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LEGAL ACKNOWLEDGEMENT OF THE CONDITIONED FULFILLMENT OF OBLIGATIONS AS A NECESSARY CONDITION FOR INCREASING THE INVESTMENT ATTRACTIVENESS OF THE RUSSIAN LEGAL SYSTEM

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Introduction: *one of the crucial tasks of the domestic civil science is developing a modern approach to understanding the fundamental civil law categories, "conditioned legal relations" being one of those.* ***Purpose:*** *to create the author's approach to the category "conditioned fulfillment of obligations", which includes revealing the importance of reforming the Russian Federation law of obligations in the context of the regulatory arrangement of the institution of conditioned fulfillment of obligations, defining the concept and the legal nature of the institution of conditioned fulfillment of obligations under the Russian legislation, qualifying the conditioned fulfillment of obligations as an element complicating the obligation, focusing on potestative conditions of deals, consideration of the disputable topic about the Russian concept model of the counter-execution, differentiation between the conditioned fulfillment of obligations and the conditioned transaction.* ***Methods:*** *the methodological framework of the research is based on the following methods: general scientific dialectical method, universal scientific methods (analysis and synthesis, induction and deduction, comparison, abstracting, concrete-historical, formal logical, system-structural), and special juridical methods (comparative legal method, method of system interpretation).* ***Results:*** *changes in the institution of conditioned fulfillment of obligations and the absence of its proper theoretical development serve as somewhat of a limiting factor for the law enforcement potential of this civil law construction, thus making it less efficient.* ***Conclusions:*** *at the present stage of the civil law knowledge development and with regard to the amendments made to the general provisions on obligations, it is necessary to perform a complex analysis of the European experience, to study modern foreign doctrine of the conditioned legal relations, to pay scientific attention to the forgotten results of pre-revolutionary civil law scientists on the subject under consideration, and to critically evaluate the court arbitration practice data which demonstrate significant gaps in understanding the essence of the conditioned civil relations and the*

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legislator's approach to their regulation by both the participants of civil circulation and law executors. Legal acknowledgment of the institution of obligations fulfillment can surely be viewed as one of the necessary conditions for increasing the investment attractiveness of the Russian legal system, since constructing conditioned legal effects serves as a constitutive element of high quality contractual activities.

Keywords: conditioned fulfillment of obligations; complex obligations; conditioned transaction; potestative conditions; conditioned legal relations; reform of the law of obligations; digital economy

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ПОЗИТИВАЦИЯ ИНСТИТУТА ОБУСЛОВЛЕННОГО ИСПОЛНЕНИЯ ОБЯЗАТЕЛЬСТВ КАК НЕОБХОДИМОЕ УСЛОВИЕ ПОВЫШЕНИЯ ИНВЕСТИЦИОННОЙ ПРИВЛЕКАТЕЛЬНОСТИ РОССИЙСКОЙ ПРАВОВОЙ СИСТЕМЫ

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Введение: *одной из актуальных и значимых задач отечественной цивилистической науки является формирование современного подхода к пониманию фундаментальных цивилистических категорий, к числу которых следует отнести и «условные правоотношения».* ***Цель:*** *разработка авторского подхода к категории «обусловленное исполнение обязательств» на основе установления значения реформы обязательственного права Российской Федерации в контексте нормативного оформления института обусловленного исполнения обязательств; определение понятия и правовой природы института обусловленного исполнения обязательств по российскому гражданскому праву; квалификация обусловленного исполнения обязательств в качестве усложняющего обязательство элемента; акцентрация внимания на потестативных условиях сделок; рассмотрение дискуссионного вопроса о российской концептуальной модели встречного исполнения, а также дифференциация обусловленного исполнения обязательств от условной сделки.* ***Методы:*** *общенаучный диалектический, универсальные научные методы (анализ и синтез, индукция и дедукция, сравнение, абстрагирование, конкретно-исторический, формально-логический, системно-структурный), специально-юридические методы (сравнительно-правовой, метод системного толкования).* ***Результаты:*** *новеллизация обусловленного исполнения обязательства и отсутствие его надлежащей теоретической разработки в определенной мере сдерживают правоприменительный потенциал этой гражданско-правовой конструкции, снижая его эффективность.* ***Выводы:*** *на современном этапе развития цивилистического знания в условиях новвелизации общих положений об обязательствах необходимо осуществлять комплексный анализ европейского опыта и изучать современную зарубежную доктрину условных правоотношений, уде-*

