda № S01-757/2015 po delu № A43-23561/2014 [SIP Resolution No. S01-757/2015 of September 30, 2015, on Case No. A43-23561/2014]].

There are more complicated cases where it is impossible to establish whether one photograph is an exact copy of another, for instance, if both were taken from the same position. There have been rulings on such cases where one photograph was qualified as a violation of copyright, which meant a greater degree of protection than protection from exact replication.[83]

Protection of elements of works of *design* is controversial. On the one hand, similarities and coincidences or the copying of elements are not enough for exclusive rights to be declared violated.[84] On the other hand, if an original design has differences from a design whose copyright status is disputed, it is not enough to consider the latter an independent creation. The reproduction of characteristics of the original design in the disputed one may be evidence of violation of exclusive rights[85] but it does not in and of itself preclude the latter design from being protectable.[86]

So the degree of originality of designs is supposed to betaken into account in copyright disputes.

However, in recent years an increasingly common practice has been to give large scopes of protection to works or elements of works that were either of insignificant creative value or replicated generally accessible designs or elements, or expressed ideas that were expressed in earlier works. For example, the use of a *sentence* similar to an earlier sentence in structure, vocabulary and general content has been qualified as a violation of exclusive rights in some cases.[87] Coincidences between elements

---

[83] Постановление Первого арбитражного апелляционного суда от 7 июня 2012 года № 01АП-2140/2012 по делу № А11-7029/2011 [Postanovlenie Pervogo arbitrazhnogo apelljacionnogo suda ot 7 ijunja 2012 goda № 01AP-2140/2012 po delu № A11-7029/2011 [Resolution of the First Arbitrazh Court of Appeal No. 01AP-2140/2012 of June 7, 2012, on Case No. A11-7029/2011]].

[84] *See* Постановление Суда по интеллектуальным правам от 1 июля 2015 года № С01-468/2015 по делу № А76-2656/2014 [Postanovlenie Suda po intellektual'nym pravam ot 1 ijulja 2015 goda № S01-468/2015 po delu № A76-2656/2014 [SIP Resolution No. S01-468/2015 of July 1, 2015, on Case No. A76-2656/2014]] (website designs); Постановление Суда по интеллектуальным правам от 18 мая 2015 года № С01-265/2015 по делу № А76-12136/2014 [Postanovlenie Suda po intellektual'nym pravam ot 18 maja 2015 goda № S01-265/2015 po delu № A76-12136/2014 [SIP Resolution No. S01-265/2015 of May 18, 2015, on Case No. A76-12136/2014]] (furniture designs).

[85] Постановление Девятого арбитражного апелляционного суда от 8 сентября 2014 года № 09АП-32019/2014-ГК по делу № А40-20099/2014 [Postanovlenie Devjatogo arbitrazhnogo apelljacionnogo suda ot 8 sentjabrja 2014 goda № 09AP-32019/2014-GK po delu № A40-20099/2014 [Resolution No. 09AP-32019/2014-GK of the Ninth Arbitrazh Court of Appeal of September 8, 2014, on Case No. A40-20099/2014]], which was upheld by Постановление Суда по интеллектуальным правам от 12 декабря 2014 года № С01-1268/2014 [Postanovlenie Suda po intellektual'nym pravam ot 12 dekabrja 2014 goda № S01-1268/2014 [SIP Resolution No. S01-1268/2014 of December 12, 2014]].

[86] Определение Высшего Арбитражного суда РФ от 2 сентября 2013 года № ВАС-9457/13 по делу № А40-92833/2011 [Opredelenie Vysshego Arbitrazhnogo suda RF ot 2 sentjabrja 2013 goda № VAS-9457/13 po delu № A40-92833/2011 [Ruling No. VAS-9457/13 of the Supreme Court of Arbitrazh of the Russian Federation of September 2, 2013, on case A40-92833/2011]].

[87] Определение Московского городского суда от 3 ноября 2015 года № 4г/8-11086/2015 [Opredelenie Moskovskogo gorodskogo suda ot 3 nojabrja 2015 goda № 4g/8-11086/2015 [Moscow City Court Judgment No. 4g/8-11086/2015 of November 3, 2015]].

of architectural solutions are considered sufficient for assertions that a violation of exclusive rights has taken place while differences are ignored and no attempts are made to find out whether the replications represent content that belongs to the public domain and is unprotectable.[88] The understanding of an architectural solution as an idea provides the basis for the monopolization of public domain content since ideas are not usually considered protectable.[89]

Works of cartography are another source of controversial practice. On the one hand, similarities between maps due to their recording the same factual data cannot result in copyright violation verdicts.[90] This means that the scope of protection of maps depends on the degree of their originality, with no protection being considered for elements belonging to the public domain. However, there has been a practice of giving protection to coordinates published by the State Geodetic Network and to maps based on them, and this makes it possible to monopolize public domain content, and, moreover, give it a large scope of protection.[91]

To sum up, the degree of individuality of any content is hardly ever linked to the scope of protection it is given in Russian judicial practice. Moreover, there is an obvious trend to give extensive protection to works of low authorship with the result that courts consider similarity between two works to be a sufficient reason for a judgment that a copyright violation has taken place and do not try to find out how much of the replicated work is original or belongs to the public domain or is standard information.

---

88 Постановление Суда по интеллектуальным правам от 18 декабря 2015 года № С01-383/2014 по делу № А60-10618/2011 [Postanovlenie Suda po intellektual'nym pravam ot 18 dekabrja 2015 goda № S01-383/2014 po delu № A60-10618/2011 [SIP Resolution No. S01-383/2014 of December 18, 2015, on Case No. A60-10618/2011]].

89 Постановление Суда по интеллектуальным правам от 14 сентября 2015 года № С01-669/2015 по делу № А60-7894/2014 [Postanovlenie Suda po intellektual'nym pravam ot 14 sentjabrja 2015 goda № S01-669/2015 po delu № A60-7894/2014 [SIP Resolution No. S01-669/2015 of September 14, 2015, on Case No. A60-7894/2014]].

90 Постановление Суда по интеллектуальным правам от 12 августа 2015 года № С01-632/2015 по делу № А56-55404/2014 [Postanovlenie Suda po intellektual'nym pravam ot 12 avgusta 2015 goda № S01-632/2015 po delu № A56-55404/2014 [SIP Resolution No. S01-632/2015 of August 12, 2015 on Case No. A56-55404/2014]].

91 Обзор судебной практики по делам, связанным с разрешением споров о защите интеллектуальных прав. Пункт 60 (утвержден Президиумом Верховного суда РФ 23 сентября 2015 года) [Obzor sudebnoj praktiki po delam, svjazannym s razresheniem sporov o zashhite intellektual'nyh prav. Punkt 60 (utverzhden Prezidiumom Verhovnogo suda RF 23 sentjabrja 2015 goda) [Clause 60 of *Review of Judicial Practice in Dealing with Disputes on the Protection of Intellectual Rights,* approved by the Presidium of the Russian Federation Supreme Court on September 23, 2015]]; Определение Верховного суда РФ от 8 апреля 2015 года № 306-ЭС14-5432 по делу № А12-18806/2013 [Opredelenie Verhovnogo suda ot 8 aprelja 2015 goda № 306-ES14-5432 po delu № A12-18806/2013 [Russian Federation Supreme Court Judgment No. 306-ES14-5432 of April 8, 2015, on Case No. A12-18806/2013]]; Постановление Суда по интеллектуальным правам от 9 декабря 2015 года № С01-1034/2015 по делу № А08-1560/2014 [Postanovlenie Suda po intellektual'nym pravam ot 9 dekabrja 2015 goda № S01-1034/2015 po delu № A08-1560/2014 [SIP Resolution No. S01-1034/2015 of December 9, 2015, on Case No. A08-1560/2014]].

De facto, this gives green light to the monopolization of public domain content.[92]

3.5. Burden of Proving the Creative Character of a Work. Standard of Proof

Until 2012, Russian courts had, on the whole, consistently applied the creativity presumption as prescribed by Clause 28 of Resolution 5/29. Claimants have not been required to prove the creative character of typical works of high authorship. But in disputes over works of low authorship, courts have quite often, on their own initiative, challenged the claimant to prove that such a work was creative regardless of whether the defendant provided evidence of the opposite.

In recent years, the SIP has been trying to end this practice. It has become normal for a court to order that the burden of proof be divided pursuant to Clause 14 of Resolution No. 15 of the Plenary Session of the Supreme Court of June 19, 2006, 'On Issues Arising in Courts in the Course of Civil Litigations in Connection with the Enforcement of Legislation on Copyright and Related Rights.' Clause 14 requires that the claimant prove their ownership of copyright and/or related rights and the unauthorized use of such rights by the defendant.[93] The work in question would be presumed to be creative under Clause 28 of Resolution 5/29, while the defendant

---

[92] In the German system, the protection scope mechanism enshrined in § 24 of *UrhG* is used for such purposes. *See* Eugen Ulmer, *Id.* 265 ff. The U.S. system uses similar originality evaluation procedures – content is qualified as a replication if it has essential similarities to earlier content. See *Feist Publications, Inc. v. Rural Telephone Service Co*., 499 U.S. 340, 361 (1991).

[93] *See,* e.g., Определение Верховного суда РФ от 23 июня 2015 года № 5-КГ15-58 [Opredelenie Verhovnogo suda RF ot 23 ijunja 2015 goda №5-KG15-58 [Russian Federation Supreme Court Judgment No. 5-KG15-58 of June 23, 2015]]; Постановление Суда по интеллектуальным правам от 9 февраля 2016 года № С01-1176/2015 по делу № А33-24660/2014 [Postanovlenie Suda po intellektual'nym pravam ot 9 fevralja 2016 goda № S01-1176/2015 po delu № A33-24660/2014 [SIP Resolution No. S01-1176/2015 of February 9, 2016, on Case No. A33-24660/2014]]; Постановление Суда по интеллектуальным правам от 4 февраля 2016 года № С01-1217/2015 по делу № А50-3186/2015 [Postanovlenie Suda po intellektual'nym pravam ot 4 fevralja 2016 goda № S01-1217/2015 po delu № A50-3186/2015 [SIP Resolution No. S01-1217/2015 of February 4, 2016, on Case No. A50-3186/2015]]; Постановление Суда по интеллектуальным правам от 14 января 2016 года № С01-1060/2014 по делу № А19-18151/2014 [Postanovlenie Suda po intellektual'nym pravam ot 14 janvarja 2016 goda № S01-1060/2014 po delu № A19-18151/2014 [SIP Resolution No. S01-1060/2014 of January 14, 2016, on Case No. A19-18151/2014]]; Постановление Суда по интеллектуальным правам от 16 декабря 2016 года № С01-1040/2015 по делу № А32-36970/2014 [Postanovlenie Suda po intellektual'nym pravam ot 16 dekabrja 2016 goda № S01-1040/2015 po delu № A32-36970/2014 [SIP Resolution No. S01-1040/2015 of December 16, 2015, on Case No. A32-36970/2014]]; Постановление Суда по интеллектуальным правам от 15 декабря 2015 года № С01-985/2014 по делу № А76-1534/2014 [Postanovlenie Suda po intellektual'nym pravam ot 15 dekabrja 2015 goda № S01-985/2014 po delu № A76-1534/2014 [SIP Resolution No.S01-985/2014 of December 15, 2015, on Case No. A76-1534/2014]]; Постановление Суда по интеллектуальным правам от 22 июля 2015 года № С01-546/2015 по делу № А40-145318/2014 [Postanovlenie Suda po intellektual'nym pravam ot 22 ijulja 2015 goda № S01-546/2015 po delu № A40-145318/2014 [SIP Resolution No. S01-546/2015 of July 22, 2015, on Case No. A40-145318/2014]].

would have to prove either that they had made legal use of the claimant's work or that the latter was non-creative.[94]

The burden of proving the creative character of a work is extremely rarely put on its author or their heirs. This only happens when it is suspected that a disputed work is non-creative – either due to established practice, or due to it coming under an unprotectable category, or due to the requirement of proof of protectability (Clause 3, Subclause 4 of Clause 6 and Clause 7 of Article 1259 of the Civil Code),[95] or on the strength of specific circumstances and evidence (this involves loose interpretations of the claimant's duty to prove lawful ownership of copyright).[96]

However, more and more often, defendants are having to prove the creative character of their work (usually by proving they created it independently) if it contains similarities to parts of the claimant's work.[97]

However, these are only occasional situations determined by specific features of cases and do not reflect any stable rules on the placement of the burden of proof.

Nor do there exist any hard-and-fast *standards of evidence* for the creative or non-creative character of a work. In some cases, courts themselves determine whether

---

[94] Постановление Суда по интеллектуальным правам от 18 января 2016 года № С01-1286/2014 по делу № А40-169281/2013 [Postanovlenie Suda po intellektual'nym pravam ot 18 janvarja 2016 goda № S01-1286/2014 po delu № A40-169281/2013 [SIP Resolution No. S01-1286/2014 of January 18, 2016, on Case No. A40-169281/2013]]; Постановление Суда по интеллектуальным правам от 10 сентября 2015 года № С01-675/2015 по делу № А40-105604/2013 [Postanovlenie Suda po intellektual'nym pravam ot 10 sentjabrja 2015 goda № S01-675/2015 po delu № A40-105604/2013 [SIP Resolution No. S01-675/2015 of September 10, 2015, on Case No. A40-105604/2013]].

[95] *See* Определение Верховного суда РФ от 11 июня 2015 года № 309-ЭС14-7875 по делу № А50-21004/2013 [Opredelenie Verhovnogo suda RF ot 11 ijunja 2015 goda № 309-ES14-7875 po delu № A50-21004/2013 [Russian Federation Supreme Court Judgment No. 309-ES14-7875 of June 11, 2015, on Case No. A50-21004/2013] (a literary character); Постановление Суда по интеллектуальным правам от 23 января 2015 года № С01-7/2014 по делу № А60-17048/2013 [Postanovlenie Suda po intellektual'nym pravam ot 23 janvarja 2015 goda № S01-7/2014 po delu № A60-17048/2013 [SIP Resolution No. S01-7/2014 of January 23, 2015, on Case No. A60-17048/2013]] (price indices).

[96] Апелляционное определение Московского областного суда от 16 апреля 2014 года по делу № 33-6628/2014 [Apelljacionnoe opredelenie Moskovskogo oblastnogo suda ot 16 aprelja 2014 goda po delu № 33-6628/2014 [Appellate Judgment of the Moscow Regional Court of April 16, 2014, on Case No. 33-6628/2014]].

[97] Определение Верховного суда РФ от 23 июня 2015 года № 5-КГ15-58 [Opredelenie Verhovnogo suda ot 23 ijunja 2015 goda № 5-KG15-58 [Russian Federation Supreme Court Judgment No. 5-KG15-58 of June 23, 2015]]; Постановление Суда по интеллектуальным правам от 19 января 2016 года № С01-1109/2015 по делу № А40-156890/2013 [Postanovlenie Suda po intellektual'nym pravam ot 19 janvarja 2016 goda № S01-1109/2015 on case № A40-156890/2013 [SIP Resolution No. S01-1109/2015 of January 19, 2016, on Case No. A40-156890/2013]];

Постановление Суда по интеллектуальным правам от 18 декабря 2015 года № С01-383/2014 по делу № А60-10618/2011 [Postanovlenie Suda po intellektual'nym pravam ot 18 dekabrja 2015 goda № S01-383/2014 po delu № A60-10618/2011 [SIP Resolution No. S01-383/2014 of December 18, 2015, on Case No. A60-10618/2011]; Решение Арбитражного суда Владимирской области от 3 июля 2013 года по делу № А11-7029/2011 [Reshenie Arbitrazhnogo suda Vladimirskoj oblasti ot 3 ijulja 2013 goda po delu № A11-7029/2011 [Ruling of July 3, 2013, of the Arbitrazh Court of Vladimir Region on Case No. A11-7029/2011]].

a work is creative or whether it contains borrowed elements,[98] while, in others, they either insist that this should be the responsibility of the litigants[99] or seek external expert assessment.[100]

In addition, as proof of the creative character of works, courts today accept contracts commissioning such works and documents certifying the authors' fulfillment of their commitments under such contracts.[101] The reason for this is the

---

98 *See,* e.g., Постановление Суда по интеллектуальным правам от 8 мая 2015 года № С01-320/2015 по делу № А40-84902/2014 [Postanovlenie Suda po intellektual'nym pravam ot 8 maja 2015 goda № S01-320/2015 po delu № A40-84902/2014 [SIP Resolution No. S01-320/2015 of May 8, 2015, on Case No. A40-84902/2014]]; Постановление Суда по интеллектуальным правам от 12 августа 2015 года № С01-632/2015 по делу № А56-55404/2014 [Postanovlenie Suda po intellektual'nym pravam ot 12 avgusta 2015 goda № S01-632/2015 po delu № A56-55404/2014 [SIP Resolution No. S01-632/2015 of August 12, 2015 on Case No. A56-55404/2014]]; Определение Московского городского суда от 3 ноября 2015 года № 4г/8-11086/2015 [Opredelenie Moskovskogo gorodskogo suda ot 3 nojabrja 2015 goda № 4g/8-11086/2015 [Moscow City Court Judgment No. 4g/8-11086/2015 of November 3, 2015]]; Апелляционное определение Московского городского суда от 18 апреля 2014 года по делу № 33-12780 [Apelljacionnoe opredelenie Moskovskogo gorodskogo suda ot 18 aprelja 2014 goda po delu № 33-12780 [Moscow City Court judgment of April 18, 2014, on Appeal Case No. 33-12780]].

99 *See,* e.g., Постановление Суда по интеллектуальным правам от 1 июля 2015 года № С01-468/2015 по делу № А76-2656/2014 [Postanovlenie Suda po intellektual'nym pravam ot 1 ijulja 2015 goda № S01-468/2015 po delu № A76-2656/2014 [SIP Resolution No. S01-468/2015 of July 1, 2015, on Case No. A76-2656/2014]]; Постановление Суда по интеллектуальным правам от 1 июля 2015 года № С01-468/2015 по делу № А76-2656/2014 [Postanovlenie Suda po intellektual'nym pravam ot 1 ijulja 2015 goda № S01-468/2015 po delu № A76-2656/2014 [SIP Resolution No. S01-468/2015 of July 1, 2015, on Case No. A76-2656/2014]]; Постановление Суда по интеллектуальным правам от 19 января 2016 года № С01-1109/2015 по делу № А40-156890/2013 [Postanovlenie Suda po intellektual'nym pravam ot 19 janvarja 2016 goda № S01-1109/2015 po delu № A40-156890/2013 [SIP Resolution No. S01-1109/2015 of January 19, 2016, on Case No. A40-156890/2013]]; Постановление Суда по интеллектуальным правам от 18 декабря 2015 года № С01-383/2014 по делу № А60-10618/2011 [Postanovlenie Suda po intellektual'nym pravam ot 18 dekabrja 2015 goda № S01-383/2014 po delu № A60-10618/2011 [SIP Resolution No. S01-383/2014 of December 18, 2015, on Case No. A60-10618/2011]].

100 *See,* e.g., Определение Судебной коллегии по гражданским делам Верховного суда от 23 июня 2015 года № 5-КГ15-58 [Opredelenie Sudebnoj kollegii po grazhdanskim delam Verhovnogo suda ot 23 ijunja 2015 goda № 5-KG15-58 [Russian Federation Supreme Court Judgment No. 5-KG15-58 of June 23, 2015]]; Определение Судебной коллегии по гражданским делам Верховного суда РФ от 9 апреля 2013 года № 5-КГ13-2 [Opredelenie Sudebnoj kollegii po grazhdanskim delam Verhovnogo suda RF ot 9 aprelja 2013 goda № 5-KG13-2 [Russian Federation Supreme Court Judjment No. 5-KG13-2 of April 9, 2013]]; Постановление Суда по интеллектуальным правам от 18 декабря 2015 года № С01-383/2014 по делу № А60-10618/2011 [Postanovlenie Suda po intellektual'nym pravam ot 18 dekabrja 2015 goda № S01-383/2014 po delu № A60-10618/2011 [SIP Resolution No. S01-383/2014 of December 18, 2015, on Case No. A60-10618/2011]]; Постановление Суда по интеллектуальным правам от 26 февраля 2016 года № С01-1219/2015 по делу № А50-1262/2015 [Postanovlenie Suda po intellektual'nym pravam ot 26 fevralja 2016 goda № S01-1219/2015 po delu № A50-1262/2015 [SIP Resolution No. S01-1219/2015 of February 26, 2016, on Case No. A50-1262/2015]].