лить научное внимание забытым наработкам дореволюционных ученых-цивилистов по данной проблематике, а также судебно-арбитражной практике, свидетельствующей о наличии существенного пробела в понимании как участниками гражданского оборота, так и правоприменителями существа условных правоотношений и подхода отечественного законодателя к их регламентации. Позитивация института обусловленного исполнения обязательств, безусловно, может быть признана одним из необходимых условий повышения инвестиционной привлекательности российской правовой системы, поскольку конструирование условных правовых эффектов выступает конститутивным элементом качественной договорной работы.

Ключевые слова: обусловленное исполнение обязательств; сложные обязательства; условная сделка; потестативные условия; условные правоотношения; реформа обязательственного права; цифровая экономика

On Increasing the Investment Attractiveness of the Russian Legal System and Creating New Regulatory Environment for Digital Economy Resulting from Updating the Normative Platform

In the conditions of the new electronic (digital) economy, with its concept being initially formulated as far back as in 1995 [82], a special relevance is obtained by virtual economic relations, new digital currencies, which require substantial improvement of the Russian legislation for their juridical settlement. The Russian legal system is naturally "saturated" with digitizing processes, which when supported significantly increase the country's competitive ability and investment attractiveness, provide the economic growth which is especially desired in Russia in the conditions of the lasting economic crisis. For example, Government Resolution of July 28, 2017, No. 1632-r approved program "Digital Economy of the Russian Federation"[1], which particularly mentions that "effective development of the markets and industries is only possible with developed platforms, technologies, institutional and infrastructural environments, therefore it is necessary to be focused on the key institutions that create conditions for developing digital economy, these including *legal regulation* (*emphasis added by the author – A. Z.*), personnel and education, development of researchers' competencies and technological reserves".

It is also interesting to note that RF Presidential Decree of May 9, 2017, No. 203 "About the Strategy of Information Society Development in the Russian Federation in 2017-2030" makes it prominent that "the majority of the states are forced to practice the "in-process" adapting of the state regulation of the information and information technologies sphere to new circumstances"[2].

As V. A. Vaypan was right to say, "the top-priority measures needed for the digital economy development should include preparing proposals on *developing principal legal concepts and institutions ensuring the modern digital civil turnover*" [14, p. 6].

As for the institution of the conditioned fulfillment of obligations, its potential for developing the digital civil turnover can be revealed through the system of automated contracts that got widespread at the digital market when algorithmic trading was introduced [54; 62; 79; 93]. For example, Article 327.1 of the RF CC is directly related to the legal opportunity of using the so-called "smart contracts", which allow for fulfillment of obligations with no preliminary expressing of the debtor's will.

The changes in the institution of conditioned fulfillment of obligations and the absence of its proper theoretical development to a certain extent restrict the law-enforcement potential of this civil law construction, thus reducing its efficiency. The law executors need scientifically justified rules and application limits for the legal institution under consideration. Also, there is a need for a critical scientific evaluation of the inconsiderable in number but available court materials on the questions under study.

[1] RF Government Resolution No. 1632-r "On the Approval of Program "Digital Economy of the Russian Federation" of July 28, 2017. Official Internet portal of legal information. Available at: http://www.pravo.gov.ru (accessed 03.08.2017).

[2] RF President's Decree No. 203 "On the Strategy for the Development of the Information Society in the Russian Federation for 2017-2030" of May 9, 2017. Official Internet portal of legal information. Available at: http://www.pravo.gov.ru (accessed 10.05.2017)..

On the Meaning of the Law of Obligations Reform in the Russian Federation in the Context of the Regulatory Recognition of the Institution of Conditioned Fulfillment of Obligations

Before March 8, 2015, when Federal Law No. 42-FZ "About Introducing Changes into Part One of the Russian Federation Civil Code"[1] was adopted, neither the Russian civil legislation nor the earlier adopted RSFSR Civil Code had contained general provisions for regulating the conditioned fulfillment of obligations[2].

The analysis of the Concept of the Russian Federation Civil Law Development[3] (hereinafter referred to as the Concept), prepared in accordance with RF President's Decree "On Improving the Russian Federation Civil Code"[4], demonstrates that the reformers of the civil legislation recognized the necessity to fill the legislative gap associated with this civil law construction.

The representatives of the legal science positively evaluated the new norm under discussion. For example, I.Z. Ayusheeva notes that "the introduction of the new norm is viewed positively because in this way the legislator agreed with the opportunity to amend a contract with terms covering the obligation fulfillment, and exercising, changing or terminating rights under contract which totally depend on the parties' will (on potestative conditions)" [4, p. 59].

A. P. Sergeev and T.A. Tereshchenko come to the conclusion that "this norm is reasonable, complies with the practical needs and widens the freedom and the opportunities of the civil circulation participants. And the explicit reference to the conditions when actions or occurrence of particular circumstances can totally depend on the will of one of the parties crosses out the permanent question whether the conditions are allowed that totally depend on the will of a party" [47, p. 152].

Taking a favorable view of the norm presented in Article 327.1 of the RF CC, S.V. Sarbash adds that "the changes introduced into the RF Civil Code minimize the risk of recognizing a term as unagreed when it is defined through indicating an action performed by a party" [45].

The opinion given by A.G. Karapetov is also very interesting: "the possible situation when not the whole legal effect of the transaction but particular rights and obligations therein are covered by the condition is absolutely legitimized by Article 327.1 of the RF CC adopted on June 1, 2015, and this surely moves the Russian civil law forward" [29, p. 80].

It can be noted that numerous scientific publications related to the issue of the legal acknowledgment of the institution of conditioned fulfillment of obligations are mostly limited to the statement of the fact of introducing a new norm, with no special attention given to the practical meaning of the content of the institution [17, p. 5].

Let us note that in the process of reforming the civil law, a task was set "to study the question of possible expanding the concepts of the *suspensive condition* and the *resolutive condition* in conditioned transactions, with regard to the current practice and needs of the property turnover"[5]. That proves the original intention of the reformers to first of all improve the provisions of Article 157 of the RF CC. In particular, the Explanatory Note to draft Federal Law "About Introducing Changes to Parts One, Two, Three and Four of the Russian Federation Civil Code and Certain Legislative Acts of the Russian Federation" runs that "in Sub-Section 4 "Transactions and Representation" (Article 157), it is proposed to establish that a condition in the transaction cannot be presented by a circumstance that fully or mostly depends on the will of one of the parties in transaction".

The main task of this norm is to overcome the established court practice which is very severe on the so called potestative conditions.

With this, attention is given to the fact that everywhere in the Continent Europe (in France, Germany, Italy, Austria, the Netherlands, Switzerland), it is acknowledged that potestative conditions are divided into two types – "simply potetstative" conditions (when the will of a party has a certain role but is not determinative), for example winning

[1] Federal Law No. 42-FZ "On Amendments to Part I of the Civil Code of the Russian Federation" of March 8, 2015. Official internet portal of legal information. Available at: http://www.pravo.gov.ru (accessed 09.03.2015).

[2] Civil Code of the RSFSR: approved by the RSFSR Supreme Soviet on June 11, 1964 (as amended on 26.11.2001). *Journal of The Supreme Soviet of the Russian SFSR*. 1964. No. 24. Article 407; RSFSR Code of Laws. Vol. 2. P.7.