101 Постановление Суда по интеллектуальным правам от 15 июня 2015 года № С01-484/2015 по делу № А57-2146/2014 [Postanovlenie Suda po intellektual'nym pravam ot 15 ijunja 2015 goda № S01-484/2015 po delu № A57-2146/2014 [SIP Resolution No. S01-484/2015 of June 15, 2015, on Case No. A57-2146/2014]]; Постановление Суда по интеллектуальным правам от 21 сентября 2015 года № С01-557/2015 по делу № А10-343/2014 [Postanovlenie Suda po intellektual'nym pravam ot

above-described re-interpretation of copyrightability criteria that attaches more importance to proving a work to be the result of independent effort than to proving its creative character.

4. Principal Conclusions

Minimum standards of creativity for a piece of intellectual property to be copyrightable have been sharply reduced in Russian judicial practice in recent years. Usually, in order to obtain copyright to a work, its author needs to prove that it belongs to any of the types of work that are copyrightable under Russian law and that they have created it by their own efforts (sufficient proof of the latter would be that the work has been published under their name and it is not a copy of a work that has been published under someone else's name). Any work that meets these criteria is considered protectable on the strength of its presumed creative character under Clause 28 of Resolution 5/29. It is considered irrelevant to provide any further proof of its novelty, uniqueness or originality.

This makes the Russian practice comparable to the principles of the American sweat of the brow doctrine.

However, unlike foreign legal systems that set comparatively low standards of protectability, Russian courts have not evolved a mechanism to offset risks of monopolization of public domain content as a result of overprotection, and this is a problem. First of all, there is no practice of granting exclusive rights to a work that is similar to an earlier work but has been created independently. Secondly, the practice of refusing protection to non-unique, standard, generally known, and generally available content is disappearing. There exist court rulings granting copyright to the author of content that had been widely known before it was published under their name.[102] Thirdly, there is a tendency to give a large scope of protection to works of low authorship with the result that any similarity between two works is considered a case of copyright violation and no attempt is made to find out whether replications are original or standard and generally accessible content. This is the principle that any replication of a protected work or of any of its elements is qualifiable as a violation of copyright. It means that content belonging to the public domain is not identified as such and is not denied copyrightable status in replication disputes.

21 sentjabrja 2015 goda № S01-557/2015 po delu № A10-343/2014 [SIP Resolution No. S01-557/2015 of September 21, 2015, on Case No. A10-343/2014]]; Постановление Девятого арбитражного апелляционного суда от 29 октября 2015 года № 09АП-41914/2015-ГК по делу А40-70695/13 [Postanovlenie Devjatogo arbitrazhnogo apelljacionnogo suda ot 29 oktjabrja 2015 goda № 09AP-41914/2015-GK po delu № A40-70695/13 [Resolution No. 09AP-41914/2015-GK of the Ninth Arbitrazh Court of Appeal of October 29, 2015, on Case No. A40-70695/13]].

[102] Such rulings argue that the fact that content is not novel cannot be evidence that it is not the result of creative effort (Clause 28 of Resolution 5/29).

In effect, all this brings judicial practice close to a model where practically any content can be qualified as protectable if it belongs to any of the copyrightable types listed in Part 1 of Article 1259 of the Civil Code and was published under the name of a specific author, regardless of whether it was known before and included non-unique or generally accessible elements.

As a result, exclusive rights are granted to standard or generally accessible content – content that must belong to the public domain, – which puts unjustified restrictions on the creative activities of other authors.

Moreover, it makes legal status of other authors unpredictable as it establishes basis for unintended copyright violations that can be penalized.

The SIP is the chief motivator and vehicle of these changes. Sticking to these changes favored by arbitrazh courts rather than courts of general jurisdiction. The Supreme Court holds an intermediary position, occasionally applying the originality, novelty, and uniqueness criteria.

References

Berking, Christina. *Die Unterscheidung von Form und Inhalt im Urheberrecht*, 83–84 (Nomos 2002).

Dreier, Thomas, & Schulze, Gernot. Urheberrechtsgesetz Kommentar, § 2, Rn. 17 (C.H. Beck 2004).

Girth, Peter. *Individualitat und Zufall im Urheberrecht*, 48 UFITA (1974).

Hubmann, Heinrich. *Das Recht des schopferischen Geistes* (De Gruyter 1954).

Hubmann, Heinrich. *Urheber- und Verlagsrecht* (6 ed., C.H. Beck 1987).

Kashanin, Andrey. *Debates on Criteria of Copyrightability in Russia*, 2(1) Russian Law Journal (2014).

Kummer, Max. *Das Urheberrechtlich Schutzbare werk* (Stampfli & Cie 1968).

Nimmer, Melville, & Nimmer, David. Nimmer on Copyright, § 13.03, LEXIS (2004).

Schmieder, Hans-Heinrich. *Geistige Schöpfung als Auswahl und Bekenntnis*, 52 UFITA (1969).

Stamer, Britta. *Der Schutz der Idee unter besonderer Berücksichtigung von Unterhaltungsproduktionen für das Fernsehen* (Nomos 2007).

Ulmer, Eugen. *Urheber- und Verlagsrecht* (3d ed., Springer 1980).

Корнеев В.А. Программы для ЭВМ, базы данных и топологии интегральных микросхем как объект интеллектуальных прав [Korneev V.A. *Programmi dlya EVM, bazi dannih i topologii integral`nih mikroshem kak ob`ekt intellektual`nih prav* [Vladimir A. Korneyev, *Computer Programs, Databases and Integrated Circuit Topologies as Copyrightable Works*]] (Statut 2010).

Савельев А.И. Актуальные вопросы судебной практики в сфере оборота программного обеспечения в России // Вестник Высшего Арбитражного Суда Российской Федерации. 2013. № 4. [Savel`ev A.I. *Aktual`nie voprosi sudebnoy praktiki*

v sfere oborota programmnogo obespecheniya v Rossii // Vestnik Visshego Arbitrajnogo Suda Rossiyskoy Federatsii. 2013. № 4. [Alexander I. Savelyev, *Key Issues of Judicial Practice in Dealing with the Software Market in Russia,* 4 Bulletin of the Supreme Arbitrazh Court of the Russian Federation (2013)]].

Сергеев А.П. Право интеллектуальной собственности в Российской Федерации [Sergeev A.P. *Pravo intellektual`noy sobstvennosti v Rossiyskoy Federatsii* [Alexander P. Sergeyev, *Intellectual Property Law in the Russian Federation*]] (2d ed., Velbi 2003).

Хохлов В.А. Авторское право: законодательство, теория, практика [Hohlov V.A. *Avtorskoe pravo: zakonodatel`stvo, teoriya, praktika* [Vadim A. Khokhlov, *Copyright: Legislation, Theory and Practice*]] (Gorodets 2008).

Acknowledgments

This article is part of the HSE Academic Fund program for 2015–2016 (Grant No. 15-01-0017) and has been partially financed from a Russian government subsidy to the HSE for the implementation of the Global Competitiveness Program.

Information about the author

Andrey Kashanin (Moscow, Russia) – Deputy Director of Institute of Legal Studies, National Research University – Higher School of Economics (3 Bolshoy Trekhsvyatitelskiy pereulok, 109028, Moscow, Russia; e-mail: kashanin@mail.ru).

A CRITICAL ANALYSIS OF THE RECENT RUSSIAN REGULATION ON CREDIT RATING AGENCIES

LORENZO SASSO,
National Research University – Higher School of Economics
(Moscow, Russia)

DOI:10.17589/2309-8678-2016-4-2-62-82

Since the recent financial crisis of 2008, credit rating agencies (CRAs) have been under scrutiny for their role in the proliferation of structured finance products. Whether their methodological tools and evaluations have been up to standard is in question. As is well-known, CRAs are multinational enterprises that operate on a global basis. Their evaluations may well hinder the stability of international markets. As a legal response to the many concerns raised about CRAs, different approaches have been applied to the use of credit ratings in the US and EU with many similarities. In this international scenario, the government of the Russian Federation also recently introduced a new regulation on CRAs, drafted on the lines of the European regulation. This short paper is targeted to inform the reader of certain aspects of the newly approved regulation in Russia and to examine – in a comparative way – whether the introduced rules match the expectations behind the initiatives of the Russian government.

Key words: CRAs; rating; issuer-pays conflict; rating shopping; financial regulation; liability of intermediaries; competition.

Recommended citation: Lorenzo Sasso, *A Critical Analysis of the Recent Russian Regulation on Credit Rating Agencies,* 4(2) Russian Law Journal 62-82 (2016).

Table of Contents

1. Introduction

Since the global financial crisis of 2008, the role of Credit Rating Agencies (CRAs) has been examined very closely by a large part of the legal and economic doctrine, both theoretically and empirically, mainly because of their involvement in the market turmoil. In particular, CRAs have been criticized for their contribution to the proliferation of structured finance products in the global market, and for their poor credit assessment.[1]

Over the years, CRAs have grown in size and power in a heavily concentrated market for ratings, in which Moody's and Standard & Poor's have dominated as a duopoly, with Fitch as the only other major player. This scenario has been facilitated by the huge fixed costs to enter in the industry and the inclusion of credit ratings in bank capital regulation.[2] Credit ratings have developed in terms of their use and

[1] In the view of the Financial Stability Forum (FSF) '[…] *poor credit assessment of complex structured credit products by CRA contributed to both the build-up and the unfolding of the financial crisis*', See *Report of the FSF on Enhancing Market and Institutional Resilience* (7 April 2008) <http://www.financialstabilityboard.org/publications/r_0804.pdf>; *see also* CESR, *CESR's Second Report to the European Commission on the compliance of credit rating agencies with the IOSCO Code and the role of credit rating agencies in structured finance, update to the code of conduct* (May 2008) <www.cesr-eu.org/data/document/CESR_08_277.pdf> and The European Securities Markets Expert Group (ESME), *Report to the European Commission, Role of Credit Rating Agencies* (June 2008). <http://ec.europa.eu/finance/securities/docs/esme/report_040608_en.pdf>; CGFS (Committee on the Global Financial System), *Ratings in Structured Finance: What Went Wrong and What Can Be Done to Address Shortcomings?* 32 CGFS Paper (2008) <http://www.bis.org/publ/cgfs32.pdf>; FSA (UK Financial Services Authority), *The Turner Review: A Regulatory Response to the Global Banking Crisis* (London 2009) <http://www.fca.org.uk/static/pubs/other/turner_review.pdf>; M.K. Brunnermeier, A. Crockett, C. Goodhart, A.D. Persaud and H.S. Shin, *The Fundamental Principles of Financial Regulation*, Geneva Report on the World Economy (2009) <http://www.princeton.edu/~markus/research/papers/Geneva11.pdf>. Among the commentators *see* Darbellay A. *A Regulating credit rating agencies* ch. 4 to 6 (Cheltenham: Edward Elgar Publishing 2013); Iris H-Y Chiu, *Regulatory Governance of Credit Rating Agencies in the EU: The Perils of Pursuing the Holy Grail of Rating Accuracy,* 2 The European Journal of Risk Regulation 209 (2013); Alcubilla R.G. and J.R. del Pozo, *Credit Rating Agencies on the Watch List: Analysis of European Regulation* ch. 5 p. 246 (Oxford, OUP, 2012); Darbellay A. and F. Partnoy, *Credit Rating Agencies and Regulatory Reform* in *Research Handbook on the Economics of Corporate Law* 294 (Claire A. Hill and Brett H. McDonnell eds., Cheltenham: Edward Elgar 2012); Partnoy F. *Rethinking regulation of credit-rating agencies: an institutional investor perspective*, 25 Journal of International Banking Law and Regulation 190 ff. (2010); Hunt J.P. *Credit Rating Agencies and the 'Worldwide Credit Crisis': the Limits of Reputation, the Insufficiency of Reform and a Proposal for Improvement*, Columbia Business Law Review 109, 112–114, 127–128 (2009) <http://cblr.columbia.edu/archives/10923>; Amtenbrink F. and J. De Haan, *Regulating Credit Ratings in the European Union: A Critical First Assessment of Regulation 1060/2009 on Credit Rating Agencies*, 46 Common Market Law Review 1943 ff. (2009) <http://www.kluwerlawonline.com/abstract.php?area=Journals&id=COLA2009077>.

[2] See Basel Committee on Banking Supervision (BCBS), *International Convergence of Capital Measurement and Capital Standards* (1988) <http://www.bis.org/publ/bcbsc111.htm>; Basel Accord and BCBS, *Amendment to the Capital Accord to Incorporate Market Risks* (1996) (Basel I) <http://www.bis.org/publ/bcbs24.htm>; and BCBS, *Application of Basel II to Trading Activities and the Treatment of Double Default Effects* (2005) (Basel II) <http://www.bis.org/publ/bcbs111.pdf >.

application since they first came into existence. They appeared in the market as qualified financial opinions. However, as debt markets expanded, myriads of complex financial instruments have been created, all requiring a rating to be distributed to retail investors. The importance of ratings as a regulatory stamp has grown *pari passu* with their convenience, and their applicability has been built into financial arrangements of all kinds, even as a valid trigger signal to dismiss an investment. Unfortunately, when the financial crisis materialized, the strong reliance on CRAs in highly interconnected financial markets trapped many financial institutions in liquidity crises as a result.[3]

In response to the global financial crisis and to the many concerns raised by CRAs' activity, different approaches have been applied to the use of credit ratings in financial market regulations in the European Union and the United States. In Europe, aiming at ensuring "that credit ratings used in the Community are independent, objective and of the highest quality", three new regulations have been promulgated at both national and supranational levels, imposing legally binding obligations on CRAs. These are: Regulation 1060/2009 (CRA I),[4] Regulation 513/2011 (CRA II)[5] and Regulation 462/2013 (CRA III).[6] Different is the case of the US, where the approved Dodd-Frank Act of 2010[7] – acknowledging the inconsistency of a rating-based regulation with the proper functioning of market forces in the rating industry – in order to reduce over-reliance on ratings, has removed regulatory references to rating from financial regulations.[8]

Against this international background, the government of the Russian Federation has also taken action, approving a new framework for CRAs drafted on the lines of the initial European regulation. Having in mind the EU and US experiences regarding CRA regulation, this article offers comment on certain aspects of the recently introduced CRA regulation in Russia as a regulatory response to the failure of CRA activities. The analysis starts by providing some background on the function of CRAs, and related criticisms raised following the last financial crisis. The new Russian regulatory framework for CRAs is then presented and examined. This is followed by some concluding considerations.

---

3 Weber R.H. and A. Darbellay, *The regulatory use of credit ratings in bank capital requirements regulations,* 10 J. Banking Regulation 10 ff. (2008). DOI: 10.1057/jbr.2008.22.

4 See the European Parliament and Council Regulation (EC) 1060/2009 (O.J. 2009, L. 302/1) entered into force on 7 December 2009.

5 [2011] OJ 2011 L145/30.

6 [2013] OJ 2013 L146/1.

7 Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, HR 4173, 111th Congress, 2d Session (2010) (Dodd-Frank Act) Sections 931–939H (Title IX, Subtitle C 'Improvements to Regulation of Credit Rating Agencies').

8 Dodd-Frank Act of 2010, Sec 939–939A.

2. The Function of Credit Rating Agencies

A credit rating is an opinion regarding the creditworthiness of an issuer, or of its debt or financial obligation, preferred share or other structured financial instrument. The probability of default of a company is used to classify each of the financial instruments issued into a certain risk-rating class. These classes are expressed on a scale of letters and figures from AAA (highest rating) to D (lowest rating). Depending on the risk-rating class assigned to an issuer, the market fixes the 'premium' due by the company to compensate an investor for supporting that risk, that is the payable interest rate. Therefore, ratings play a crucial role in financial markets, as institutional and non-institutional investors use them to evaluate the credit risks of financial instruments. The assessment of these instruments requires specific knowledge and is highly time-consuming, making it attractive for investors to rely on the ratings by CRAs. From an economic perspective, by providing information on the rated security, credit ratings are aimed at reducing information asymmetries between investors and the issuer, which can lead to so-called 'adverse selection' problems. In the process of raising funds, the management (agent) of the firm issuing a security holds private information regarding the risk of the investment. If the investor cannot accurately gauge the quality and the risk of the investment to subscribe, they will ask the issuer for a higher return. CRAs provide investors with a tool for screening and in so doing reduce the premium (interest rate) paid by issuers. [9]

CRAs also perform a kind of audit function through the use of their ratings, which can upgrade or downgrade the creditworthiness of a firm. This function is targeted to mitigate the so-called 'collective action' problems of dispersed debt for investors by helping them to monitor performance, with downgrades serving as a signal to take action. At the same time, by rating a security and the creditworthiness of an issuer, they cap the amount of risk that the agent can take on behalf of the principal. For these reasons, nowadays credit ratings issued by a recognized rating agency are typically among the main tools used by portfolio managers in their investment decisions, and by lenders in their credit decisions.[10]

If we look at rating agencies from a regulatory perspective, CRAs perform a *quasi*-regulatory function. By rating periodically the risk of default of financial institutions and public companies, they contribute indirectly to the prudential supervision carried out by the host country's central banks and financial service authorities. In fact, under the Basel II agreement of the Basel Committee on Banking Supervision, regulators can allow banks to use credit ratings from certain approved CRAs (called External

---

[9] Partnoy F. *The Siskel and Ebert of Financial Markets? Two Thumbs Down for the Credit Rating Agencies*, 77 Washington University Law Quarterly 644 (1999).

[10] However, these collection active problems could be also substantially reduced with the use of covenants in the bond's issues. The breach of covenant could work as a perfect trigger for the creditor.

Credit Assessment Institutions, or ECAIs) when calculating their net capital reserve requirements.[11] The idea is that banks and other financial institutions should not need to keep in reserve the same amount of capital to protect the institution against, for example, a run on the bank, because not all firms share the same risk. If the financial institution is heavily invested in highly liquid and very 'safe' securities, such as government bonds or short-term commercial paper from very stable companies, it will be required to keep in reserve less net capital.

Before the introduction of the latest European regulation on rating agencies (CRA III), part of the doctrine compared the monitoring function of CRAs to the control procedures carried out by audit companies.[12] It has been said that while they share a similar power, both being financial intermediaries acting in a highly concentrated market, they do *not* share a similar liability. However, CRAs have traditionally shielded themselves from investors' litigation, and until a few years ago, prevented direct regulation of their operations simply by claiming that their status is the same as financial journalists and, as such, they are protected by the constitutional guarantee of freedom of the press. They contended that this protection precluded government regulation of the content of a rating opinion or the underlying methodology. In fact, CRAs do not have the same power of investigation assigned to audit companies. They often did not base their ratings and research on official and public data, in particular for the structured finance for which most of the material analysed was private and unaudited. Surely and unfortunately, the real meaning of CRAs' ratings had been widely misinterpreted by the market also because of the regulatory involvement of the rating. The rating, while assessing the credit default risk, did not cover market and liquidity risks. Since market liquidity and price volatility were not considered, bonds with the same rating might have very different market prices. For example, a government debt holding a very high rating (AAA) might have a different and generally superior overall quality, as compared with the same rating of senior tranches of a collateralized mortgage obligation (CMO). Despite this fact, and even though each rating agency has its own rating methodologies and scales, market participants have often treated similarly rated securities as generally fungible.[13] That said, there are several concerns raised by CRAs that deserve serious consideration, as described in the next section.

---

[11] In the United States, the SEC permits investment banks and broker-dealers to use credit ratings from 'Nationally Recognized Statistical Rating Organizations' (or NRSROs) for similar purposes.

[12] Leyens P.C. *Intermediary Independence: Auditors, Financial Analysts and Rating Agencies*, 11(1) Journal of Corporate Law Studies 33–36 (2011). DOI:10.5235/147359711795344145.

[13] Partnoy F. *How and Why Credit Rating Agencies Are Not Like Other Gatekeepers*, 07–46 San Diego Legal Studies Research Paper (2006) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=900257>; Alexander Kern, *The Risk of Ratings in Bank Capital Regulation*, 25 European Business Law Review 304–305 (2014) <http://www.kluwerlawonline.com/abstract.php?area=Journals&id=EULR2014011>; Goodhart C.A.E. *The regulatory response to the financial crisis* 121 (Cheltenham, Edward Elgar Publishing Ltd. 2009).

3. The Main Criticisms of the Credit Rating Industry

According to the Larosiere Report,[14] CRAs contributed to the causes of the financial crisis, because they fuelled the development of the structured finance market with ratings based on inappropriate methodologies that lowered the perception of credit risk.[15] Indeed CRAs failed to correctly evaluate the risks associated with banks' changed business models, especially due to the application of traditional risk-assessment models to new – far more complex – financial instruments.[16] Their methodology had two aspects: a focus on the permanent component of default risk and a prudent migration policy. Based on the first aspect, agency ratings disregard short-term fluctuations in default risk. By filtering out the temporary component of default risk, they measure only the permanent, long-term and structural component. The second aspect concerns the enhancement of rating stability by a prudent migration policy. According to this, only substantial changes in the permanent component of default risk lead to rating changes and, if triggered, ratings are partially adjusted to the actual level in the permanent component of default risk. This explains the delays in CRAs downgrading debt securities until just before insolvency.[17]

Another reason for the slow reaction of CRAs in the middle of the financial turmoil was the systemic impact of credit ratings. As debt markets have expanded, ratings have been built into financial arrangements of all kinds. For example, many banks had built so-called "ratings triggers" into their loan agreements. These meant that, if something happened to lower the borrower's creditworthiness to a specified level, the loans could have been called in. In time of crisis, and with capital markets highly

---

[14] *See* Basel: Bank for International Settlements: de Larosiere Group, *Report of the High-Level Group on Financial Supervision in the EU* 9 (Brussels, February 2009) <http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf>.

[15] The weaknesses concerning the credit assessment of complex structured credit products were highlighted also by the Financial Stability Forum. See *Report of the FSF on Enhancing Market and Institutional Resilience* (7 April 2008).

[16] In the view of the Financial Stability Forum (FSF) '[…] *poor credit assessment of complex structured credit products by CRA contributed to both the build-up and the unfolding of the financial crisis'*, in *Report of the FSF on Enhancing Market and Institutional Resilience* (7 April 2008) <http://www.financialstabilityboard.org/publications/r_0804.pdf>; see also Committee of European Securities Regulators (CESR), *CESR's Second Report to the European Commission on the compliance of credit rating agencies with the IOSCO Code and the role of credit rating agencies in structured finance, update to the code of conduct* (May 2008) <www.cesr-eu.org/data/document/CESR_08_277.pdf>; The European Securities Markets Expert Group (ESME), *Report to the European Commission, Role of Credit Rating Agencies* (June 2008) <http://ec.europa.eu/internal_market/securities/esme/index_en.htm>; Committee on the Global Financial System (CGFS), *Ratings in Structured Finance: What Went Wrong and What Can Be Done to Address Shortcomings?* 32 CGFS Paper (2008) <http://www.bis.org/publ/cgfs32.htm>; Financial Services Authority (FSA), *The Turner Review: A Regulatory Response to the Global Banking Crisis* (London, 2009) <http://www.fca.org.uk/static/pubs/other/turner_review.pdf>. For an analysis see Weber R.H. and A. Darbellay, *The regulatory use of credit ratings in bank capital requirements regulations* (n.3) 1; Partnoy F. (n.1) 4 (2010).

[17] Goodhart C.A.E., *The regulatory response to the financial crisis* (n.13) 129.

interconnected, this effect could have easily created default situations and liquidity crises. For these reasons, CRAs were rightly reluctant to downgrade because of the impact on the triggers, which were usually not publicly disclosed, in private financial contracts, even if the downgrade was already reflected in market prices.[18]

Nevertheless, as doctrine has stressed, the recent structured finance failures are only the last of a series of failures to foresee severe financial problems. The CRAs' slow reaction to market events has raised the question of whether regulators and market participants should rely on credit ratings at all. In addition, from a macroeconomic perspective, credit ratings as well as other capital requirements (Basel I and II) have been said to be pro-cyclical in their nature, or 'through the cycle' indicators. For this reason they contribute to systemic risk in a global market, such as financial markets where financial agents and institutions are extremely interconnected. The riskiness of assets varies over the business cycle and risk assessments based on external evaluation by CRAs reflect this pro-cyclicality. The pro-cyclical approach of ratings creates a similar pro-cyclical approach in capital charges, with the implication that banks hold less capital or over-lend at the cusp of a cycle – exactly when the danger of a systemic crisis is largest – while they hold too much capital or under-lend during the downturn – when macroeconomic stabilization requires an expansion in lending.[19]

Some scholars have argued that CRAs' poor rating performance can be explained by the limited competition in this industry.[20] Indeed CRAs operate in an oligopolistic market that offers limited incentives to compete on quality ratings. As regards market structure, there is no doubt that the rating industry is heavily concentrated. The three largest companies, Moody's, Standard & Poor's and Fitch, *de facto* dominate the market.[21] Although it has been said that the level of rating prices was low in absolute terms, these companies have been extremely profitable compared to the value of the financial information provided to the markets. Their behaviour has raised doubts as to whether CRAs are driven only by private market forces.[22] From a different point of view, it has been argued that an excess of competition would lower not only the

---

[18] Look at the downgrading of AIG's debt on September 16, 2008 that triggered collateral calls on credit default swap contract provisions that AIG had with banks around the world forcing the US Federal Reserve to inject new liquidity to save the company.

[19] Goodhart C.A.E., *The regulatory response to the financial crisis* 4(4) Journal of Financial Stability 351–358 (2008). DOI: 10.1016/j.jfs.2008.09.005. See the Financial Economists Roundtable (FER), *Reforming the Role of the Statistical Ratings Organizations in the Securitization Process* (Statement released the 1st December 2008, Philadelphia) <http://fic.wharton.upenn.edu/fic/Policy%20Page/FER12%201%2008rev.pdf>.

[20] For literature on the topic, see Darbellay, *A Regulating credit rating agencies* (n.1) 207 ff.

[21] In 2012 they shares accounted for the 96% of all outstanding ratings in the US, see Staff of the SEC, 2012 *Summary Report of Commission Staff's Examinations of Each Nationally Recognized Statistical Rating Organization, As Required by Section 15E(p)(3)(C) of the Securities Exchange Act of 134* 7 (November 2012).

[22] Darbelley, *A Regulating credit rating agencies* (n.1) 215.

price but also the quality of ratings, resulting in a 'race to the bottom'.[23] In truth, in a market for ratings in which competition incentives work adequately, CRAs' success and credibility strongly depend on their reputation. In fact – as many scholars have stressed – a competitive rating market is based on reputation-driven business.[24]

Despite these arguments, a strong reliance on CRAs due to a lack of understanding was apparently also shared by the regulators that linked bank capital requirements to ratings, generating a heavy dependence of the market on them. Under Pillar I standardized approach of Basel II, if the bank's commitments to its obligors are highly rated, the bank is required to hold less regulatory capital. Therefore, the purpose of obtaining a high rating had a twofold benefit for issuers. First, to lower the overall cost of capital and in so doing increase the share value, make the balance sheet appear safer and be able to take on more debt. Second, to make the issuer more appealing to the market, which means being able to sell to a larger range of investors. For instance, mutual funds and government-run pension funds often restrict their investments to certain grades of bonds.[25]

As underlined by much of the literature, one great cause for concern arises from the conflict of interest inherent in the relationship between banks, rating agencies and investors – the so-called *issuer-pays* business model.[26] The ratings were for the use of investors, but the issuers paid for them, meaning that the same banks made more profit when a higher rating was assigned to their financial products by a CRA, which in return made more profit pleasing the issuers with high ratings and thus having more financial products to rate. This agency conflict could have (and probably did) generate *inflated* credit ratings as a consequence of the fact that CRAs have more interest in helping issuers than in warning investors against potential losses.[27]

In the last two decades, financial institutions in need of raising fresh finance have fuelled markets with a myriad of structured credit products to take advantage of the

---

[23] Hunt J.P., *Credit Rating Agencies and the 'Worldwide Credit Crisis'* (n.1) at 109, 112–114, 127–128. *See also* Bolton P., X. Freixas, J. Shapiro, *The Credit Ratings Game*, 67(1) The J. of Fin. 85–110 (2012).

[24] Schwarcz S.L. *Private Ordering of Public Markets: The Rating Agency Paradox,* 2 University of Illinois Law Review 1, 26 (2002); Jackson H.E. *The Role of Credit Rating Agencies in the Establishment of Capital Standards for Financial Institutions in a Global Economy* in *Regulating Financial Services and Markets in the 21st Century* 312 (Eilis Ferran and Chares A.E. Goodhart (eds.), Hart Publishing 2001); Partnoy F., *The Siskel and Ebert of Financial Markets? Two Thumbs Down for the Credit Rating Agencies* (n.9) 627.

[25] Weber R.H. and A. Darbellay, *The regulatory use of credit ratings in bank capital requirements regulations* (n.3) 10 ff.

[26] *See* IOSCO, *Code of conduct: Fundamentals for Credit Rating Agencies*, December 2004, section 3.5 and 3.7 <www.iosco.org/library/pubdocs/pdf/IOSCOPD180.pdf>.

[27] For a review of the literature see Darbellay A. and Partnoy F. *Credit Rating Agencies and Regulatory Reform,* University of San Diego Legal Studies Research Paper Series, Research Paper No. 12–083 (April 2012); Alexander Kern, *The Risk of Ratings in Bank Capital Regulation,* 24 European Business Law Review 305–306 (2013) (n.13); Partnoy F. *Overdependence on credit ratings was a primary cause of the crisis*, 27 Fondazione Eni Enrico Mattei Nota di Lavoro (2009).

different risk preferences of investors, and CRAs were paid to give these issuers their certified stamp. The problem was that investors viewed debt products with the same credit rating as fungible and, as a consequence, even the most complex and opaque financial instrument could be sold as long as it received a certain investment-grade rating. The lack of transparency and great complexity in this market, and the great appetite of investors for high rates of return at a time of low interest rates, ensured a heavy reliance by market participants on rating agencies.[28]

The rating-based regulation for banks and financial institutions on the one hand, and the high demand for highly rated products on the other, had the result of developing a market for securitized debt. Securitization transactions grew enormously in a short period, dramatically increasing the revenue stream and profitability of rating agencies. This growing business prompted financial institutions to relax credit-underwriting standards by relying on the assessment of external CRAs instead of collecting information on borrowers, and to expand into higher-risk market segments in order to originate loans solely for the purpose of securitizing them – the so-called 'originate to distribute' model.[29] Credit ratings were therefore critical to the development of securitization and structured financial products. If CRAs had denied, or issued some negative ratings, banks would have not been able to profitably sell on individual loans that were generally not granted direct access to the capital markets. Thus, the result of the rating-dependent regulation has been to weaken the monitoring role of banks as financial intermediaries while providing them with a great incentive for engaging in creative financial engineering. By structuring a deal in such a way as to obtain a higher credit rating, the issuers were able to transfer the risk to the investors.[30]

4. The Regulatory Response to Rating Agencies' Failures

In response to CRAs' failures, authorities in the Russian Federation have introduced a detailed range of regulatory measures in line with initial regulation introduced in the EU.[31] The measures have been mainly targeted to manage the conflicts of interest. They include governance reforms in rating agencies, the improvement of the quality of rating methodologies for structured finance, increased transparency and disclosure obligations and the introduction of direct government oversight to replace self-regulation. The new

[28] Goodhart C.A.E., *The regulatory response to the financial crisis* (n.13) 121.

[29] Partnoy F. *Overdependence on credit ratings was a primary cause of the crisis*, 27 Fondazione Eni Enrico Mattei Nota di Lavoro (2009).

[30] Weber and Darbellay (n.3) at 18.

[31] Federal'nyi zakon RF o deyatel'nosti kreditnych agentstv v Rossiiskoi Federatsii [Federal Law of the Russian Federation on 'The activities of the rating agencies in the Russian Federation']. Rossiiskaia Gazeta [Ros. Gaz.] July 17, 2015. Compare to (EC) Regulation 1060/2009 of the European Parliament and of the Council of credit rating agencies, O.J. 2009, L 302/1.

Russian Federation Law (RFL) on CRAs is applicable from the date of its publication (July 2015). The Regulation is divided into four main chapters: Chapter 1 – General Provisions (art. 1 and 2); Chapter 2 – Operating Environment of Credit Rating Agencies (art. 3 to 14); Chapter 3 – Regulation and Supervision of Credit Rating Agencies (art. 15 and 16); and Chapter 4 – Final Provisions (art. 17 to 20). As a rule, all CRAs that would like their credit ratings to be applied in the Russian Federation will have to be registered in accordance with the requirements of the Central Bank of Russia (CBR).[32]

The applications will be submitted directly to the CBR, which will have to grant every rating agency a judgement of conformity with Russian requirements, and will be involved in the day-to-day supervision of those entities. The RFL lays down the conditions and the procedure for granting, refusing, suspending and withdrawing registration.[33] The CBR can reject an application on the basis that an applicant does not demonstrate by documentation a complete conformity to the governance, methodology and ownership criteria defined in the law. In addition, the RFL imposes several requirements of disclosure on CRAs.[34] Registered rating agencies will have to comply with rigorous rules to make sure that (i) ratings are not affected by conflicts of interest, (ii) the quality of their rating methodology and their ratings does not deteriorate, and (iii) they act in a transparent manner. First of all, the regulation requires special disclosure of the CRA ownership structure. In particular, article 6 of the RFL explains how to become shareholder of a rating agency without being *de facto* in a situation of conflict of interests. An individual controlling directly or indirectly – through a company, a shareholders' agreement or on a fiduciary basis – more than 10 per cent of the voting rights in a rating agency must *not* invest in another rating agency or exercise any kind of influential power over financial institutions or organizations.[35] All investors holding more than 10 per cent of the voting rights must declare themselves to the CBR, which in the case of a *persona non grata* can apply to the courts to reduce their voting power as appropriate.[36] Financial institutions, investment firms, insurance, assurance and reinsurance undertakings holding a share in a CRA cannot – in any case – increase their shareholding above 20 per cent in terms of voting rights.[37] The CBR has the right to a judicial remedy for any act or collective decision of a CRA's shareholders' meeting taken in contravention of the formal requirement.[38]

---

[32] RFL article 4. Similar article was included in EU Regulation (CRA I), see art. 4(1) of the Regulation.

[33] RFL articles 15 and 16. The same content is included in CRA I, articles 14 to 20.

[34] RFL articles from 5 to 12. They match with CRA I, art. 8.

[35] RFL art. 6 section 1. Control and influential power are concepts as determined by the International Financial Reporting Standards (IFRS) see art. 6 sub2. Same approach is taken in the EU, where policy-makers also wish to prohibit cross-ownership of credit rating agencies so that CRA would remain independent of one another. See CRA I, art. 6a.

[36] RFL article 6 section 4. In the EU, see CRA I, art. 3(1)(j).

[37] *Id.*, art. 6 section 6.

[38] *Id.*, art. 6 sections 7, 8, 9.

Second, like CRA I,[39] the RFL sets out certain requirements for rating agencies, including the establishment of executive and supervisory boards, internal controls and compliance functions. Directors and members of the executive and supervisory boards of CRAs hold fiduciary duties towards the company and must act in the *bona fide* best interest of the company. They must comply with the highest reputational standards for professionals involved in the management of financial intermediaries.[40] All nominations proposed for positions on the internal control and risk management units must be communicated to the CBR within three days of the appointment for approval, which must arrive within a month. Their dismissal from the position or termination of powers must be communicated to the CBR no later than the next working day.[41] The CBR has the right to ask CRAs to replace one or more individuals involved on the boards in the case of them no longer meeting the minimum requirements for eligibility.[42] The control over financial accounts can be outsourced, but only to a physical person not under the control of the CRA who fulfils the international professional standards for this role. If it is outsourced to a company, that company must have among its players a physical person fulfilling the professional standards required and taking full responsibility for its mission.[43] For CRAs with more than twenty employees, at least one third of the advisory and executive board of directors, or a minimum of two individuals, must be independent non-executive directors.[44] Independent non-executive directors must not be involved in any other CRA's activity or any municipal or public entity.[45] They cannot be elected for more than five consecutive years or for a more than a total of seven years.[46] Their duty is to remain vigilant with respect to the quality of their rating methodologies and ratings, and to enable their procedures and controls to prevent, identify and solve any potential conflict of interest.[47] Their remuneration must not be linked to the performance of the credit rating agency and should be defined so as to guarantee independence in their judgement.[48]

Articles 9 to 14 continue the mission of improving the operational environment of the rating industry. Accordingly, they establish a general duty of rating agencies to

---

[39] See CRA I, art. 6 and section A and B of Annex I.

[40] The RFL defines at art.7 section 1sub sections 1-15 all requirements to be considered eligible for the position.

[41] *Id.*, art. 7 sections 2, 5, 6 and 7.

[42] *Id.*, art. 7 section 3.

[43] *Id.*, art. 7 section 8.

[44] *Id.*, art. 8 section 2.

[45] *Id.*, art. 8 section 3.

[46] *Id.*, art. 8 section 4.

[47] *Id.*, art. 8 section 5.

[48] *Id.*, art. 8 section 6.

ensure that their ratings are not tainted by any actual or potential conflict of interest or business relationship involving the CRA issuing the rating, its managers, rating analysts and employees. Detailed requirements are set out for rating agencies to demonstrate their independence. In the absence of those requirements, the CRA cannot assign a rating to an entity, or the rating assigned in conflict of interest will not be disclosed to the market.[49] Several clear cases of conflicts of interest are described in the regulation. For instance, if the rated entity exerts considerable influence over a CRA, it is in a conflict of interest position.[50] The same applies if an employee whose services are placed at the disposal of or under the control of the CRA is related to a member of the supervisory board of the rated entity or related third party.[51] CRA founder members holding more than 10 per cent of voting rights are not allowed to rate entities in which they own – either directly or indirectly – more than 10 per cent of voting rights or in which they have any other similar indirect ownership interest.[52] Likewise, no rating can be issued if the entity to be rated is a creditor of the CRA for an amount higher than 10 per cent of the total turnover generated by the CRA's activity.[53] Mutual and pension funds as well as common investment funds are exempted from these restrictions.[54] Other requirements state that the remuneration paid to CRAs should not depend on the rating assigned,[55] and CRAs are not allowed to provide their clients with consultancy or advisory services.[56] In Russia, CRAs will have to be pre-emptively authorized by the CBR for any additional service they would like to offer.[57]

Similar requirements to those applying to directors also exist for financial analysts. Articles 10 to 12 define the professional requirements and independence criteria that financial analysts must fulfil in order to become part of CRAs' rating committees. Financial analysts develop their activities through the rating committee formed by at least five rating analysts, where the president of the committee takes the final decision regarding the rating to be issued according to the modalities described in the internal credit rating procedures, and in conformity with the requirements of the CRA Regulation and the CBR Regulation.[58] A financial analyst whose services are placed at the disposal of or under the control of a CRA cannot hold shares or

49 *Id.,* art. 9 section 3. Similar articles exist in CRA I, see Annex I, Section B, para.3.

50 RFL art. 9 section 3 sub 1.

51 *Id.,* art. 9 section 3 sub 5.

52 *Id.,* art. 9 section 3 sub 6.

53 *Id.,* art. 9 section 3 s. 8.

54 *Id.,* art. 9 section 7.

55 *Id.,* art. 9 section 8.

56 *Id.,* art. 9 section 12.

57 *Id.,* art. 9 section 11.

58 *Id.,* art. 11 sections 1 and 7.

other financial instruments of the rated entity or hold any position on the board.[59] A financial analyst cannot rate an entity if they have had a business relationship with the same entity within the last 12 months.[60] They must be independent in their decisions and not influenced by any marketing or commercial policies[61] or members of the executive or advisory board.[62] They must rotate their rating activities in order not to be involved in the rating of the same entity for more than four years, or five in the case of sovereign rating.[63] Their remuneration must not depend on the profit gained through fees obtained by clients.[64] They cannot hold shares or any ownership interest in CRAs.[65] They cannot receive gifts with a face value of more than 3,000 roubles.[66]

In order to increase transparency in the market, the RFL imposes several disclosure obligations on CRAs regarding the methodologies, models and key assumptions used in the rating process. These methodologies will have to be rigorous, systematic and continuous, and subject to validation based on historical experience.[67] CRAs must establish internal arrangements to monitor and review the impact of changes in macroeconomic or financial market conditions on credit ratings.[68] If CRAs decide to change their rating methodology they must immediately disclose which ratings are likely to be affected by this change and re-rate them promptly.[69] They will have to constitute an internal methodology committee that is independent from the rating committee and the executive/advisory boards.[70] All information and documents regarding the members of the rating committee and the methodologies adopted must be communicated to the CBR.[71] The public authorities of the Russian Federation and global and local regulators such as the CBR and the local governments have no right to influence the content of the credit rating issued and the methodologies used

---

59 *Id.,* art. 10 section 10.

60 *Id.,* art. 10 section 2. In the EU see CRA I Section C, Annex I.

61 *Id.,* art. 11 section 2. In the EU, see CRA I art. 7(2).

62 *Id.,* art. 10 section 4.

63 *Id.,* art. 10 sections 5 and 6. A similar mechanism of rotation is implemented in Europe, see CRA III art. 6 and Para 8, Annex I, Section C where it is proposed CRA themselves to rotation every 4 years.

64 RLF, art. 10 section 7.

65 *Id.,* art. 10 section 8.

66 *Id.,* art. 10 section 9. In the EU see CRA I, Para 4, Annex I, Section C.