[3] Concept of the Russian Federation Civil Law Development. *Bulletin of the RF SAC*. 2009. No. 11.

[4] RF President's Decree No. 1108 "On Improvement of the Civil Code of the Russian Federation" of July 18, 2008 (as amended on 29.07.2014). *Collection of Legislative Acts of the Russian Federation*. 2008. No. 29. Part 1. Art. 3482.

[5] Concept of Civil Law Development of the Russian Federation: approved by the decision of the RF Presidential Council for Codification and Enhancement of Civil Legislation of October 7, 2009. *Bulletin of the RF SAC*. 2009. No. 11 (November).

a tender, and “exclusively potestative” conditions (when the will of the party is determinative).

The doctrine and the court practice of the above countries are negative only about “exclusively potestative” conditions but have no restrictions for “simply potestative” conditions as it unacceptably restrains the circulation”[1].

As we see, the legislator, intending to reform the institution of conditioned transaction, first of all aimed to legitimize the potestative conditions, which the court arbitration practice kept an especially watchful eye on [52; 58; 61; 75; 81; 83; 97]. For example, the parties entered into an interest-free loan agreement, according to which the plaintiff gave a sum of money to the defendant for purchasing an apartment in a building under construction. The obligation for repaying the debt arises only in case the apartment is sold or transferred by way of gift, and the defender undertakes to pay a half of the price that the apartment would cost at the moment of selling or transferring. The court satisfied the claim about partial invalidation of the loan terms according to which “the obligations of the borrower on repaying the debt will arise only in case the apartment mentioned in the loan receipt is sold or transferred by way of gift”, on the grounds that this term does not comply with the requirements of law. The court indicated that the loan agreement concluded between the parties does not contain the specific deadline for the defendant to repay the loan. It is not possible to view selling / transferring by way of gift as an event that should inevitably take place and does not depend on the will of the parties, as it is the defendant who is entitled to decide in the future if he will sell or grant the apartment which is being purchased using the loan. Selling or transferring the apartment by the borrower (the defendant in case under study) cannot be accepted as a suspensive condition of the loan agreement, because the circumstance given as a suspensive condition depends on the actions performed by one party only, i. e. the borrower[2].

However, it is noteworthy that the mentioned explanatory note later on emphasizes the following: “With this, the draft law takes into account that in the court practice the contractual conditions which make the obligation fulfillment dependent on occurrence of circumstances, including those fully dependent on the will of one of the parties (the same as for reciprocal performance of obligation), are sometimes mistakenly interpreted as potestative. For this reason, Article 327.1 “Conditioned Obligation Fulfillment” was included into the draft law”. Thus, as per the intention of the developers of the civil legislation reform, the norm covering the conditioned fulfillment of obligations is not aimed at the legal acknowledgment of the potestative conditions, and this directly contradicts the established opposite point of view, being of predominate importance in the modern civil law literature [56; 67; 73; 78; 94].

In general, we should summarize that the legal acknowledgment of the institution of the conditioned fulfillment of obligations can certainly be recognized as one of the necessary conditions for increasing the investment attractiveness of the Russian legal system [70; 71], as the development of the conditioned legal effects acts as a constitutive element of proper contractual work. The critical need of the modern civil circulation for efficient and internally non-contradictory doctrine is justified by the above mentioned with the sufficient degree of confidence.

Concept and Legal Nature of the Institution of Conditioned Fulfillment of Obligations as per the Russian Civil Law

According to Article 327.1 of the RF CC, “fulfillment of obligations and exercising, changing or termination of certain rights under contractual obligation can be conditioned by performance or non-performance of some actions by one of the parties in obligation, or by occurrence of other circumstances defined in the contract, including those totally dependent on the will of one of the parties”.