67 RLF, art. 12 sections 1 to 5. In CRA I this is stated in art. 8(3).

68 RLF, art. 12 sections 8 to 11. In CRA I this is stated in art. 8(5).

69 RLF, art. 12 section 12. In CRA I this is stated in art. 8(6).

70 The methodology committee cannot develop any commercial or marketing function in the credit agency. See art. 12 sections 13 and 14.

71 See RFL art. 12 section 15.

by CRAs.[72] However, the CBR must agree on the appropriateness of all information disclosed.[73] Additional periodical disclosures include data on CRAs' historical performance and default rates of rating categories, and a list of their largest clients by revenue composing more than 5 per cent of their annual turnover.[74] Finally, every year – before the end of March – CRAs must prepare a report containing information on their capital structure, internal controls and audit, ratings assigned and revised, directors and members of the boards, any rotation of their financial analysts, and the turnover of the year ended.[75] This report is presented to the CBR, which has the right to disclose the data on their website.[76]

For the particular task of issuing sovereign ratings, CRAs will have to follow an approved calendar to be agreed with the CBR as appropriate.[77] If the rating is unsolicited, the CRA will have to mention it.[78] In any case, the CBR has the right to add supplementary requirements for the disclosure of certain ratings.[79] These provisions are intended to achieve a compromise between the political interest in ratings of sovereign debt and the maintenance of objectivity and independence in its regulatory regime. The provisions will prevent situations of rating downgrades driven by superficial perceived dangers that do not take into account the country's economic context and unique features. These scenarios have a systemic risk impact and therefore should be avoided.

5. A Comparative Evaluation of the Russian Regulation on Credit Rating Agencies

The areas for improvement in relation to CRAs involve promoting competition in the credit rating industry, solving the conflicts of interest (due to the issuer-pays business model) and reducing the regulatory franchise of rating agencies.[80]

Russian, American and European regulation require rating agencies to register on a list of companies authorized by a financial supervisor, which for Russia will be

---

72 RLF, art. 12 section 17. Same statement is found in CRA I, Recital 23, art. 23.

73 *Id.,* art. 13 section 1 where is provided a list of information that need to be disclosed.

74 *Id.,* art. 13 section 3. CRA I states similar requirements at art. 11(2) and Annex I, Section E, Pt II.

75 *Id.,* art. 13 section 4. For CRA I see art. 11(2) and Annex I, Section E, Pt III.

76 *Id.,* art. 13 section 8.

77 *Id.,* art. 14 section 4. In the EU a similar requirement was introduced with the amendments of CRA III in 2013 (art. 8a) according to which rating agencies have to set three dates in advance for publishing any unsolicited sovereign debt rating.

78 *Id.,* art. 14 section 5.

79 *Id.,* art. 14 section 6.

80 Hunt J.P., *Credit Rating Agencies and the 'Worldwide Credit Crisis'* (n.1) 109.

the CBR. This licence will hopefully increase the number of players in the industry and, therefore – by increasing competition – will reduce the great power that CRAs have acquired over the years. However, as doctrine has pointed out, size and market recognition may be greater barriers to entry than regulatory status.[81] Furthermore, the process of promoting competition in the industry is highly influenced by the other two issues – the issuer-pays business model and the rating-based regulation for financial institutions. In fact, these three areas of intervention are strictly interconnected. A blind increase of competition without addressing the other issues may prove a trivial exercise. As long as CRAs receive their payments from issuers, a strategy of increasing competition might actually lower the quality of ratings. The reason for this is that new entrants would probably compete by offering higher ratings or by lowering prices. By doing so, both the level of effort in ratings and their reliability would be compromised.[82] Additionally, the reputational incentives for CRAs would be proportionally reduced by the increase in competitors.[83] Finally, it has been said that a limited number of global CRAs promote greater consistency and uniformity in ratings across markets, making it easier for investors to compare debt securities issued in different countries.[84]

This is why countries will not only have to apply competition and anti-trust law *sensu stricto*. It will also be important to avoid take-over attempts by major players of newcomers, as well as any abuse of a dominant position and anti-competitive agreements between CRAs. However, it will be essential to implement competition policies targeted to provide market players with appropriate incentives to compete.[85] Ideally, a competitive rating market requires as few barriers to entry as possible and a natural extinction of CRAs not providing quality ratings.[86] As some scholars have noted, rating scandals originated mostly from market failures, which were structural, and only in small part from anti-competitive practices.[87]

For instance, the issuer-pays model fundamentally compromises the objectivity of the rating process, creating serious concerns for maintaining reputational capital.

---

81 Partnoy F. *The Siskel and Ebert of Financial Markets?* (n.9) 627.

82 Coffee Jr. J.C. *Ratings Reform: the Good, the Bad, and the Ugly,* 1 Harvard Business Law Review 231, 234 (2011) <http://www.hblr.org/wp-content/uploads/2014/09/Ratings-Reform.pdf>.

83 Becker B. and T. Milbourn, *Reputation and Competition: Evidence from the Credit Rating Industry,* Working Paper 09–051 (Harvard Business School, Cambridge, MA, 2008).

84 Becker B. and T. Milbourn, *How Did Increased Competition Affect Credit Ratings?* 101(3) Journal of Financial Economics 493–514 (2011). DOI: 10.1016/j.jfineco.2011.03.012.

85 Darbellay A., *Regulating credit rating agencies* (n.1) 217–224.

86 Partnoy F. *The Syskel and Ebert of Financial Markets?* (n.9) 639.

87 McVea H. *Credit Rating Agencies, the Subprime Mortgage Debacle and Global Governance: the EU Strikes Back*, 59(3) International and Comparative Law Quarterly 701, 715 (2010) <http://www.jstor.org/stable/40835429>.

Frequently, the most important source of information about the creditworthiness of an issuer comes, in fact, from the issuer itself. Under such circumstances, certified CRAs have more interest in helping issuers benefit from favourable regulatory treatment than in providing investors with accurate information. In light of this, a mandatory conversion to an investor-pays model has been proposed, in which rating agencies would earn fees from users of the rating information.[88] The idea is not new. The major rating agencies relied on subscription fees as their primary source of revenue for most of their history until the early 1980s. In the US, a few registered rating agencies currently operate on an investor-pays model, but they have failed to gain market acceptance and thus remain limited to geographic or product niches. This approach may be a welcome solution, although it would probably result in substantially fewer offerings receiving ratings, to the detriment of smaller and less liquid issuers. Further, critics of this model also suggest that it would not eliminate conflicts of interest but simply shift them from issuers to investors.[89] For these reasons, the US Dodd-Frank Act, although affirming that the credit rating market should be competitive, does not cite competition as a specific objective, and it is improbable that in the US the number of authorized credit agencies will increase in the near future.[90]

A large part of all implemented regulations has been dedicated to reducing the conflicts of interest in which CRAs often operate. In this sense the Russian regulation on CRAs does not differ from the others. CRAs are obliged to submit all rating information to a financial supervisor, which will make it publicly available for users. The financial supervisor will monitor CRA activities and hold the power to suspend or revoke the registration of any rating agency found to be in breach of these rules. In Russia the duty to collect information and supervise on ratings is given to the CBR; in the EU it is the European Securities and Markets Authority (ESMA) and in the US it is the Securities and Exchange Commission (SEC). Like US and EU regulation, Russian rules on CRAs increase the level of disclosure required of this market as the availability of relevant financial information may have a positive implication for the competitive environment in the rating industry. In the US for instance, the SEC, independently of the mandates enacted under Dodd-Frank, introduced rule 240.17g-5, which required, among other things, that sponsors of securitization

---

88 SIFMA (Securities Industry and Financial Markets Association), *Recommendations of the Credit Rating Agency Task Force (*2008) <http://www.sifma.org/issues/item.aspx?id=21391>.

89 Goodhart C.A.E. *The regulatory response to the financial crisis,* 13, 130; Goodhart C.A.E. *How, if at all, should Credit Rating Agencies (CRAs) be regulated?* 181, 1–34 (LSE Financial Market Group Paper Series, June 2008).

90 At today, there are 10 rating organizations authorized by NRSRO in the USA against 26 registered rating agencies in the EU. In the US States from 2008 to 2014 the market shares of the big three rating agencies Standard & Poor's, Moody's and Fitch has passed from more than 99 to 96.6 per cent, *see* Staff of the SEC, *NRSRO Annual Report 2014* 11; Staff of the SEC, *Summary Report of Commission Staff's Examination of Each Nationally Recognized Statistical Rating Organization, As Required by Section 15E(p)(3)(C) of the Securities Exchange Act of 1934* 4 *(December 2015)*.

transactions seeking ratings from CRAs create a password-protected website to which they must post all documents and data to be considered by the agency when issuing a rating.[91] Under this rule, access to this website must be given to all qualified CRAs not requested to provide a rating for a particular transaction together with any additional information communicated from issuer to invited agency, whether orally or in writing. In this way, access to confidential information from issuers, which is facilitated for the major rating agency, does not constitute an unfair advantage over providers of creditworthiness assessments based on public information. The goal of this rule was to incentivize uninvited agencies to issue unsolicited ratings on complex hybrid issues – in order to prevent *rating shopping* by issuers.[92] However, in practice, the rule has only imposed new formalities and constraints on the communications between issuers and rating agencies, with no rating agencies willing to invest the resources necessary to provide a rating without being paid for it.[93]

The SEC also introduced rules regarding the internal-control structure at rating agencies, which ensures review of the methods used to generate effective ratings. Every year, the managing director of a CRA must deliver and sign a report attesting to the company's internal controls. The rules prohibit anyone involved in sales and marketing to play a role in determining the credit rating. Other disclosure mandates are the obligation for CRAs to publish their methodologies, credit rating histories and additional information for investors.[94] All these requirements have also been introduced in the European and Russian regulations.[95] However, it is recognized that relevant legislation of the Russian government only came about in recent times and, as such, the assessment of this regulation takes place in a limited chronological space.

Where the Russian approach seems so far to diverge is in relation to the civil liability of CRAs. In the US, section 939G of Dodd-Frank rescinded the exemption from liability under section 11 of the Securities Act of 1933, which rating agencies

---

[91] *Code of Federal Regulations*, Part 240 Rule 17g-1 to 10 (Nationally Recognized Statistical Rating Organizations). The SEC provided several exemptions from many of the requirements introduced by the Rule 17g-5 for small size NRSRSO for which it would be too big burden.

[92] U.S. SEC, *Summary Report of Issues Identified in the Commission Staff's Examinations of Select Credit Rating Agencies* (Washington, DC, 2008) <http://www.sec.gov/news/studies/2008/craexamination070808.pdf >.

[93] Borod R.S. and M. Bartlam, *Rating Agency Reform in the EU and the U.S.*, 38(13) Practical International Corporate Financial Strategies 3–4 (2012) <http://files.dlapiper.com/files/upload/DLAPiper_CF07152012.pdf>. A more draconian tool was proposed in the Franken Amendment to Dodd-Frank Act. The Amendment required the SEC to study 'the feasibility of establishing a system in which a public or private utility or a self-regulatory organization assigns nationally recognized statistical rating organizations to determine the credit ratings of structured finance products' ($ 939F). However, it got watered down in the final version of Dodd-Frank.

[94] *Code of Federal Regulation*, Part 240, section 17g-7.

[95] For Europe see CRA I regulation 2009 articles 8, 9, 10, 11, 12 and Annex I, Section E, Pt II. For Russia, see CRA regulation 2015 No 222 FZ articles 3 to 14.

previously enjoyed under Rule 436(g). CRAs were largely immune from liability and seemingly did not owe any duty of care to investors. It has been very difficult to demonstrate the reliance necessary to be successful in a fraud or negligence action against a CRA.[96] After this amendment CRAs became exposed to liability for misconduct like other gatekeepers such as accounting firms or securities analysts.[97] This rule was complemented by the introduction of article 933(b)(2), which alters the pleasing standards applied to actions against rating agencies. Accordingly, plaintiffs will have grounds to sue CRAs in court if they can allege that 'the rating agency (i) knowingly or recklessly failed to conduct a reasonable investigation of the facts on which it relied in evaluating the credit risk of the securities, and (ii) it failed to obtain reasonable investigation on those facts'.[98] The rule in practice requires rating agencies to act more independently in examining and verifying the facts on which they rely and to obtain independent verification of material facts. Only time will tell.[99] A similar approach was taken in Europe where art. 35(a) of Regulation 462/2013 established a liability regime for CRAs, especially in circumstances where the absence of a contractual relationship would make it difficult to impose a civil liability.[100] Despite these clear approaches towards the introduction of civil liability for CRAs, the Russian regulator so far has decided not to include any provision in this sense.

Another difference in the approach to regulate CRAs that distinguishes Russian and European regulation from the US Dodd-Frank Act concerns the problem of rating involvement in banking capital regulation. Rating-based regulation had the result of creating market over-reliance on CRAs, which facilitated bad practices that compromised the integrity of their ratings.[101] It has been said that rating-based regulation discourages investors from performing their own due diligence.[102] As the IOSCO concluded in its report in 2008, banks should not be allowed to outsource their risk management to CRAs, and they should by no means try to escape from their

---

96 *Jefferson County Sch. Dist v Moody's Investor services, Inc* [1999], No 97-1157; *Compuware Corp v Moody's Investor services, Inc* [2007] No. 05-1851; Newby v Enron Corporation [2005] 511 F Supp 2d 741.

97 Dodd-Frank Act section 933(a). See 15 U.S.C. 78o-7(m)(1).

98 15 U.S.C. 78u-4(b)(2)(B).

99 Miglionico A. *Market failure or regulatory failure? The paradoxical position of credit rating agencies,* 9(2) Capital Markets Law Journal 194–211 (2014). DOI: 10.1093/cmlj/kmu001; Ellis N.S., L.M. Fairchild and F. D'Souza, *Is Imposing Liability on Credit Rating Agencies a Good Idea? Credit Rating Agency Reform in the Aftermath of the Global Financial Crisis*, 17(2) Stanford Journal of Law, Business & Finance 183–184 (2012).

100 See CRA III, Tittle IIIA *Civil liability of Credit Rating Agencies* (2013).

101 Partnoy F. *Overdependence on credit ratings was a primary cause of the crisis,* 27 Fondazione Eni Enrico Mattei Nota di Lavoro (2009) <http://hdl.handle.net/10419/53327>.

102 FSF, *Report of the FSF on Enhancing Market and Institutional Resilience* 37–38 (April 2008); IOSCO, *Report of the Task Force on the Subprime Crisis*, *Final Report* 39 (May 2008) <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD273.pdf>.

legal obligations. Therefore, ratings should not be given a 'regulatory license' relative to other forms of financial risk assessment.[103] This has been the approach taken by the US regulator. Accordingly, the objective of the Dodd-Frank Act of 2010 was to remove certified CRAs' quasi-governmental function and to reconsider them as exclusively private-sector entities.[104] However, this does not so far seem to be the approach of the EU. The EU regulation on CRAs amended in 2011 (CRA II) included hedge funds among the issuers required to use ratings issued by registered or certified rating agencies. The Russian regulator has not dealt with this issue yet.

6. Conclusion

The effectiveness and efficiency of CRA regulations introduced in the EU and US have been widely criticized by doctrine and institutional bodies. It was argued that such reforms were insufficient and merely treated the symptoms of the problems and not the root causes because they left unchanged the fundamental characteristics of the rating industry, namely the issuer-pays business model and the rating-based regulation.[105] For these reasons, further regulation was introduced. Only time will tell how effective this is. Both regulators have concentrated their efforts on educating investors on the limitations of ratings. However, while civil liability for the authorized agencies operating in the market was introduced in both regulations, the US has taken a more energetic approach in eliminating references to rating in banking and financial regulation.[106]

So far the Russian regulator has implemented adequate rules to reduce the conflicts of interest and increase competition in the industry in line with the other regulations on CRAs. However, the achievement of these goals implies the implementation of wider competition policies aimed at providing market players with the right incentives. Only adequate incentives can make CRAs compete on

---

103 IOSCO, *The Role of Credit Rating Agencies in Structured Finance Markets*, *Final Report* 2 (2008) <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD270.pdf>.

104 Dodd-Frank Act section 939(a-f) has expressly removed statutory references to ratings. Pursuant sec. 939A every Federal Agency has one year to remove regulatory reliance on ratings, which will have to be removed from every type of governmental rule.

105 See Amtenbrink F. and J. De Haan, *Regulating Credit Ratings in the European Union* (n.1) 1943 ff; Mollers T.M.J. *Regulating Credit Rating Agencies: the new US and EU law – important steps or much ado about nothing?* 4(4) *Capital Markets Law Journal* 496 (2009). DOI: 10.1093/cmlj/kmp034; Weber R.H. and A. Darbellay, (n.3) 10 ff.; Veron N. *Rating Agencies: An Information Privilege Whose Time Has Passed,* Briefing Paper for the European Parliament's ECON Committee (Bruegel Policy Contribution 2009/01) at <http://veron.typepad.com/>; It is also interesting the proposal of professor Goodhart in favour of an independent institution, a CRA Assessment Centre, whose only task would be to assess the accuracy of CRA estimates and to publish comparative studies of such accuracy. Thus no further legal intervention would be needed. See Goodhart C.A.E. *The regulatory response to the financial crisis* (n.13) 129 ff.

106 Alexander Kern, *The Risk of Ratings in Bank Capital Regulation* (n.13) p. 312.

rating quality. Russia favoured the increase of the number of rating agencies and recently welcomed a multilateral independent international credit rating agency called UCRG (Universal Credit Rating Group) resulting from a partnership between China's Dagong Global Credit Rating, US-based Egan-Jones Rating Company and Russia's RusRating. The next step could be to introduce civil liability of CRAs for misconduct following the example of the other regulations. However, as evinced in this article, CRAs' failures were especially structural. Being a potentially high-growth economy, Russia presents a great market for CRAs, which have largely increased their profits in a very few years. Likewise, the Russian economy needs CRAs in order to raise foreigner funds to develop its market. The next challenge for the Russian regulator will be to favour the role of CRAs in the market while increasing their supervision. This objective could be achieved through empowering a unit of experts dedicated to CRAs within the Central Bank that will supervise CRAs and examine the functioning of their boards and deliberations, as for example in Europe, by facilitating interactions between the unit and CRAs' independent non-executive directors.

References

Alcubilla R.G. and J.R. del Pozo, *Credit Rating Agencies on the Watch List: Analysis of European Regulation,* ch. 5 p. 246 (Oxford, OUP, 2012).

Alexander Kern. *The Risk of Ratings in Bank Capital Regulation*, 25 European Business Law Review 304–305 (2014) <http://www.kluwerlawonline.com/abstract.php?area=Journals&id=EULR2014011>.

Amtenbrink F. and J. De Haan, *Regulating Credit Ratings in the European Union: A Critical First Assessment of Regulation 1060/2009 on Credit Rating Agencies*, 46 Common Market Law Review 1943 ff. (2009) <http://www.kluwerlawonline.com/abstract.php?area=Journals&id=COLA2009077>.

Becker B. and T. Milbourn, *Reputation and Competition: Evidence from the Credit Rating Industry,* Working Paper 09–051 (Harvard Business School, Cambridge, MA, 2008).

Becker B. and T. Milbourn, *How Did Increased Competition Affect Credit Ratings?* 101(3) Journal of Financial Economics 493–514 (2011). DOI: 10.1016/j.jfineco.2011.03.012.

Bolton P., X. Freixas, J. Shapiro, *The Credit Ratings Game*, 67(1) The J. of Fin. 85–110 (2012).

Borod R.S. and M. Bartlam, *Rating Agency Reform in the EU and the U.S.*, 38(13) Practical International Corporate Financial Strategies 3–4 (2012) <http://files.dlapiper.com/files/upload/DLAPiper_CF07152012.pdf>.

Chiu, Iris H-Y, *Regulatory Governance of Credit Rating Agencies in the EU: The Perils of Pursuing the Holy Grail of Rating Accuracy,* 2 The European Journal of Risk Regulation 209 (2013).

Darbellay A. and F. Partnoy, *Credit Rating Agencies and Regulatory Reform* in *Research Handbook on the Economics of Corporate Law* 294 (Claire A. Hill and Brett H. McDonnell eds., Cheltenham: Edward Elgar 2012).

Ellis N.S., L.M. Fairchild and F. D'Souza, *Is Imposing Liability on Credit Rating Agencies a Good Idea? Credit Rating Agency Reform in the Aftermath of the Global Financial Crisis*, 17(2) Stanford Journal of Law, Business & Finance 183–184 (2012).

Goodhart C.A.E., *The regulatory response to the financial crisis* 4(4) Journal of Financial Stability 351–358 (2008). DOI: 10.1016/j.jfs.2008.09.005.

Goodhart C.A.E. *The regulatory response to the financial crisis* 121 (Cheltenham, Edward Elgar Publishing Ltd. 2009).