With this, it is important to remember about explanations contained in the Supreme Court Plenum Resolution of November 22, 2016, No. 54 “On Some Issues Concerning Application of General Provisions of the Russian Federation Civil Code about Obligations and Their Fulfillment”. Item 23 of the Resolution runs that by implication of RF CC Article 314 Item 1, RF CC Article 327.1, the deadline for the fulfillment of an obligation can also be reckoned from the moment of fulfilling the obligation / performing certain actions by the other party, or from occurrence of other circumstances stated by

[1] Explanatory Note to Draft Federal Law “On Amendments to Parts One, Two and Four of the Civil Code and Certain Laws of the Russian Federation”. The document has not been published. Access from the legal reference system ConsultantPlus (accessed 02.03.2018).

[2] Decision of the Moscow City Court on case No. 33-34720 of October 26, 2011. The document has not been published. Access from the legal reference system Consultant Plus (accessed 02.03.2018).

law or the contract. In case the creditor within the time limit prescribed by law / other normative acts / contract (and within a reasonable time in case the due date was not specified) has not performed actions that should have initiated the obligations to be fulfiled by the debtor, the creditor shall be regarded as guilty of the delay (RF CC Article 328 or 406). For example, the initial and deadline expiry dates for the contractual work performance (RF CC Article 708) can be related to the advance payment made by the customer, and failure to make advance payment entails legal consequences prescribed by RF CC Article 719.

If the arrival of the condition that should have initiated the obligation performance has been obstructed / assisted in bad faith by the party for which its taking place / non-taking place is desirable, the said condition at the request of the good faith party shall be recognized correspondingly as not having taken / having taken place (Item 1 of Article 6, Article of the RF CC)[1].

For example, the court arbitration practice came across the question of whether it conforms with the legislation to have a condition in the contract stating that the date of payment for the works performed by the subcontractor is to be reckoned from the moment when the primary contractor has the work results accepted by the customer or from the moment when the primary contractor receives payment from the customer. The digest of case law gives the following reply to this question with reference to Article 327.1 of the RF CC: the condition stating that the date of payment for the works performed by the subcontractor is to be reckoned from the moment when the primary contractor has the work results accepted by the customer or from the moment when the primary contractor receives payment from the customer, does not in itself contradict the mentioned norms[2].

The following case, common in the court practice, can be given as an example of applying Article 327.1 of the RF CC. The contract for information services on choosing and demonstrating an apartment to the customer (the potential purchaser) can contain a condition that remuneration for the Contractor is determined as a percent of the selling price of the contract concluded as a result of rendering these services and is payable in case the customer or his relatives purchase the apartment which was demonstrated to the customer as part of the performer's obligations[3].

The cases of violation and incorrect interpretation of provisions of RF CC Article 327.1 are most common in the sphere of realtor services. For example, Decision of the RF Supreme Court of June 13, 2017 No. 41-KG17-5 describes the following. On November 30, 2015, sole trader P. V. Orlov as the Contractor and S. A. Khryapchenko as the Customer concluded an agreement for paid information services. According to the agreement terms, the Contractor undertook to demonstrate a real estate item, complying with the parameters defined in the agreement, to the Customer. The Customer undertook to pay a remuneration in the amount of 6% of the price originally claimed by the seller of the real estate item and given in the information services acceptance act. The claimant performed his obligations in good faith, having demonstrated the apartment to the defendant, however after the contract for the sale and purchase of the apartment was concluded and the title to the apartment was acquired, S. A. Khryapchenko refused to pay the remuneration to the sole trader P. V. Orlov for the information services under the agreement. With reference to Article 327.1 of the RF CC, the Judicial Body for Civil Cases of the Russian Federation Supreme Court pointed out that performing the obligation on paying for the services by a Customer can be conditioned by his taking a certain action, including entering a civil transaction[4].

The analysis of this legal situation clearly demonstrates the construction of the conditioned fulfillment of the obligation in action: discharging the obligation to pay for the services by the customer in this case is conditioned by his performing certain actions, including entering a civil transaction of purchasing the property. It turns out that it is not the fact of rendering information services that has a critical importance for the fulfillment of the obligation by the customer, but the conditioned

[1] Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation No. 54 "On Certain Issues of Application of General Provisions of the Civil Code of the Russian Federation on Obligations and their Performance" of November 22, 2016. *Bulletin of the RF SAC.* No. 1 (January). 2017.