Hunt J.P. *Credit Rating Agencies and the 'Worldwide Credit Crisis': the Limits of Reputation, the Insufficiency of Reform and a Proposal for Improvement*, Columbia Business Law Review 109, 112–114, 127–128 (2009) <http://cblr.columbia.edu/archives/10923>.

Jackson H.E. *The Role of Credit Rating Agencies in the Establishment of Capital Standards for Financial Institutions in a Global Economy* in *Regulating Financial Services and Markets in the 21st Century* 312 (Eilis Ferran and Chares A.E. Goodhart (eds.), Hart Publishing 2001).

Leyens P.C. *Intermediary Independence: Auditors, Financial Analysts and Rating Agencies*, 11(1) Journal of Corporate Law Studies 33–36 (2011). DOI:10.5235/1473597 11795344145.

McVea H. *Credit Rating Agencies, the Subprime Mortgage Debacle and Global Governance: the EU Strikes Back*, 59(3) International and Comparative Law Quarterly 701, 715 (2010) <http://www.jstor.org/stable/40835429>.

Miglionico A. *Market failure or regulatory failure? The paradoxical position of credit rating agencies,* 9(2) Capital Markets Law Journal 194–211 (2014). DOI: 10.1093/cmlj/kmu001.

Mollers T.M.J. *Regulating Credit Rating Agencies: the new US and EU law – important steps or much ado about nothing?* 4(4) *Capital Markets Law Journal* 496 (2009). DOI: 10.1093/cmlj/kmp034.

Partnoy F. *Rethinking regulation of credit-rating agencies: an institutional investor perspective*, 25 Journal of International Banking Law and Regulation 190 ff. (2010).

Partnoy F. *The Siskel and Ebert of Financial Markets? Two Thumbs Down for the Credit Rating Agencies*, 77 Washington University Law Quarterly 627, 644 (1999).

Schwarcz S.L. *Private Ordering of Public Markets: The Rating Agency Paradox,* 2 University of Illinois Law Review 1, 26 (2002).

Information about the author

Lorenzo Sasso (Moscow, Russia) – Associate Professor of International Commercial Law, National Research University – Higher School of Economics (3 Bol'shoy Trekhsvyatitel'skiy pereulok, 101000, Moscow, Russia; e-mail: lsasso@hse.ru).

ARCTIC LEGAL SYSTEM: A NEW SUSTAINABLE DEVELOPMENT MODEL

MANJEET KUMAR SAHU,
National University of Study and Research in Law
(Ranchi, India)

DOI:10.17589/2309-8678-2016-4-2-83-95

Historically, the term 'Arctic' was used synonymously with the term 'ice', but climate change and Arctic hydrocarbon grabbed the attention of the world community as an opportunity to make the Arctic an 'Energy Hub'. Exploration of oil and gas over the past six decades in the Arctic has made the region as places in the world. All major players in the market have endeavored to approach this new energy basket to utilize its maximum benefit. Commercial exploitation of natural resources has made this place a center for the regulation of oil and gas activities. However, petroleum exploration and its operation have had significant local detrimental impacts on the atmosphere, inhabitants and marine environment.

Geologists have always believed in the huge reserves of oil and gas in the Arctic Region. However, the exploration of oil and gas started as recently as the mid-1950s. An increase in the demand of oil and gas in the international market, as well as its growing scarcity, compelled the world to locate oil and gas reserves in various regions. It is significant to note that the Arctic states are strategically going to control the excessive exploitation of Arctic hydrocarbon with much profitability. However, it is still a far sighted question 'whether Arctic will provide direct competition to the Middle East' and become another hub in the energy market.

Keywords: arctic; exploration; energy hub; energy market; sustainable development.

Recommended citation: Manjeet Kumar Sahu, *Arctic Legal System: a New Sustainable Development Model,* 4(2) Russian Law Journal 83-95 (2016).

Table of Contents

1. Introduction: a New Energy Basket

The economic potential for the Arctic region is changing and increasingly drawing the world's interest.[1] It is perhaps becoming the most promising arena for the oil and gas industry in the human history. It is estimated that nearly eighty-four percent of the Arctic's reserves are resting offshore.[2] As the demand for oil and gas has substantially increased, more and more energy companies are exploring and investing in unstable and challenging areas[3] to meet the needs of existing communities. The Arctic is depicted as one of the last few remaining unspoiled ecosystems with limited human contact.

The global oil and gas industry is above all a long-term affair; nonetheless some short-term drama would endeavor to weaken the prospective growth of the industry, but exploration of oil and gas in the arctic has beckoned new waves to oil and gas explorers.[4] Development of Arctic resources will be energy intensive, not only because of the Arctic conditions under which mines, fisheries and other activities must operate but also because of the remoteness of such sites from markets. Additionally, transportation infrastructure is underdeveloped in the Arctic region. On another level, however, new marine shipping routes through Arctic seas could become more attractive for a global transportation network that has come under pressure from increasing costs of fuels. Some of these routes are considerably shorter than existing routes for transporting manufactured goods.[5]

---

1 Charles Ebinger, John P. Banks, and Alisa Schackmann, *Offshore Oil and Gas Governance in the Arctic. A Leadership Role for the U.S.*, Brookings Security Initiative (March 2014) <http://www.brookings.edu/~/media/Research/Files/Reports/2014/03/offshore-oil-gas-governance-arctic/Offshore-Oil-and-Gas-Governance-web.pdf?la=en>.

2 Kristen Rice, *Freezing to Heat the Future: Streamlining the Planning and Monitoring of Arctic Hydrocarbon Development*, 24(2) Colorado Natural Resources, Energy, & Environmental Law Review 393–418 (2013) <http://www.colorado.edu/law/sites /default/files/Rice_6713.pdf>.

3 Kristoffer Svendsen, *The Russian regime for subsoil use, energy and environmental policy in the High North*, 10(4) Environmental Law Review (2008).

4 Carole Nakhle, *The Arctic: The Last Great Oil Frontier – Or Is It?* 6 International Energy Law Review 1–5 (2010).

5 Sustainable Development Working Group, SDWG Report on Arctic Energy (2009) [hereinafter *SDWG*]; *see also* Dr. Timo Koivurova, *Transboundary Environmental Assessment in the Arctic*, 26(4) Impact Assessment and Project Appraisal 265–275 (2008). DOI: 10.3152/146155108X366031.

Oil and gas are typically found in sands, sandstone and limestone beneath the earth's surface, and sedimentary rocks are usual reservoirs. Despite the well-known impression, oil and gas do not accumulate in subterranean pools or streams where liquids collect upon the surface of the ground.[6] Hence, apart from the blind exploration of oil and gas in the Arctic, the principle goal of all Arctic states should be to develop and establish a sustainable framework to reduce environmental degradation of the Arctic region from land and marine-based activities.[7]

Adjacent to exploration and production, there is also a pressing need for the development and adoption of an international treaty designed to protect the Arctic environment and its natural resources. Indigenous populaces are seriously affected by contamination, mostly from numerous industrial sources located within the Arctic states as well as other countries around the world.[8] The Arctic states are committed to international cooperation to ensure the protection of Arctic environment and its sustainable development, while also protecting the cultures of indigenous people. The international legal community is attempting to regulate the activities in the Arctic region. However, the issue is understanding of the regulating legal provisions and considering the consequences of the development and economic exploitation of the vast resources at the Arctic.

For the legal regulations to be successful, all Arctic states must surrender their personal interest to the common service to mankind. However, a sovereignty claim identifies the state role in the international community. This is not the fifteenth century where a country can travel the world, plant their flag, and claim the right to any territory. The nations have become more vigilant with respect to territorial claims. International law respects the mutual coordination among the nation but particular general principles shall not be changed.

1.1. Demystifying The Arctic

There are four different types of ice in the Arctic:

a) First year ice – Relatively thin sea ice that exists during the winter months but melts during the summer time.

b) Multi-year ice – Relatively thick sea ice that has survived at least one summer's melt.

c) Ice island – Massive piece of floating ice that has broken from an ice shelf; it may extend several hundred square miles in area and several hundred feet in depth.

---

[6] James A. Veasey, *The Law of Oil and Gas*, 18(6) Michigan Law Review 445 (1920). DOI: 10.2307/1277804.

[7] Elena Gladun, *Environmental Protection of the Arctic Region: Effective Mechanisms of Legal Regulation*, 3(1) Russian Law Journal (2015). DOI: 10.17589/2309-8678-2015-3-1-92-109.

[8] Melissa A. Verhaag, *It Is Not Too Late: the Need for a Comprehensive International Treaty to Protect the Arctic Environment*, 15(3) Georgetown Environmental Law Review 555 (2003).

d) Iceberg – Large floating mass of ice that has broken away from a glacier.

Fundamental project decisions are based on the types of ice that will be encountered. While there is relatively little multi-year ice in the Antarctic, the Arctic Ocean has a significant amount of multi-year ice.[9] Icebergs are dynamic features that float in different directions and up and down in the water. The study of ice can more accurately help forecast how icebergs will move and drift near operations. Operation in the Arctic for the exploration of oil and gas involves various technicalities. Using advanced software platforms, a first-of-its-kind 3D iceberg modeling capability allows mapping of an iceberg's underwater features to ensure the optimal ice load predictions available for the design of drilling structures.

2. Historical Development

Humans have utilized oil and gas for much of written history.[10] Ancient cultures utilized the unrefined petroleum for binding things together, and it was used as a water repellant for keeping water away from entering unwelcome places. The Summerians utilized asphalt to inlay mosaics in walls and floors around 5000 years ago. The Mesopotamians utilized bitumen to line water channel and construct streets. The Egyptians greased chariots with pitch and embalmed mummies with asphalt. For quite a while, the quest for oil was erratic.

Exploration in the Arctic region, beyond the High Arctic, is not new and began onshore in the 1920s and offshore in the 1970s, with an aggregate of 10,000 wells drilled to date. In the nineteenth century, an explorer also discovered oil in the United States to a great extent by searching for leakages or other surface evidences its occurrence.[11]

In modern times, energy has been a basic highlight of the geopolitical flow between and among states. As states get to be progressively dependent on energy supplies to fuel their economies and maintain or enhance the quality of life of their citizens, a wide scope of foreign policy decisions, while not fundamentally based on energy considerations, must consider energy issues into account. Arctic states are the same and will proceed to enthusiastically assert their sovereignty against genuine or perceived incursions as openness to the Arctic and its resources increases.

Geologists have always believed in the huge reserves of oil and gas in the Arctic region. However, exploration of oil and gas started as recently as the mid-

---

[9] *Shipping in Polar Waters: Adoption of an International Code of Safety for Ships Operating in Polar Waters (Polar Code)*, International Maritime Organization <http://www.imo.org/MediaCentre/HotTopics/polar/Pages/default.aspx> (accessed Mar. 29, 2015).

[10] As Old as History, American Petroleum Institute <http://classroomenergy.org/oil_natural_gas/progress_through_petroleum/petroleum/aboutpetroleum02a.html> (accessed Mar. 2, 2015).

[11] James W. McKie, *Market Structure and Uncertainty in Oil and Gas Exploration*, 74(4) The Quarterly Journal of Economics 543 (1960). DOI: 10.2307/1884351.

1950s. An increase in demand for oil and gas in the international market, as well as growing scarcity, compelled the whole world to locate the availability of oil and gas reserves into various regions. Exploration of oil and gas in the Arctic region has substantially made the region one of the busiest place in the world over the past six decades. However, petroleum exploration and its operation have had significant local detrimental impacts on the atmosphere, local inhabitants, and marine environment.

3. Arctic Council: an Institutional Set Up

The Arctic Council is the main intergovernmental initiative for the Arctic region, including each of the eight Arctic states.[12] The Council was made as a high-level intergovernmental forum to promote cooperation, coordination, and interaction among the Arctic states on common Arctic issues, with the inclusion of the Arctic indigenous communities and other Arctic inhabitants. Specifically, the Council considers issues of sustainable development and the environmental protection in the Arctic. The Council is also a promoter of soft law. In the two-year period following adoption of the Ottawa Declaration, the Arctic states and permanent participants worked on standards of methodology and terms of reference for a sustainable development program, as well as new mandates for the Council's programs. Those rules, terms of reference and mandates were approved by the Arctic Ministers in their Declaration at Iqaluit (the 'Iqaluit Declaration').

3.1. Arctic Economic Council (AEC)

The developing significance of business in the Arctic has resulted in the creation of another key institution within the Arctic Council: the Arctic Economic Council. On September, 20 2014, the formal creation of Arctic Economic Council took place to bridge the gap between the business community and the Arctic Council. The AEC is an independent body working in connection with the Arctic Council. The formation of the AEC also marked a new step towards strengthening the Arctic Council and changed the pattern of business activities in the Arctic region.

This initiative is a challenge for opening up new circumpolar business opportunities in the north and attracts involvement of public-private partnership in the Arctic with a definitive objective of economic development in the region. The interests of private players in the energy market of the Arctic, becoming more prominent over time, has motivated the Arctic Council to set up a regulatory body in order to deal with the business activities.

---

[12] Evan Bloom, *Establishment of the Arctic Council*, U.S. Dep't of State <http://www.state.gov/documents/organization/212368.pdf> (accessed July 16, 2015).

The AEC, as a new institution, currently faces huge challenges. However, the primary objective of AEC is focused on sustainable economic development.

3.2. Proposal for Arctic Treaty

Both the Polar regions have similar characteristics. A multilateral agreement or an 'Arctic treaty' could either be modeled after the already existing Antarctic treaty or established as a unique Arctic treaty. Nonetheless, the circumstance in the Arctic today has all the earmarks of being fundamentally diverse to the one in the Antarctic in 1961, when the treaty for its peaceful use entered into force. For example, the Antarctic Treaty is aimed at preventing exploration whereas Arctic States are eager to explore and exploit. Despite a multilateral agreement aimed at the delimitation of boundaries, the Arctic states could also enter into joint development agreements. Such agreements would empower them to commonly impart the restrictive rights with natural resources in the contested areas without abandoning their claims and without the requirement for a final resolution of all legal issues. Additionally, joint development agreements may simply offer important adaptability when confronting such a multitude of complex claims.

3.3. Arctic Environmental Protection Strategy (AEPS) – 1991

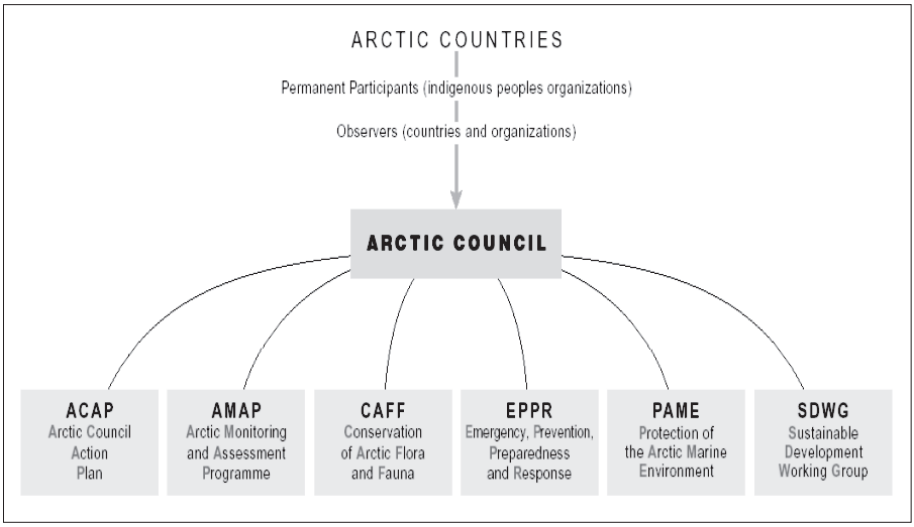
The Arctic Environmental Protection Strategy of 1991 (AEPS) was signed with an objective to guide the actions of Arctic countries individually and collectively, as they move toward achievement of these objectives. This strategy is also known as the Finnish Initiative.[13] It also describes the problems and priorities which the eight Arctic states agree need to be addressed. Arctic ecosystems are influenced, and in some cases threatened, by factors occurring outside the Arctic. In turn, the Arctic also exerts an important influence on the global environment. The implementation of an Arctic Environmental Protection Strategy will therefore benefit both the Arctic countries and the world at large. The strategy is also intended to guide development in a way that will safeguard the Arctic environment for future generations and in a manner that is harmonious with nature. As a priority, the countries distinguished six pollution issues: persistent organic pollutants, oil pollution, heavy metals, noise, radioactivity and acidification. The Council set up diverse mechanisms in order to tackle them, and the AEPS also created four working groups to support the countries by the establishment of international cooperation.[14]

---

[13] *Arctic Environmental Protection Strategy*, Council on Foreign Relations (June 14, 1991) <http://www.cfr.org/world/arctic-environmental-protection-strategy/p20582>.

[14] *Guide to Arctic Policy and Assessment*, Arctic Council <http://www.grida.no/polar/resources.aspx>.

Currently, there are six working group directing working under the direction of Arctic Council and submitting its report to the same:[15]



4. Arctic Legal System

The Arctic legal system is perhaps one of the best theoretical and experimental case studies of the international legal regime. It is regulated in light of a system of a more extensive general binding regulation of different international environmental law treaties. These older legislations needs to be rejuvenated by adding clarification to adapt to and solve the existing complexities arising in the arctic region due to its growing relationship with the world community. A multifaceted approach is required to resolve some issues in the Arctic. The current Arctic legal system is confronted with various changes in its political as well as social strategies; however, it is subjected to the execution of existing regulatory framework in an effective manner.

The legal regime representing the Arctic region is presently a boundless and complex accumulation of standards, settlements, traditions and soft law controlling the exercises of national governments in their utilization of Arctic waters in several dimensions ranging from flexibility of the Arctic seas, the preservation of fisheries and other marine resources, disallowances against marine pollution and dumping to regulations that guarantee safe shipping, carriage and navigation and endeavors to ensure peaceful use of the ocean.[16]

---

[15] *Organisational Structure*, Arctic Monitoring and Assessment Programme <http://www.amap.no/about/organisational-structure>.

[16] Elena Gladun, *Id.* 92.

Some of the applicable conventions and their applicabilities are as follows:

1. ***United Nations Convention on Law of the Sea 1982 (UNCLOS)***
   The UNCLOS provides rules regarding continental shelf, outer continental shelf, exclusive economic zone, and other similar areas. The provisions are relevant in the context of exploration and exploitation of oil and gas activities. The UNCLOS also provides generally applicable rules for marine pollution that may come out from the oil and gas activities.

2. ***United Nation Framework Convention on Climate Change (UNFCCC)***
   According to the UNFCCC Factsheet, numerous long haul changes in atmosphere have been observed at continental, regional and ocean basin scales, including changes in arctic temperatures and ice. The fact sheet additionally expresses that the Arctic Ocean will endure enormous effects and stands at the threshold of significant transformation.Climate change[17] and the melting of ice have created a potential impact on vulnerable ecosystems, the livelihoods of local inhabitants and indigenous communities and the potential misuse of natural resources.[18]

3. ***The ESPOO Convention***
   This Convention deals with environmental impact assessment in transboundary. It is silent on how alternatives shall be resolved, yet it does require the consideration of a "no action" alternative to the proposed activity.

4. ***The Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) Convention (1992)***
   The OSPAR Convention deals with offshore activities carried out in the maritime area for the purpose of exploration and exploitation of liquid and gaseous hydrocarbon and other offshore transportation sources.

5. ***International convention on oil pollution, preparedness, response and co-operation (OPRC) (1990)***
   OPRC requires national or cooperative measures to deal with pollution incidents and oil pollution emergency plan.

6. ***The Agreement between Denmark, Finland, Iceland, Norway and Sweden Concerning Cooperation in Measures to Deal with Pollution of the Sea by Oil or Other Harmful Substances (1993)***

---

[17] UNFCCC, art.1(2): 'Climate change' means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.

[18] The Ilulissat Declaration, Arctic Ocean Conference Ilulissat, Greenland (May 27–29, 2008) [hereinafter *Ilulissat Declaration*] <http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf>.

This agreement specifies measures of monitoring and dealing with events like oil spills occurring within the waters under the jurisdiction of the parties in the territorial sea, EEZ and continental shelf.

7. ***Bilateral Agreement Between Denmark and Canada for Cooperation Relating to the Marine Environment (1983)***
   This agreement provides provisions to ensure appropriate measures in the engagement of installations for exploration and exploitation of natural resources of the seabed and subsoil in so that risk of pollution is minimized.

8. ***International Maritime Organization (IMO)***
   IMO adopted the International Code for Ships Operating in Polar Waters (Polar Code) in November 2014. Related amendments to the International Convention for the Safety of Life at Sea (SOLAS).[19]

9. ***Arctic Offshore Oil and Gas Guidelines***
   These guidelines outline the strategic actions for regulation of oil and gas activities including transportation and related onshore activities.[20] They have tried to uphold the general principles of environment like the precautionary principle approach, the polluters pays principle, and the continuous improvement and sustainable development.