[2] Review of Court Practice of the Russian Federation Supreme Court, No. 2 (2017): approved by the RF Supreme Court Presidium on April 26, 2017. *Bulletin of RF Labor and Social Legislation.* 2017. No. 6.

[3] Decision of the RF Supreme Court No. 41-KG17-8 of June 27, 2017. The document has not been published. Access from the legal reference system ConsultantPlus (accessed 19.02.2018).

[4] Decision of the RF Supreme Court No. 41-KG17-5 of June 13, 2017. The document has not been published. Access from the legal reference system ConsultantPlus (accessed 19.02.2018).

circumstance which is totally dependent on the will of the customer himself / herself – i. e. the fact of purchasing the apartment by the customer or his / her relatives. Consequently, having rendered the information services in good faith, the realtor in this case may receive no remuneration in case the condition is not followed of purchasing this particular unit of property which was chosen and demonstrated to the customer by the realtor.

An interesting fact is that all the lower-level courts came to just the opposite conclusion and rejected the realtor's claim. They explained that the subject of the agreement for rendering services cannot include reaching a definite result, and so the provision of the information services agreement about paying for services only in case the demonstrated apartment is purchased, contradicts the provisions of law. The courts also pointed out that purchasing the apartment by S. A. Khryapchenko was not related to executing the agreement for paid information services between S. A. Khryapchenko and the sole trader P. V. Orlov, as this apartment was also shown to S. A. Khryapchenko by other real estate agents, and the offer for sale of the apartment was published by the seller for general public.

In our opinion, the actions of the defendant are characterized by obvious misuse of the right, because having concluded the agreement for information services, the realtor fully performed his obligations under agreement – he arranged the necessary selection of the real estate units that complied with the customer's requirements, he assisted in examining the preferred apartments. As a result, the final positive effect of his actions was objectified – the customer chose the particular apartment which had been selected by the realtor.

With this, it is important to note that the obligation that allows for fixing the date of its fulfillment (by indicating the event which will inevitably occur; by determining the moment after fulfillment of obligations by one of the parties; after completing specific actions by that party or after other legislatively established circumstances occur) is to be fulfilled on that fixed date. Correspondingly, the obligation to pay for the realtor's services appears *on the day when one of the parties to the obligation (the customer) performed certain actions* – i. e. purchased the real estate item that had been selected and examined with the realtor's assistance.

In terms of the structural arrangement of the institution of conditioned fulfillment of obligations, introduction of the norm covering this institution into RF CC Chapter 22 "Fulfillment of Obligations" apparently means that the generic nature of this institution should particularly imply the structurally complicated mechanism of the obligation fulfillment through the prism of the corresponding condition. However, in juridical literature the innovation of Article 327.1 of the RF CC is rather often associated with the date of the obligation fulfillment: "it is expressly provided that the execution of the duties under a contractual obligation may be conditional on one of the parties to the obligation taking definite actions or on the occurrence of other circumstances provided for by the contract or by the law"[1].

This conclusion is logical itself and resulting from the literal interpretation of Article 327.1 of the RF CC. However, in our opinion, if we proceed from this thesis, it would be a mistake to think that the institution of conditioned obligation fulfillment is inherently related to the date of the obligation fulfillment. In this case, it will be more accurate to say that increasing complicacy of the structure of an obligation as part of the institution of conditioned fulfillment of obligations significantly influences the period of this obligation fulfillment through establishing a definite condition or circumstance in the contract. S.V. Sarbash adheres to a similar position: "RF CC Article 327.1 covers not the period but the conditions" [45].

The felicitous remark of A. G. Karapetov is that "the principal difference between the period and the condition is that when we mean a condition, the corresponding legal effect is made dependent on the circumstance which may not reliably occur, while when we mean a period – we mean a circumstance which will inevitably come" [29, p. 77].

As for the term for the fulfillment of the obligation, we deem it important to answer the following question: when RF CC Article 327.1 is legally acknowledged, is it possible to consider as unagreed the term determined through indicating an event which is not inevitable? While answering this question, one should note that the risk of invalidating the contract because of the unagreed term is cured by RF CC Article 314 rather than by RF CC Article 327.1.

The updated version of the RF CC Article 314 runs that the time period within which the obligation must be executed can be counted from the time of discharge of duties by the other party.

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[1] Large-scale Changes in Part One of the Civil Code of the Russian Federation: Obligations. Access from the legal reference system ConsultantPlus. 2015. Data provided by the "GOLTSBLAT BLP" company.

Moreover, one should keep in mind the position of the RF SAC which presumes that if the beginning of the time period is determined through indication to the actions performed by other parties or individuals, including the provisions covering the advance payment, and such actions are performed at a reasonable period of time, then the condition about the time period for executing the obligation shall be considered agreed and the contract shall be considered concluded[1].

At the same time, the analysis of the court arbitration practice proves that the law executor can declare the time period unagreed in case it was determined in breach of Item 2 of Article 190 of the RF CC, i. e. it is tied up to the event which is not inevitable. For example, the parties have agreed in the contract that the rental period shall start from the moment when the river ice thickness reaches 1 meter, and so the country cottage will be accessible with transport. We think that in this case it is better to go by Article 327.1 of the RF CC.

Complicacy of the Conditioned Obligation

It should be noted that the obligation with its structural components including a condition provided by Article 317 of the RF CC is surely structurally complicated.

It is important that even pre-revolutionary civil scientists mentioned the so-called "complicated" obligations [9, p. 317; 34, p. 107]. German scientist L. Enneccerus understood complicated obligations as legal relations with numerous legal powers (and legal consequences) [50, p. 239].

Soviet researchers of private law, for example N. G. Aleksandrov [1, pp. 38–39], M. A. Gurvich [23, pp. 49–50], S.S. Alekseev [2, pp. 10–11] noted that there are "structurally complicated obligations" in the law of obligations. V. V. Kulakov proposes to distinguish structurally complicated obligations based on "the complicated content and structure of the obliging legal relation, which is manifested either in the subject or in the object; and this inevitably influences the complicacy of the structure and is reflected in the content of the obligation, where there is general focus of the obligation" [32, p. 144].

Emphasizing the complicacy as one of the classification criteria of the conditioned fulfillment of obligations is important both practically and theoretically: making the structure of the obliging legal relation more complicated directly influences the obligation execution, change and termination, and bringing to liability for failure to fulfill the obligation or its improper fulfillment.

As is mentioned in the research literature, making a legal phenomena more complicated is a deviation from a certain "standard" set by the basic legal norm. In this respect, conditioned fulfillment of the obligation is a structurally-complicated civil law construction, which differs from a simple obligation established by Article 307 of the RF CC.

With this, it is proposed to view these exceptions from the law as "provisions allowed by the legal norms and established by them, which differ from the generally acknowledged rules and are used on certain conditions by the persons truly authorized for that" [22, p. 124].

We deem it necessary to pay special attention to the fact that such exceptions from law as the conditioned fulfillment of obligations did not appear spontaneously in law but were caused by objective reasons – they resulted from the complication of the public relations, from the development of the civil turnover. Correspondingly, the emergence of the civil law construction of complicated obligation was caused by the objective needs of the economy.

As for the complicacy of the conditioned fulfillment of obligations, it should be noted that this "complicacy" is primarily manifested through a special potestative condition – performing or non-performing of certain actions by one of the parties to obligation, or occurrence of other circumstances required under contract, including circumstances which are totally dependent on one of the parties' will.