10. ***Agreement of Marine Oil Pollution Preparedness and Response to the Arctic***
    On May15, 2013, the member nations of the Arctic Council signed an agreement called The Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic with an objective to strengthen cooperation, coordination and mutual assistance among the Parties on oil pollution preparedness and response in the Arctic in order to protect the marine environment from pollution by oil.[21] It was the first Pan-Arctic Agreement that combined duties and obligations for all the Arctic countries.[22] The member states of the Arctic Council acknowledged the

---

[19] *Shipping in Polar Waters, Polar Code,* International Martime Organisation <http://www.imo.org/MediaCentre/HotTopics/polar/Pages/default.aspx> (accessed July 17, 2015).

[20] *Arctic Offshore Oil and Gas Guidelines*, Arctic Council (2009) <http://www.pame.is/images/03_Projects/Offshore_Oil_and_Gas/Offshore_Oil_and_Gas/Arctic-Guidelines-2009-13th-Mar2009.pdf>.

[21] Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic, U.S. Dep't of State (May 15, 2013) [hereinafter *Agreement on Cooperation*] <http://www.state.gov/r/pa/prs/ps/2013/05/209406.htm>.

[22] Alex Boyd, *The Circumpolar States of the Arctic Council Have Agreed to Tackle Oil Spill Disasters as a Team*, Barents Observer (May 15, 2013) <http://barentsobserver.com/en/arctic/2013/05/binding-oil-spill-agreement-signed-15-05>.

threat from marine oil pollution to the vulnerable Arctic marine environment and to the livelihoods of local and indigenous communities and sought to minimize damage that may result from such an incident.[23]

11. Un Declaration on the Rights of Indigenous Peoples (UNDRIP)

The UN Declaration on the Rights of Indigenous Peoples has attempted to guarantee direct indigenous participation in all matters that straightforwardly influence them, including those within the Arctic region.[24] The Arctic is not a homogenous region[25] and seven out of eight Arctic states have indigenous communities.[26] People have been living in the Arctic for years and have built up profoundly concentrated societies and economies based on the physical and biological conditions of the long isolated region. Notwithstanding, with the slow interruption from the business world has led to significant changes in their ways of life and economies. Out of a total of four million inhabitants of the Arctic, approximately 500,000 people belong to indigenous peoples and indigenous organizations have been conceded as permanent participants in the Arctic Council.[27]

Arctic indigenous people include Saami in circumpolar areas of Finland, Sweden, Norway and Northwest Russia, Nenets, Khanty, Evenk and Chukchi in Russia, Aleut, Yupik and Inuit (Iñupiat) in Alaska, Inuit (Inuvialuit) in Canada and Inuit (Kalaallit) in Greenland. The majority of the aforementioned nations, with the exception of Iceland, have indigenous groups living inside their region. Official statistics do not essentially recognize indigenous populations independently, in spite of the fact that distinctions happen. The number of indigenous people is not precise because of the definition of indigenousness.[28]

---

[23] Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic, *supra* note 117.

[24] *Study, as examples of good practice, of the Indigenous participatory mechanisms in the Arctic Council, the Circumpolar Inuit Declaration on Resource Development Principles in Inuit Nunaat, and the Laponia management system*, UN ECOSOC Res No. E/C.19/2012/10 11th Session Item 9 of the provisional agenda (May 7–18, 2012), Permanent Forum on Indigenous Issues New York at Para. 1 [hereinafter UN ECOSOC] <http://www.un.org/esa/socdev/unpfii/documents/2012/session-11-e-c19-2012-10.pdf>.

[25] Joan Nymand Larsen, Arctic Human Development Report-II: Regional Processes and Global Linkages, Nordic, Council of Ministers, Nordic Council of Ministers Secretariat (Feb. 2015) <http://norden.diva-portal.org/smash/record.jsf?pid=diva2%3A788965&dswid=3411>.

[26] Ronald O'Rourke, *Changes in the Arctic: Background and Issues for Congress*, Congressional Research Service Report 7–5700 (Mar. 17, 2015) <http://www.fas.org/sgp/crs/misc/R41153.pdf>.

[27] *Permanent Participants*, Arctic Council (Apr. 27, 2011) <http://www.arctic-council.org/index.php/en/about-us/permanent-participants/inuit-circumpolar-council/123-resources/about/ permanent-participants>.

[28] *Settlement in the Arctic regions, Arctic Indigenous Peoples* [hereinafter *Arctic Peoples*] <http://www.arcticcentre.org/EN/SCIENCE-COMMUNICATIONS/Arctic-region/Arctic-Indigenous-Peoples> (accessed Mar. 2, 2016).

5. A Call for New Sustainable Development Model

It is indubitably clear that the current Arctic legal system is inadequate to manage the existing socio-legal issues in an organized manner. The future lawmakers of the arctic need be more vigilant in inculcating those provisions in the international legal regime, which has remained untouched by any of the international conventions and treaties. These gaps shall be treated as a scope for future lawmaking. Existing legislation has been successful as a part of social experiment to some extent and has acted as a legal driver for the Arctic hydrocarbon development. Now it is necessary to smooth the drive of Arctic exploration for the long run. This can only happen when all the Arctic States maintain a similar platform and curtail their political conflicts.

The Arctic legal system is nothing more than the conflict between common heritage of mankind and the territory of Arctic states. The Arctic Ocean is regulated by certain standards in the provisions of UNCLOS and many controversial issues still go unattended due to lack of a universal legal framework especially with respect to economic interests of future shipping and exploration of Arctic hydrocarbon. The Arctic Region has constantly been put to scanner relating in each century. In the first part of 20th century, the dispute was not over exploration of oil and gas in the Arctic; rather, it was over the jurisdiction of the Arctic Region.

Oil is the world's vital source of energy and will remain so for many years to come, even under the most idealistic of suppositions about the pace of development and deployment of alternative innovation. However, the sources of oil to take care of rising demand, the cost of producing it, and the prices that consumers will need to pay are greatly unverifiable, perhaps like never before.[29]

The primary forces driving Arctic hydrocarbon development today are the hybridization of economic opportunity and the likelihood of earning effectively sovereign rights to hydro-carbon-rich waters under UNCLOS. The time has come when Arctic states should launch expert dynamic approach in controlling the oil and gas activities in the Arctic. The Arctic states shall require industry to consolidate cultural and environmental protection along with the consideration of various exploration and production phases of oil and gas activities, identify and appropriately manage oil and gas activities in ecologically and culturally sensitive areas and regional assessment for oil and gas activities needs to be promoted.

There are certain possible options that could be done in order to organize whole of the Arctic Legal System.

First, an introduction of a new dispute settlement mechanism is required to be incorporated within the Arctic Council, which shall grant power to look into all concerns relating to limitation over the exploitation of hydrocarbon resources also dispute uproaring the environmental dilapidation to be looked into by a panel of group

---

[29] World Energy Outlook, Executive Summary, International Energy Academy 37 (2008) <http://www.iea.org/Textbase/npsum/WEO2008SUM.pdf>.

from the Arctic states. The Arctic Council should also play the role of a neutral party and analyze the effects of the arctic oil and gas development on order to build public confidence through transparency and facilitate state-level regulatory consistency.

Second, in concurrence to the Antarctic Treaty for the South Pole, there must be a formation of an Arctic treaty for the North Pole. It should be based on the Antarctic Treaty system consolidating all the concerns with respect to social, economic, and political changes. However, the thinkers argue that such a treaty would be unnecessary and inappropriate because situations in the Arctic and the Antarctic are hardly analogous. The primary concern over incorporation of an Arctic Treaty is to 'shift the soft legal arrangement of the arctic into the hard legal regime.' The mechanisms under Antarctic Treaty System also gives an outline for a future Arctic regime comprising norms, standards, and rules to prevent the ill-effect of increased offshore oil and gas activities.

Third, the governance of the Arctic region shall solely be vested under the Arctic Council. All disputes pertaining to any complexities must be channelized from the Arctic Council.

Fourth, the composition of the Arctic Council must also hold the representation from the recognized NGO's working on the development of the Arctic region. The Role of NGO shall also be regulated by the Arctic Council. It is significant to note that the Arctic Council is not a Government body but an international governance forum and such responsibility granted to an independent body will render fair and proper justice. The International Tribunal for the Law of the Sea (ITLOS)[30] in the Arctic Sunrise Case[31] has also discussed about the implications of NGO participation in international lawmaking.

Fifth, if possible, all current legal framework existing in the regulation of the Arctic shall be consolidated into a single legal instrument. However, it is admitted that the journey to consolidate such law is not an easy process of amelioration.

Sixth, there shall be standard requirement from the oil companies to maintain the environmental standards for exploration and production in the Arctic. These environmental standards shall include the latest technology, drilling operation, aspects of climate change, protection of the interest of indigenous people.

Seventh, the role of Non-Arctic states[32] shall also specify their needs. In fact, some Non-Arctic states have long standing participation in the Arctic.[33] The role of Non-

[30] It is a judicial body entrusted with the adjudication of disputes that arise from application and interpretation of the United Nations Convention on the Law of the Sea (UNCLOS).

[31] Kingdom of the Netherlands v. Russian Federation, 22 (2013) <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22_11_2013_orig_Eng.pdf>.

[32] Non-Arctic States comprises states from various Continents like from Asia: China, India, Japan, Republic of Korea, and from Europe: European Union considered itself as an Arctic Entity, Germany, United Kingdom, France.

[33] Interests and Roles of Non-Arctic States in the Arctic: Background Brief, Seminar presented by the National Capital Branch of the Canadian International Council and the Munk-Gordon Arctic Security Program (Oct. 5, 2011).

Arctic states shall be limited to scientific research on climate change and global warming, energy security, natural resource security, protection of marine species, shipping routes, and other similar roles in compliance with their foreign policies.

6. Conclusion

Energy is the most fundamental unit of any existing civilization. The hunt for energy is another aspect which has immensely helped in the discovery of almost every place on this organized planet.[34] There is increased exploration and exploitation for oil and gas resources that happens worldwide and most recent endeavors have focused on prospective development of hydrocarbon resources in the Arctic Ocean. Throughout much of human history, the Arctic region was neglected as important ocean space, largely because the area was permanently covered by a massive ice sheet and thick sea ice. However, this negligence is depicted as the boon for the indigenous peoples and eschews the consequences of adverse effects in the ecological system. However, the increases in demand of natural resources and the continual hunt for vast reserves of hydrocarbon on this earth landed geologists to this undiscovered Arctic in the late nineteenth century.

Someone has rightly stated that we cannot regulate natural systems, but we can make an attempt to manage the interaction between social systems and natural systems. Law is an effective tool to manage those interactions. It is based on a given factual and social reality that is constantly changing and helps us characterize such essential concepts and serves to allocate rights and responsibilities and ensure the human rights of individuals and peoples.

As the Atharva Veda states, 'Oh Earth, whatever we dig out from you must have to be filled up again, and restored as fast as possible. Oh Pure one we do not intend to hit you at your heart of hearts.'

References

McKie James W. *Market Structure and Uncertainty in Oil and Gas Exploration*, 74(4) The Quarterly Journal of Economics 543 (1960). DOI: 10.2307/1884351.

Nakhle Carole, *The Arctic: The Last Great Oil Frontier – Or Is It?* 6 International Energy Law Review 1–5 (2010).

Veasey James A. *The Law of Oil and Gas*, 18(6) Michigan Law Review 445 (1920). DOI: 10.2307/1277804.

Information about the author

Manjeet Kumar Sahu (Ranchi, India) – LLM (Constitutional and Administrative Law) student at National University of Study and Research in Law (Ward No.11, Shanti Nagar, Palkot Road, Gumla-835207 (Jharkhand); e-mail: manjeetsahu2009@gmail.com).

[34] SDWG, *supra* note 6.

COMMENTS

MEDIATION OF LABOUR DISPUTES IN KAZAKHSTAN IN COMPARATIVE CONTEXT

GUZAL GALIAKBAROVA,
Gumilyov Eurasian National University (Astana, Kazakhstan)

SHOLPAN SAIMOVA,
Gumilyov Eurasian National University (Astana, Kazakhstan)

DOI:10.17589/2309-8678-2016-4-2-96-111

The authors undertake an analysis of features of mediation in individual labour disputes settlement in the Republic of Kazakhstan and the Russian Federation. The current paper also analyzes the experience of some foreign countries (USA, UK, Germany), based on a study which suggests the ways of improving the mediation institution in Kazakhstan. In addition, the identified advantages of mediation as an extra-judicial regulation of labour disputes, the authors point out the identified shortcomings of the matter in new the Labour Code of the Republic of Kazakhstan.

Relevance of the topic is reasoned to the fact that in the 21st century extra-judicial settlement of disputes is preferred worldwide these days. In this context, it is no exception to the regulation of individual labour disputes without appealing to the courts. It demonstrates the role and significance of the introduction and development of conciliation procedures, including mediation, without diminishing the importance of other remedies to protect labour rights and freedoms provided in the labour legislation.

An analysis of Kazakhstan's and Russia's procedural laws indicates a steady trend of expansion of alternative legal ways of disputes settlement in general, and particularly in labour disputes, including disputes between economic agents (employer and employee), which seems to be responded to the modern development of economic relations. Extra-judicial ways of conflict resolution may be undertaken not only by jurisdictional, but also by non-judicial mechanisms that are in the beginning stage of formation as alternative ways of resolving labour disputes at this period of Kazakhstan's development.

Key words: individual labour disputes; mediation; conciliation; extra-judicial settlement; alternative disputes settlement.

Recommended citation: Guzal Galiakbarova, Sholpan Saimova, *Mediation of Labour Disputes in Kazakhstan in Comparative Context,* 4(2) Russian Law Journal 96-111 (2016).

1. Introduction

Since its independence in 1991, Kazakhstan has created its statehood to established, developed and strengthened the foundations of its independence to provided for the country's territorial integrity and inviolability of borders; transferred the economy to a free market way of development and successfully integrated into the global market. However, the legal sphere needs further reforms. In this regard, it is increasing the role and significance of the introduction of mediation procedures, and, along with pre-trial dispute resolution methods, it is growing in importance with non-judicial resolution of disputes.

According to the guidelines for increasing productivity developed by the International Labour Organization (ILO), 'relations of production depend on the interaction between employees and employers. The nature of their interaction depends on the environment in which they operate, as well as the type of dispute that they are seeking to solve. There are a lot of disputes, but not everything can be resolved by the parties on the basis of consensus, dialogue and negotiation.'[1]

Article 13 of the Constitution of the Republic of Kazakhstan (Kazakhstan) provides for the right of citizens to protect their rights and freedoms with all means not contradicting the law, i.e. Therefore the Constitution entitles in addition opportunities to use judicial and other alternatives remedies of conflict resolution.

In different countries where mediation takes place a significant proportion of the time, it is understood that the relationship between people, social stability, welfare of the people are the main components of the basis for the state development.

An institution of mediation is not new for Kazakhstan, as even in historical traditional Kazakh society, the role of mediators was performed by judges ('Biy'). They resolved disputes and managed the reconciliation of the parties through negotiations between the conflicting parties. Despite this historical precedence, mediation has appeared in the legislation of modern Kazakhstan recently as one of the mechanisms of alternative resolution of legal disputes, whereas in many other countries, it has been used successfully for many years.

In Kazakhstan, the legal framework is not yet a completely formed science-based concept of the alternative procedure involving a mediator. Nowadays, considerable experience with integrating reconciliation procedures with the assistance of a mediator is used in the legal systems of different states. In many foreign countries, mediation exists and is used as a special form of settlement of disputes along and in

[1] Labour dispute systems: guidelines for improved performance (International Training Centre of the ILO, International Labour Organization 2013) <http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_211468.pdf>.

connection with litigation. Unfortunately, the domestic jurisprudence of this practice remains poorly understood.

Attempts at a comprehensive study of theoretical and applied aspects of mediation in civil jurisdiction, including in comparative legal aspect or in the science of civil procedure and labour law, had not been previously undertaken.

2. Mediation as an Extra-judicial Remedy of Individual Labour Disputes Settlement in Russia, USA, UK, Germany

The resolution of legal disputes by means of public proceedings, as noted by Russian scientist S.V. Nikolyukin[2], is due to a generally accepted way to ensure the stability and sustainable progress in modern market relations, and is identified as an essential element of the economic mechanism of any industrialized country in the world. At the same time, it should not be forgotten, that the formation of market relations, in the civilized sense of the term, is a long process and to a large extent depends on the level of legal protection of business entities and other economic activities. In this new environment there are merged conflicts in the social and labour spheres, which are not only related to direct violations of labour rights and guarantees, but often to contradictions and interests of the parties while adopting local acts that establish new conditions of work, changing the personnel policy of the employer.

Mediation, in its modern sense, began to develop in the second half of the 20th century. Initially it began to develop in the US, UK and Australia, then gradually began to spread in Europe. Mediation procedures, particularly those of mediation being used as a tool of internal dispute resolution, have been traditionally widespread in Japan. Adherence by Japanese businessmen to alternative dispute resolution has traditionally been related to ethics – the negative attitude to the choice of a state court as a means of disagreements resolution.[3]

In ancient China, Confucius urged the use of mediation instead of going to court. He warned that controversial participation in trial is likely to enhance the exasperation of the parties in the conflict and hinder their effective interaction.[4]

---

[2] *Николюкин С.В.* К вопросу о праве на защиту прав предпринимателей в арбитражных судах // Вестник арбитражной практики. 2011. № 4. С. 12 [Nikolyukin S.V. *K voprosu o prave na zashchitu prav predprinimatelei v arbitrazhnykh sudakh // Vestnik arbitrazhnoi praktiki.* 2011. № 4. S. 12 [S.V. Nikolyukin, *On the Question of the Right to Protection of Entrepreneurs' Rights in Arbitration Courts,* 4 Bulletin of Arbitration Practice 12 (2011)]].

[3] *Габбасова А.С.* Потенциал медиации в регулировании трудовых споров в Республике Казахстан // Вестник Казахского национального университета им. аль-Фараби. Серия Юридическая. 2013. № 2 (66). С. 162 [Gabbasova A.S. *Potentsial mediatsii v regulirovanii trudovykh sporov v Respublike Kazakhstan // Vestnik Kazakhskogo natsional'nogo universiteta im. al'-Farabi. Seriya Yuridicheskaya.* 2013. № 2 (66). S. 162 [A.S. Gabbasova, *The Potential of Mediation in the Regulation of Labour Disputes in the Republic of Kazakhstan*, 2(66) Bulletin of the Al-Farabi Kazakh National University. Series of Law 162 (2013)]].

[4] *Паркинсон Л.* Семейная медиация [Parkinson L. *Semeinaya mediatsiya* [L. Parkinson, *Semeinaya mediatsiya*]] 11 (Moscow 2010).

Considering that simplification of proceedings and the exclusion of the extensive and confusing paperwork that has become known as red tape started a long ago, particular attention should be paid to the issue of extra-judicial settlement of disputes, the most spread mean of which is mediation.

In the global context, mediation could be seen as the next stage in the development of mankind invented ways of resolving conflicts.[5]

40% of disputes are resolved by mediators, and in 80% of cases it gives a positive result. In England 87% of cases are resolved with the help of mediators, i.e to court in the US – 95, Slovenia – 35%.[6]

Global practice provides many examples of legislative enforcement of mediation. The corresponding acts were adopted in the United States, Austria, and Germany. The European Commission has approved a Code of Mediator. The European Union (EU) issued a series of guidelines governing activities of mediators, including a directive on mediation, which encourages the courts to include mediation in its procedures as well as encouraging the use of electronic information technologies in the mediation.[7] Under this directive, mediators must be aware of the existence of the European Code of Conduct for Mediators.[8] For example, the EU and Kazakhstan need to develop this kind of code.

The experience of European countries as well as Australia, Canada and the United States show participation of professional intermediaries in disputes makes the process of dispute resolution very effective.[9]

The first post-Soviet republic that introduced an institute of mediation was Moldova. Russia later adopted its own institute in 2010.[10] Kazakhstan became the third country to do so. According to the Russian scientist Maleshin, a majority of post-

---

5 Stitt A., *Mediation: a practical guide* 15 (Routledge Cavendish 2004).

6 *Мулдагалиев А.* Правовые аспекты применения медиации // Зангер. 2015. № 6 (167). С. 32 [Muldagaliev A. *Pravovye aspekty primeneniya mediatsii // Zanger.* 2015. № 6 (167). S. 32 [A. Muldagaliev, *Legal Aspects of the Use of Mediation*, 6(167) Lawyer 32 (2015)]].

7 Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters (May 21, 2008) <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32008L0052> (accessed Jan. 25, 2016).

8 *Захорка Х.* Внедрение института медиации в Республике Казахстан. Законодательство Европейского союза и Совета Европы о медиации: медиация в индивидуальном трудовом законе // Зангер. 2013. № 2 (139). С. 81, 83 [Zakhorka Kh. *Vnedrenie instituta mediatsii v Respublike Kazakhstan. Zakonodatel'stvo Evropeiskogo soyuza i Soveta Evropy o mediatsii: mediatsiya v individual'nom trudovom zakone // Zanger.* 2013. № 2 (139). S. 81, 83 [H. Zahorka, *Introduction of the Institute of Mediation in the Republic of Kazakhstan. The Legislation of the European Union and the Council of Europe on Mediation: Mediation in Individual Labour Law*, 2(139) Lawyer 81, 83 (2013)]].

9 *Бактыбаев Н.* Институт медиации в условиях инновационного развития казахстанского общества // Вестник КУАМ. 2013. № 1. С. 277 [Baktybaev N. *Institut mediatsii v usloviyakh innovatsionnogo razvitiya kazakhstanskogo obshchestva // Vestnik KUAM.* 2013. № 1. S. 277 [N. Baktybaev, *Institute of Mediation in Terms of Innovative Development of Kazakhstan Societ*y, 1 Bulletin of KUAM 277 (2013)]].

10 Muldagaliev A. *Id.*

Soviet countries have the same historical and cultural background, which explains the identity of the legal systems.[11] In this regard, it is a common aim to explore foreign legislation on mediation along with the Russian legal science. In recent years, there has been an increased interest in the mechanisms of extra-judicial resolution of specific categories of legal cases, with no role pleads to judicial mechanisms. Extra-judicial settlement o disputes are procedures for conciliation without referring to a court through the voluntary participation of parties in negotiations. This dispute resolution, which is aimed at reducing the conflict.[12]

There a number of developmental prospects for seen in the development and use of mediation for the settlement of individual labour disputes. Moreover, in the last decades of the 20th century, mediation had been used more and more in individual disputes and conflicts within in companies.[13]

It should be noted that it became a widespread, practice in foreign countries, to establish specialized state organizations and agencies engaged in the settlement of disputes arising out of labour relations. For an example, the case of the Federal Mediation and Conciliation Service (FMCS) and the Mediation Research & Education Project, Inc. (MREP) in the United States[14] is illustrative. According to the annual reports of FMCS, the service annually conducts about 5,000 mediations in disputes arising in the course of collective bargaining, of which 86% the parties reached an agreement add about 2,000 mediations in disputes arising out of the breach of the collective agreements, of which 74% the parties reached an agreement.[15]

Unfortunately, in Kazakhstan, extra-judicial cases are not recorded officially, this causes a lack of ability to analyze not possible to analyze the practice of mediation in labour disputes resolution.

The United States is an interesting example where the entire legal system aims to ensure that the majority of disputes are resolved voluntarily before the trial, and the judge may suspend a trial and advise the parties to apply for a mediator.

Mediation has often been equated with constructive behavior of both sides, and on questions which were not worthwhile to fight on questions that are not worthy of length court mitigation, for example, small claims or personal disputes. In the United States, mediation has a tradition in labour relations since 1898, when

---

11 D. Maleshin, *The Russian Style of Civil Procedure,* 21(2) Emory International Law Review 559 (2007).

12 *Бекбасова Г., Амуртаева Д.* Особенности рассмотрения конфликтов институтом медиации в Республике Казахстан // Закон и время. 2013. № 05 (149). С. 41–42 [Bekbasova G., Amurtaeva D. *Osobennosti rassmotreniya konfliktov institutom mediatsii v Respublike Kazakhstan // Zakon i vremya.* 2013. № 05 (149). S. 41–42 [G. Bekbasova, Amurtaeva D, *Features Grievance Mediation Institute in the Republic of Kazakhstan*, 05(149) Law and Time 41–42 (2013)]].

13 Kramer, *Alternative Dispute Resolution in the Work Place,* § 1.02 1–8 (1998).

14 MREP Grievance Mediation Report (2008).

15 Sixty-First Annual Report (Federal Mediation and Conciliation Service 2008).

the Erdman Act created a settlement system for disputes between railway carriers and workers for salaries, working time or other worker conditions.[16] This law first obliged the parties to a mediation or a conciliation attempt by the Chairman of the Interstate Commerce Commission; as a second step then to an arbitration procedure before an Arbitration Board.[17] In 1991, the US Supreme Court opened the way to further individual mediation in the labour law, which lets calculate that more and more now mediation is used for individual disputes in labour law.[18]

In recent years, courts and legislatures in the US not only encourage alternative forms of dispute resolution, but also take certain steps to ensure that the data forms litigants have resorted to without fail.[19]

An indicator of the growing importance of negotiations and settlement agreements for the American justice system is the fact that some of the training programs of law schools, as well as training programs for lawyers, include a course and negotiation skills to resolve the dispute.[20]

The US experience in the field of alternative settlement of labour disputes was the same by the UK. British analogy of the US Federal Mediation and Conciliation Service is the Advisory, Conciliation and Arbitration Service (ACAS), established on the basis of the Ensuring Employment Act of 1975. It was started as an independent body to assist in the resolution of individual and collective disputes by means of alternative methods, including mediation. As a general rule, any complaint made to the Labour Tribunal, which he main body for consideration of labour disputes in England, Wales and Scotland is recorded and automatically sent to ACAS. After receiving a copy of the complaint, the mediator appointed by the Service addresses the dispute's parties with a proposal to start a mediation procedure. If the dispute can not be resolved through conciliation, the case is referred back to the Labour Tribunal.[21]

It is believed that reconciliation conducted by the Service in collective labour disputes is more effective than the individual. Firstly this may be due to the fact that the parties are afraid to apply for more costly procedures and, in individual disputes the worker often relies on satisfaction of their claims, if he/she further appeal to the Labour Tribunal. The activity of the labour tribunals is linked to the resolution of

16 Mark Lembke, *Mediation im Arbeitsrecht* 31 (2001).

17 Hans-Juergen Zahorka, *Mediation in Labour Relations: What Can Be Learned from the North American and EU Example*, Labour Legislation and Arbitration Project <http://www.libertas-institut.com/de/PDF/Mediation.pdf> (accessed Jan. 25, 2016).

18 Gilmer v. Interstate/Johnson Lane Corporation, (90–18) 500 U.S. 20 111 S.Ct. 1647 (1991).

19 Abraham P. Ordover, *Alternatives to Litigation: Mediation, Arbitration, and the Art of Dispute Resolution.* (2d ed. National Institute for Trial Advocacy 2002).

20 Mark Schoenfield & Mick Schoenfield, *The McGraw-Hill 36-Hour Negotiation Course* (McGraw-Hill, N.Y. 1991).

21 David & Francis, *A comparative assessment of labour dispute resolution in the United States and the United Kingdom*.

individual disputes involving workers, trade unions, employers and their associations. Even if these disputes are closely related to collective relations, it can be argued that in the UK there is an observed trend towards a significant reduction of the number of collective labour disputes, while there is an increasing number of individual disputes. It appears that the weakening of the trade union movement and the reduction of strike activity promotes increasing the load on the Labour Tribunals as the only remedy of protecting workers' rights.[22] Despite the fact that in the UK more than half of all the employees' claims are resolved out of court,[23] according to British experts in labour law, '... in comparison with the standards of most developed countries, the British dispute resolution procedures in labour relations are very messy.'[24]

In addition to the United States and Britain, there is a widespread internal mechanism of labour disputes resolution in the public institutions and bodies. For example, US companies usually have already established a special office or division to resolve complaints. In England, this type of service has been established in state bodies, such as the Ministry of Health (1998) and the Agency for Social Payments (since 1998). The researchers note that in the London municipal department on fire safety and civil defense, there was increased effectiveness of the internal mechanisms for resolving employees complaints after the training on mediation techniques.[25]

In continental Europe, labour dispute mediation is used much less than in the UK and the US. This is largely due to a quite effective system of labour justice. At the same time, labour courts also focus on the prompt and mutually beneficial settlement of cases. For example, in accordance with the Labour Procedural Code of Germany, the court must make an attempt to conciliate parties.[26] As a rule, this function is performed by the Chairman at the preliminary hearing, and only if it is impossible to reach an agreement will the full composition of court to be gathered. The German court, in this case, is comprised of two juror judges, each representing respectively the employers and trade unions, and one professional judge; the chairman and they consider the

---

[22] *Лютов Н.Л.* Коллективное трудовое право Великобритании: [монография] [Lyutov N.L. *Kollektivnoe trudovoe pravo Velikobritanii: [monografiya*] [N.L. Lyutov, *Collective Labour Law of UK:* [*monograph*]] 106, 119–120 (Wolters Kluwer 2009).

[23] N. Selwyn, *Selwyn's Law of Employment* 498 (14 ed. Oxford University Press 2006).

[24] Brown, Hanami & Blanpain, *Industrial Conflict Resolutionin Great Britain. Industrial Conflict Resolution in Market Economies. A study of Canada, Great Britain and Sweden* 103 (T. Hanami and R. Blanpain eds., Deventer-Netherlands 1987).

[25] Boulle & Nesic, *Mediation: principles, process, practice* 4–5, 332 (London, Dublin, Edinburgh, Butterworth 2001).

[26] *Захорка Х.Ю.* Примирительные процедуры в трудовых отношениях в зарубежных странах. Что можно почерпнуть из опыта Северной Америки и ЕС? [Zakhorka Kh.Yu. *Primiritel'nye protsedury v trudovykh otnosheniyakh v zarubezhnykh stranakh. Chto mozhno pocherpnut' iz opyta Severnoi Ameriki i ES?* [H. Zahorka, *The Conciliation Procedure in Labour Relations in Foreign Countries. What can be Learned from the Experience in North America and the EU?*]] <http://www.trudsud.ru/ru/docs/publications/primiritelnye-protsedury-v-trudovykh-otnosheniyakh-v-zarubezhnykh-stranakh/> (accessed Jan. 25, 2016).

case[27]. According to the German judge in resignation Manfred Pillar 'mediation in Germany is a modern method of solving conflicts where the parties voluntarily and on their own responsibility could resolve their conflict in consultation with each other confidently and with the support of a neutral third party.'[28] Mediation could thereby become a successful model for labour disputes resolution in our country.

In Germany, according to the Labour Procedural Code, there is a provision for the traditional exclusion of arbitrary decisions in labour law. Thus, it is excluded that the arbitration courts will be established with a low legal training, independence and less tied to the substantive law than the labour courts.[29] In Germany, the binding decision in labour disputes are the exclusive domain of the Labour Courts. However, there are some elements, such as the German Labour Procedural Code, which stimulate judges to solve the dispute in the first session. This is inter-judicial mediation, which de facto led to a relatively quick procedure for the parties seeking justice before the labour courts. about 80% of the cases were settled within six months, only 4% lasted more than one year.[30] Therefore judicial mediation in Germany contributes to the overall quickening of the process as well as reducing the load on the courts. Mediation is useable has been used as a decentralized, deregulated and unified system with many different facets of attempts and results, and also in an environment of relative high legal fees for all parties.[31]

Next, the case of Kazakhstan will be considered The establishment of specialized bodies dealing with the settlement of individual labour disputes is rather premature. Much more rationale is needed to improve the existing jurisdictional mechanism provided by current legislation. The lowest indicators of appeals to the court for protection of violated rights are reported in such countries as China and Japan. According to Maleshin, such countries do not have 'a high legal culture, but the desire of both the State and citizens to reduce the role of law in society', where 'traditional dispute resolution is based on a sense of justice, and only then the law'[32] is clear. The Kazakh procedural system is the foundation of the whole system of resolving legal conflicts. However, as Mednikova fairly noted, 'being the universal form of human rights protection, judicial protection should not be a panacea for all

---

[27] *Забрамная Е.Ю, Шмелева Е.С.* Обзор систем разрешения трудовых споров, применяемых в развитых странах [Zabramnaya E.Yu., Shmeleva E.S. *Obzor sistem razresheniya trudovykh sporov, primenyaemykh v razvitykh stranakh* [E.Yu. Zabramnaya, E.S. Shmeleva, *Review of Grievance Systems Used in Developed Countries*]].

[28] Sh. Manfred, *Iz praktiki sudebnoi mediatsii v Germanii,* 3(140) Zanger 34 (2013).

[29] Grunsky, *Arbeitsgerichtsgesetz* § 4 annot. 2, 7 ed. (1995).

[30] Mark Lembke, *Mediation im Arbeitsrecht* 31 (2001).

[31] Arbeitsgerichtsgesetz Nordrhein-Westfalen [AGH] [Labour Procedure Code], 19.11.1999, Die Monatsschrift für Deutsches Recht [MDR] at 611, 2000.

[32] D. Maleshin, *Id*.

legal problems.'[33] Due to the great similarity of the legal systems, it can be argued that at this stage of the development of Kazakhstan, it would be appropriate to research, along with the experience of foreign countries, the practice of neighboring Russia in some issues of regulation of labour mediation.

A comparative analysis of statistical data on the number of labour disputes in the courts in our countries was undertaken.

The results indicate that The Russian federation has, 7813432 and 645161 case in labour disputes in the courts of common jurisdiction in 2011 and 2012, respectively. The Republic of Kazakhstan had 5185 and 6956 for the same years.[34]

Conducting this analysis became problematic with respect to the Kazakh Statistics, as unfortunately, in recent times there is data referred to as 'Generalization of court practice of labour disputes, including on the practice of hiring and dismissal of employees for 2013', which provides data only for 2011 and 2012. However, this information provided that due to the prevailing amount of the population and the broadness of the territory of Russia the number of labour disputes is very high. Such dynamics of appeals to the court, in our view, demonstrate that the shortcomings of the mechanism of individual labour disputes resolution are most acutely expressed in a post-crisis period. A post-crisis period is a time when the number of violations of workers' rights by employers sharply increase. Employers are then seeking to decrease the costs of doing business through reducing costs staff, and, therefore, by reducing the level of legal guarantees to employees. The lack of effective mechanisms for the pre-judicial settlement of labour disputes led to mass appeals of workers to the courts of general jurisdiction.

And under due to such a workload of the judicial system, for both Russia and Kazakhstan, intensive introduction of mediation determined as particularly acute problem.

The for Russian legislation mediation as a conciliation procedure with participation of the intermediary, has been known for years, however, mainly in a framework of the trial. For example, the Arbitration Procedural Code of the Russian Federation of July 24, 2002 № 95-FZ (chapter 15) provides the application of a mediator in order to resolve the dispute. In particular, Art. 138 of the Arbitration Procedural Code stipulates that the parties may settle the dispute by entering into a settlement agreement or by using other conciliatory procedures, including mediation procedure, if it is

---

[33] *Медникова М.Е.* Досудебное урегулирование споров в сфере экономической деятельности (проблемы теории и практики): Автореф. дис. … канд. юрид. наук [Mednikova M.E. *Dosudebnoe uregulirovanie sporov v sfere ekonomicheskoi deyatel'nosti (problemy teorii i praktiki): Avtoref. dis. … kand. yurid. nauk* [M.E. Mednikova, *Pre-trial Settlement of Disputes in the Sphere of Economic Activity (Theory and Practice): Abstract. Dis. ... Cand. Jurid. Sciences*]] 3 (Saratov 2007).

[34] Данные Судебного департамента при Верховном Суде Российской Федерации [Dannye Sudebnogo departamenta pri Verkhovnom Sude Rossiiskoi Federatsii [The Data of the Judicial Department under the Supreme Court of the Russian Federation]] <http://www.cdep.ru> (accessed Jan. 25, 2016).

not contrary to federal law.[35] That is, there are a variety of conciliation procedures, including the participation of a mediator or without it.

The Federal Law № 193-FZ 'On alternative dispute resolution process involving a mediator' came into force since 1 January 2011.[36] As follows from Article 1 of this Law, it is developed for the application of alternative dispute resolution procedures with the participation of an independent person – a mediator, promotion of business partnerships; the formation of ethical business practices and harmonization of social relationship.

The object of the regulation Federal Law № 193-FZ defines the use of mediation in disputes arising out of civil relations, including relations in entrepreneurial and other economic activities, as well as disputes arising out of labour relations and family relations. Such a rule is stipulated in the legislation of Kazakhstan. Analyzing this provision, it can be concluded that legislators in our countries have special expectations from an effective use of mediation procedures in labour relations. However, it seems that mediation is not of demand in disputes arising from labour relations, unlike in business or family disputes. The majority of labour disputes is associated with the misuse of disciplinary measures and dismissal. Here such confrontation reaches its peak, and as judicial practice shows, the content of most settlement agreements reduces to payment by employee a different kind of 'compensations'.

It should be noted that the Federal Law № 193-FZ provides using mediation not to labour disputes, but disputes arising out of labour relations. In this regard, the object of disputes arising out of labour relations may be much broader than the subject arising out of individual labour disputes. However, the main object of a dispute arising from labour relations still seems to be the decision made by the employer in respect to a particular employee who did not agree with such decision. It may be, for example, that disputes arising from the decision to change the labour conditions defined by the parties of the labour contract such as dismissal or non-payment of certain sums. It should be noted that neither the Russian legislator or Kazakhstan provides in the Labour Code rules that determine which institution of labour law mediation related. It will not contribute to prompt introduction of mediation procedures in disputes arising out of labour relations.

Another feature of the Russian legislation, in contrast to the Kazakh, is that in Russia, conciliation may be held on disputes arising out of labour relations, with the

---

[35] Арбитражный процессуальный кодекс Российской Федерации № 95-ФЗ [Arbitrazhnyi protsessualnyi kodeks Rossiiskoi Federatsii] [APK RF No. 95-FZ] [Code of Arbitration Procedure], Rossiiskaia Gazeta [Ros. Gaz.], Jul. 24, 2002.

[36] Федеральный закон № 193-ФЗ «Об альтернативной процедуре урегулирования споров с участием посредника (процедуре медиации)» [Federal'nyi zakon No. 193-FZ 'Ob al'ternativnoi protsedure uregulirovaniya sporov s uchastiem posrednika (protsedure mediatsii)'] [Federal Law No. 193-FZ 'On Alternative Dispute Resolution Procedure Involving a Mediator (Mediation Procedure)'], Rossiiskaia Gazeta [Ros. Gaz.], Jul. 27, 2010.

exception of collective labour disputes. It is concerned with the fact that mediation in collective labour disputes is already regulated by the Labour Code of the Russian Federation (consideration of a collective labour dispute in the Conciliation Commission, with the participation of a mediator and (or) in the labour arbitration – *Author*). This prohibition is highly controversial, not least because historically, mediation appeared as a special procedure for the settlement of collective labour disputes, and has proven its effectiveness with regard to this category of cases for many years of application in foreign countries.

According to Part 3 of Article 7 of the Federal Law № 193-FZ, the signed agreement on the use of mediation as well as the signed agreement on conducting mediation and related direct conducting this procedure is not an obstacle for applying to the court or arbitral tribunal, if otherwise provided by federal law.

Maleshin proved that the Russian procedural system often borrows from procedural institutions in the enforcement process from overseas (like the Anglo-Saxon and Romano-Germanic) but may have different content from the original version that determined its mixed and original character.[37] A comparative analysis between the laws of our countries shows that have come to the conclusion that the Kazakh civil proceedings are influenced by the culture of society and the level of its legal institutions.

The possibility of pre-judicial settlements of individual labour disputes in Kazakhstan is rarely used. It is mostly determined with difficulties, due to the formation and function of the conciliation committees as well the lack of personnel able to skillfully resolve the dispute. Moreover, as Professor Amandykova suggested, today the mentality of people is focused on judicial resolution of legal disputes, rather than on an alternative resolution.[38]

This situation is complicated by the fact that the legislature of Kazakhstan in the Law 'On Mediation' provides mediation in civil and criminal proceedings as an alternative remedy of dispute resolution. This law determined that mediators shall consider disputes (conflicts) arising out of civil, labour and family and other relations with the participation of individuals and (or) legal entities. Yet in the new Labour Code of the Republic of Kazakhstan, which entered into force on 1 January 2016, there is

---

[37] Обобщение судебной практики рассмотрения трудовых споров, в том числе по вопросам практики найма и увольнения работников от 15 апреля 2013 [Obobshchenie sudebnoi praktiki rassmotreniya trudovykh sporov, v tom chisle po voprosam praktiki naima i uvol'neniya rabotnikov ot 15 aprelya 2013 goda] [The Generalization of the Judicial Practice of Labour Disputes, Including on Recruitment Practices and Laying off Workers of April 15, 2013]] <http://sud.gov.kz/rus/content/za-2013-god> (accessed Jan. 25, 2016).

[38] *Амандыкова С.К., Муканов М.Р.* Медиация в Республике Казахстан: становление и перспективы развития [Amandykova S.K., Mukanov M.R. *Mediatsiya v Respublike Kazakhstan: stanovlenie i perspektivy razvitiya* [S.K. Amandykova, M.R. Mukanov, *Mediation in the Republic of Kazakhstan: formation and development prospects*]] <http://www.rusnauka.com/35_NOBG_2013/Pravo/9_151992.doc.htm> (accessed Jan. 25, 2016).

not provision for mediation as an alternative method of individual labour disputes resolution, the codes indicates only that 'individual labour disputes are considered by the Conciliation Commission, and on outstanding issues or non-enforcement of the conciliation committee's decisions – by the courts, except for small businesses and heads of the executive body of the legal entity' (clause 1 article 159). The Labour Code provides that the term of consideration of individual labour disputes shall be suspended during the period of mediation agreement on a labour dispute, and in case of absence of a conciliation commission, before its creation (article 160).

Expanding the method of contractual regulation of labour relations, the state provides greater autonomy to employers. However, it must be noted that this independence is not always for the benefit of employees. According to the Russian scientist Kurennoy, today the state is not fully thinking about the need for a comprehensive and, at the same time, differentiated approach to the problems and it creates a very explosive situation. Departing from undue interference in the regulation of labour relations, the state often leaves workers tête-à-tête with the employer.[39]

We agree with Professor Kurennoy and believe that a similar situation exists in Kazakhstan. The adoption of a new Labour Code itself hasn't resolved all the problems in regulation of labour relations, as it doesn't contains any links to the extra-judicial resolution of individual labour disputes, which may eventually become a popular and quite progressive mechanism for settlement of specified categories of labour disputes.

Since 1 January 2016, when a new Code of Civil Procedure of the Republic of Kazakhstan entered into force, there has been applying another innovation in the field of extra-judicial settlement of disputes. Thus, the notion of judicial mediation was introduced in legislation. President Nazarbayev noted, at the signing ceremony for the new code of Civil Procedure of Kazakhstan, that 'Reconciliation will be not only applied by mediators but also judges and appellate courts, as well as lawyers. The widespread use of reconciliation would relieve the judicial system, and most significantly – reduce the time to resolve disputes. The development of mediation would increase the level of civic participation'.[40]

Thus, the President of Kazakhstan proposes to strengthen the work on the introducing and applying mediation procedures in the field of labour relations. This very timely, as the violation of labour rights, unfortunately, has been rising year

---

[39] *Куренной А.М.* Новое законодательство о труде: итог или этап? Ученые-юристы МГУ о современном праве [Kurennoi A.M. *Novoe zakonodatel'stvo o trude: itog ili etap? Uchenye-yuristy MGU o sovremennom prave* [A.M. Kurennoi, *New Labour Legislation: the Result or the Stage? Legal Scholars of Moscow State University on the Current Law*]] 103 (JSC Publishing house 'Gorodets' 2005).

[40] Подписан новый Гражданский процессуальный кодекс Республики Казахстан // Закон и время. 2015. № 11 (179). С. 3 [*Podpisan novyi Grazhdanskii protsessual'nyi kodeks Respubliki Kazakhstan* // Zakon i vremya. 2015. № 11 (179). S. 3 [*Signed a New Code of Civil Procedure of the Republic of Kazakhstan*, 11(179) Law and Time 3 (2015)]].

on year. According to the Federation of Trade Unions of Kazakhstan the majority of labour disputes arise in three sectors – oil and gas; mining and construction systems, reaching a proportion of the last three years of 80%.[41] Perhaps so many disputes could be reduced with the proper application of the rules relating to non-judicial settlement of disputes, as mediation possesses several advantages which have been systematized and demonstrated in comparison with the judicial process.

Why choose mediation?

There are some disadvantages of judicial disputes settlement and advantages of mediation:

1) The start of the process depends only on the one party, without taking into account the opinions of other –The parties voluntarily (mutually) decided to initiate the procedure;

2) Judge is appointed – Parties have the right to choose the mediator;

3) Judge is a representative of authority – Mediator is not a representative of authority;

4) The formality of the trial – Informal procedure;

5) Publicity – Confidentiality;

6) Competitiveness – Co-operation;

7) The lawsuit in favor of one party – Achieving a solution acceptable to both parties;

8) Decision is based on the law – Decision is based on the law considering parties' interests.

It could be concluded that the key element of mediation is human factor which is tied the whole process.

In practice, parties often take no action and will not seek, a persistent conflict situation could lead to negative consequences for both parties. For the employee, unresolved conflict can lead to such consequences as dissatisfaction with its work; stress; decreased motivation to work. For the employer there are the problems of the declining quality and quantity of production, the instability of the workforce, and the emergence of management problems. As a result, the accumulated negative energy could be transformed into real protest action. In this regard, believe that it is necessary to strengthen the responsibility for a deliberate provocation of the labour conflict.

In this regard, consider that by analogy with the 'external' mediation services in the enterprises an internal mediation service could be created, or staff mediator units could be introduced. For example, employees of legal departments involved in claims work could combine the profession of lawyer and mediator.

---

[41] *Вааль Тамара*, 80 трудовых конфликтов за три года решили профсоюзы в Казахстане // Власть [Vaal' Tamara. *80 trudovykh konfliktov za tri goda reshili profsoyuzy v Kazakhstane. Vlast'* [Tamara Vaal', *80 labour conflicts decided to trade unions in Kazakhstan for three years*. *Governance*]] http://vlast.kz/novosti/11466-80-trudovyh-konfliktov-za-tri-goda-resili-profsouzy-v-kazahstane.html (2015) (accessed Jan. 25, 2016).

3. Conclusion

The study suggests that mediation has become an independent element of the legal doctrine and practice in Kazakhstan. It is advisable for Kazakhstan to have a robust institute and mechanisms of mediation. And what the following, among others, has to be included in all considerations who want to go this way consequences?

1) Mediation needs plurality. It may be possible to include all the possibilities, especially labour relations.

2) A law for the promotion of mediation is recommended, with provisions for the possibility of mediation for those who apply, and so will not contribute to further over crowding of the courts.

3) The Kazakh association of mediators should take up an intensive exchange of views and experiences with their foreign colleagues whenever possible, because mediation is an excellent means for investors into the Kazakh economy.

4) As mediation cannot be prohibited to Kazakhstan, it should be boosted by the state institutions. This could keep employees or companies, for individual cases; or trade unions, companies or associations in the situation of collective cases could be kept from crowding the courts. This would avoid the danger that court settlements could take longer than an appropriate time.

It means that for the further strengthening of this institution need to improve the rules relating to labour relations based on the experience of developed countries. In particular, the following recommendations are proposed:

– to introduce an amendment to clause 1, article 159 of the Labour Code of the Republic of Kazakhstan. The amendment should read as follows: 'Individual labour disputes are considered by the conciliation commission, by mediators, and on unresolved issues or non-enforcement of the conciliation committee's decision by the courts, except for small businesses and heads of the executive body of the legal entity';

– to supply clause 1, article 159 of the Labour Code of the Republic of Kazakhstan with the following rule: 'The parties, by their choice, could apply for resolution of individual labour disputes to the conciliation commission (the court – in the procedure stipulated by this Code) or to settle the dispute through mediation';

– due to the introduction of judicial mediation, the courts should actively promote the effectiveness of this type of mediation;

– to improve mechanisms of individual labour dispute resolution through the establishment in large organizations of specialized services or departments involved in the settlement of disputes through mediation;

– to develop a Code of Ethics for the mediator in Kazakhstan;

– to abandon the use of the adjective 'alternative' and to consider conciliation as an independent remedy of dispute resolution along with traditional judicial procedures or other jurisdictional mechanisms of legal affairs. The advantage of

mediation is that it allows parties involved to find a way out of labour disputes while keeping functioning labour relations and saving the employer's reputation.

In summary, suppose that mediation could and should be widely used by the parties of an individual labour dispute for its early resolution and mutually beneficial terms for each other, which along with other conditions would significantly affect the reduction of the burden on the judicial system of the Republic of Kazakhstan.

Acknowledgments

The authors express gratitude to the Professor of the Department of Civil Law Disciplines of Gumilyov Eurasian National University and the research supervisor Yenlik Nurgaliyeva for the scientific guidelines and support.

References

Blanpain R., & Baker J. *Comparative labour law and industrial relations in industrialized market economies* (Kluwer Law International 2004).

Boulle & Nesic, *Mediation: principles, process, practice* 4–5, 332 (London, Dublin, Edinburgh, Butterworth 2001).

Brown, Hanami & Blanpain, *Industrial Conflict Resolutionin Great Britain. Industrial Conflict Resolution in Market Economies. A study of Canada, Great Britain and Sweden* 103 (T. Hanami and R. Blanpain eds., Deventer-Netherlands 1987).

Kramer, *Alternative Dispute Resolution in the Work Place* § 1.02 1–8 (1998)

Maleshin D., *The Russian Style of Civil Procedure,* 21(2) Emory International Law Review 559 (2007).

Lembke Mark, *Mediation im Arbeitsrecht* (2001).

Ordover Abraham P., *Alternatives to Litigation: Mediation, Arbitration, and the Art of Dispute Resolution.* (2d ed. National Institute for Trial Advocacy 2002)

Roberts M. *Systems or selves. Some ethical issues in family mediation* (1992).

Schoenfield Mark & Schoenfield Mick, *The McGraw-Hill 36-Hour Negotiation Course* (McGraw-Hill, N.Y., 1991).

Selwyn N. *Selwyn's Law of Employment* 498 (14 ed. Oxford University Press 2006).

Stitt A. *Mediation: a practical guide* (Routledge Cavendish 2004).

Захорка Х. Внедрение института медиации в Республике Казахстан. Законодательство Европейского союза и Совета Европы о медиации: медиация в индивидуальном трудовом законе // Зангер. 2013. № 2 (139). С. 81, 83 [Zakhorka Kh. *Vnedrenie instituta mediatsii v Respublike Kazakhstan. Zakonodatel'stvo Evropeiskogo soyuza i Soveta Evropy o mediatsii: mediatsiya v individual'nom trudovom zakone // Zanger.* 2013. № 2 (139). S. 81, 83 [H. Zahorka, *Introduction of the Institute of Mediation in the Republic of Kazakhstan. The Legislation of the European Union and the Council of Europe on Mediation: Mediation in Individual Labour Law*, 2(139) Lawyer 81, 83 (2013)]].

Паркинсон Л. Семейная медиация [Parkinson L. *Semeinaya mediatsiya* [L. Parkinson, *Semeinaya mediatsiya*]] 11 (Moscow 2010).

Information about authors

Guzal Galiakbarova (Astana, Kazakhstan) – Ph.D. student in Law of Department of Civil Law Disciplines, Faculty of Law, Gumilyov Eurasian National University (Ryskulbekov Str., 16 – ap.65, Astana, 010009, Kazakhstan; e-mail: galiakbarova_gg@enu.kz).

Sholpan Saimova (Astana, Kazakhstan) – Associate Professor of Department of Theory and History of the Country, Constitution, Faculty of Law, Gumilyov Eurasian National University (Abylai-khan Avenue, 39/1 – ap.52, Astana, 010009, Kazakhstan; e-mail: saimova85@gmail.com).

BOOK REVIEW NOTES

RULE OF FORCE V. RULE OF LAW[1]

DENIS PATRIN,
Lomonosov Moscow State University
(Moscow, Russia)

DOI:10.17589/2309-8678-2016-4-2-112-115

Recommended citation: Denis Patrin, *Rule of Force v. Rule of Law*, 4(2) Russian Law Journal 112-115 (2016).

Seventeen years ago, on March 24th, 1999, following a break after the World War II, a new 'hot' war broke out in Europe; a full scale war broke out, a war that was neither a non-international armed conflict, nor a limited military operation sanctioned by the UN Security Council resolution. The war was ended in the invasion of the foreign military troops into the territory of a sovereign State, and dismemberment of State territory.

On that day, NATO armed forces began bombing Yugoslavian territory in a military operation named 'Allied Force'. The targets included military, industrial facilities as well as state infrastructure; TV and radio broadcasting facilities, bridges, etc. Yugoslavia citizens who took the brunt of the attack and were indeed the real targets.

The NATO strikes on the Varvarin and Grdelica bridges; the bombing of the small city of Surdulica, the destruction of Radio-Television Serbia (RTS) can be compared to the Guernica, Coventry, Dresden bombings earlier in the century.

During the military campaign, NATO used ammunition with depleted uranium, which, together with destruction of chemical plants and oil refineries, led to a long-term harm to the environmental safety and public health of the Yugoslavian citizens in and beyond the bombed areas.

The government of Yugoslavia detailed and provided evidence of the attacks (which were in violation of the rules of international humanitarian law) and compiled them into '*The White Book of NATO Crimes in the Former Yugoslavia*'. Only after the war did the government of Yugoslavia and concerned citizens of Yugoslavia, Serbia attempt (unsuccessfully) to defend the rights of the victims of the military actions in

---

[1] Reviewed book: Alexander Jaksic, *NATO Intervention in the Former Yugoslavia: Individual Damage Compensation Claims: Jurisdiction and Applicable Law* (Belgrad, Sluzbeni glasnik 2008).

the International Court of Justice, the Tribunal for the Former Yugoslavia, the European Court of Human Rights, as well as in the national courts of NATO member States.

The position taken by the Alliance corresponds to the Rule of Force, where the winners are not judged; it is the winners who judge and the entire blame for the war is vested on the leaders of the targeted country of the attack. The term '*war*' is avoided; the ugly issues of the inconsistency between the committed acts and international law are concealed.

The international community remained silent, while legal pundits continued their active discussions of '*the humanitarian intervention doctrine*', that later would be brushed up and called '*responsibility to protect*', in an attempt to somehow reconcile the action with international law principles.

Such attempts to reconcile the apologetics of war and denial of war are as ingenuous as the reconciling the Wolf from the Aesop fable and his sweet dinner. However, this wind sown at the turn of the century has become a whirlwind in the new and it has become more expedient to destroy the system of international law than to amend the existing.

The book by Serbian professor of Law Alexander Jaksic '*NATO Intervention in the Former Yugoslavia: Individual Damage Compensation Claims: Jurisdiction and Applicable Law*' (Belgrad, Sluzbeni glasnik, 2008, 184 pages) is a quasi-sequel to the above mentioned *White Book*.

Alexander Jaksic's book systematically outlines claims to receive compensation through the national and international courts for the victims of the military attacks showing evidence of violation of the international humanitarian law.

At its core, the book is based on a simple principle, a principle common to municipal legal systems and international law system; it is based on the legal principle of tort in which a wrongful act should be compensated in full by those responsible for the given wrongful act.

The book approach differs from treatises, and it is close to legal briefs in style or to a virtual reasoning issued by the relevant courts, while remaining a scientific and theoretical piece of work.

In the first chapters of his book, the author examines the rules for tort compensation in the various national legal systems. Deliberate attention is paid to the legal nature and application of the jurisdictional immunities of States, as well as the modern trends expressed by the courts in reference to State immunity from foreign jurisdiction.

In particular, the work focuses on the restrictive approach in the application of State immunity in the adjudication of claims regarding tort to human life and health - the so called tort exception rule.

In his assessment of legislation and jurisprudence of the United States and the United Kingdom, as well as the provisions of the European Convention on State Immunity of 1972, the UN Convention on Jurisdictional Immunities of States and Their Property, 2004, the author comes to a general conclusion regarding the use of references to State immunity; that is the rule of international law has evolved to

making an exceptions from the general rule of state immunity for cases involving harm to life and health, property damage.

In addition, the author elaborates further examining the application of State immunity and concludes that not only the above-mentioned exception from the State immunity rule became a norm of international law, but the extraterritorial jurisdiction in respect of grave breach of international law, including war crimes, crimes of genocide also has evolved from the state practice to the norm.

At the same time, the author's analysis of American legislative and judicial practice concludes that if a positive perception of extraterritorial jurisdiction of the own judicial authorities for alleged human rights violations and other similar actions exist in the US practice – the inverse opportunity to appeal in court for victims of attacks realized by persons the responsibility of which is held by the United States – to appeal in order to obtain judicial defense and compensation for harm in the United States judicial institutions – such opportunity is, in the strongest terms, limited and, in fact, suppressed.

The author concludes this section by stating that by far the most effective way to protect the interests of victims would be a creation of a mixed arbitration body, similar to the US-Iran Claims Tribunal. Unfortunately, the probability of the creation of such a tribunal is extremely slim.

Attempts to file claims in the national courts in the Alliance's Member States (Germany, Italy) have been unsuccessful, having been recognized extrajudicial by these courts. Initiations of legal actions in the United States or UK courts were also doomed due to the nature of legal mechanisms regarding such litigation.

The author also concludes that the application of the aggressor State immunity in Serbian courts, should be considered as a denial of justice. Furthermore, it is the Serbian courts which are the only possible judicial authority for at least some, albeit very theoretical protection of the interests of victims.

The second part is devoted to the analysis of applicable law in the legal proceedings related to damage to life, health, property of the NATO-bombing victims. These chapters address the legality of the use of force against Yugoslavia by NATO forces in the absence of a UN Security Council resolution.

The author reviews the issue of initiating legal action on a municipal level, if the tort was a result of breach of international law. He concludes that there is no fundamental difference between the concept of tort resulting from the breach of civil law or tort resulting from the breach of an international obligation. The applicable rules of international humanitarian law should, to his mind, serve as a basis for the municipal court to determine the legality of the behavior of the responsible actor. So the rules of international humanitarian law (the law of armed conflict) are considered by the author as self-executing in the application of legal action in municipal courts.

As to the issue of time limits for making claims, the author considers the claims' limitation period invalid in the case of serious breaches of international humanitarian law and international crimes. In the case of the above mentioned war, such crimes include bombing of the television and radio station of Serbia, the destruction of

the Varvarin bridge with civilians on it, the destruction of the bridge Grdelika with a passenger train crossing over it, the bombing of Surdulica, as well as environmental and ecological harm.

The last two chapters of the book are devoted to the review of the European Court of Human Rights and the activities of the Tribunal for the former Yugoslavia (ICTY) concerning investigation of the actions of NATO in 1999.

The first chapter examines *Bancovic and others v. Belgium and 16 Other Contracting States Case*, widely discussed and criticized by the international legal community. The court, in its reasoning of lack of jurisdiction, assumed a conservative position, which is uncharacteristic for this court indeed.

In the second chapter, the report given by Ms. Carla Del Ponte, Prosecutor of the Tribunal for the Former Yugoslavia (ICTY), regarding a need to conduct an investigation of war crimes committed by NATO member States against Yugoslavia is examined. It should be noted that the former ICTY prosecutor found no reason to conduct such investigations.

Thus, doors were ostentatiously slammed in front of Yugoslav, Serbian governments and victims, eliminating fair and efficient mechanisms to ensure the rule of law, that had been developed by the most civilized and democratic members of the world community.

The author has to admit that the international law has not developed effective mechanism to protect the civilian populations – the most numerous group of victims of armed conflicts. He considers it imperative to fill this gap.

In this regard, he welcomes the adoption by UN General Assembly (RES 60/147 of 16 Dec 2005) of a soft law document called '*The Basic Principles And Guidelines On The Right To A Remedy And Reparation For Victims Of Gross Violations Of International Human Rights Law And Serious Violations Of International Humanitarian Law*', which, despite the criticism of certain provisions, can be viewed as a positive step in addressing the issue of compensation to victims of armed conflict. One should add that without an effective system to protect the victims by means of legal instruments, talking about the rule of law is hypocrisy.

The work, in spite of the reasons behind its creation, is objective and is distinguished by sensible, high quality legal analysis. It focused on the challenges relating international law with national legal systems. The work is written for lawyers by a lawyer in the western legal tradition and is designed to fill the gap of silence for victims of that given war, to ensure that it is not repeated in the future. The book will be of interest to all those concerned with topical issues in international law, the law of armed conflict, problems on international and national legal orders.

Information about the author

Denis Patrin (Moscow, Russia) – Associate Professor at Faculty of Law, Lomonosov Moscow State University (1 Leninskie Gory, bldg. 13–14, Moscow, 119991, GSP-1, Russia; email: d_patrin@law.msu.ru).

Russian Law Journal

Volume IV (2016) Issue 2

Редактор *Марина Зельдина*
Оформление и компьютерная верстка: *Виола Самойлова*

Подписано в печать 18.05.2016. Формат 70x100 $^{1}/_{16}$. Объем 7,25 п.л.
Цена свободная.
Заказ №

Наш адрес: ООО «Издательский дом В. Ема»
119454, г. Москва, ул. Лобачевского, 92, корп. 2.
Тел. (495) 649-18-06

ISSN 2309-8678