The question about the legal nature of this condition is also of great significance. It should be noted that legal literature does not give special attention to this topic. Thus, there a question rises whether it is possible to qualify performance or non-performance of certain actions by one of the parties to the obligation who participate in the conditioned obligation fulfillment mechanism as a secundarius right / Gestaltungsrechte (the right to choose a juridical action)?

The idea of the secundarius right existence in the civil law theory was earlier pronounced

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[1] Resolution of the RF SAC Presidium No. 1404/10 on case No. A40-45987/09-125-283 of May 18, 2010. Access from the legal reference system ConsultantPlus (accessed 21.02.2018).

by S. S. Alekseyev: "... secundarius powers are the powers related to the obligation duration, change or termination" [3, p. 66].

Let us note that the secundarius right phenomena is an underexplored and disputable topic of civil law [15; 24; 28; 30; 84]. The Soviet jurisprudence had both supporters and opponents of this civil law category.

For example, S.N. Bratus did not recognize tself-sufficiency of secundarius rights and was sure that a secundarius right is a subjective right [11, p. 10].

Opposite to that, A. G. Pevzner justified self-sufficiency of the secundarius right category [38, p. 16]. As A. B. Babaev was right to say, while being subjective the secundarius right is intended for realizing the interests of the empowered person, thus giving certain advantages to the latter [5, p. 5].

A. O. Rybalov calls secundarius rights "potestative" and notes that they are unilateral [43, p. 131].

Speaking about secundarius rights S. S. Alekseev justly noted that these rights are relative rights, as they connect specific participants of the civil turnover [3, pp. 471–472]. With this, it is important to mention that secundarius rights are opposed not to the obligation but to the passive party's dependence, which involves suffering the legal implications.

V. A. Belov thinks that a secundarius right is a possibility to obtain, have or exercise a specific right and dispose of it [6, p. 331].

The position expressed by A. B. Babaev is also of interest: in his opinion, a conditioned right resulting from effecting a deal with a potestative condition, should be qualified as a secundarius right since such a right does not provide for obtaining the unconditional right through the creditor's actions. At the same time, the situation is different in case the condition does not depend on expressing the will by one of the parties of the transaction: in this case, a conditioned right cannot be viewed as secundarius, as "it does not contain in itself a possibility to cause changes in juridical positions of the parties" [21, p. 778].

We think that the power to perform or not to perform certain actions by one of the parties to obligation when participating in the mechanism of the conditioned obligation fulfillment can be reasonably viewed as secundarius. Exercising this power leads not to the beginning of the legal relation but to its change.

Secundarius power to perform or not to perform certain actions by one of the parties to obligation when participating in the mechanism of the conditioned obligation fulfillment, is a "secondary" legal phenomenon and a juridical fact that changes the right. Using this right by one of the parties results in effecting a unilateral transaction.

As E. A. Fleyshits was right to say, the majority of unilateral transactions are rated as auxiliary [49, pp. 216–217], i. e. such that are effected for the realization of the legal relation already in force between the parties.

One has to agree with E. V. Vavilin who notes that "... an essential feature of auxiliary deals is that they do not result in achieving the final economic purposes of the parties" [13, p. 264].

We deem it well-reasoned to think that when executing a secundarius power to perform or not to perform certain actions within the mechanism of the conditioned obligation fulfillment, a party to the obligation effects exactly an auxiliary transaction which does not have an independent juridical meaning. Such an auxiliary transaction is aimed at proper fulfillment of the obligation within the already existing legal relations between the creditor and the debtor. This transaction results in the change of the legal relations, although within the limits which were determined in advance by the agreement terms.

About Potestative Conditions: Micro Theoretical Study

First of all, it is necessary to note that for a long period of time after the rule of RF CC Article 157 was adopted, both civil science and law enforcement practice were wary of potestative conditions: the actual possibility of the so-called potestative conditions existence in the transaction (i. e. conditions depending on one of the parties' will) was not recognized, and the provisions of RF CC Article 157 were not applied for such conditions. For example, the decision of the RF Supreme Arbitration Court of April 5, 2012 No. VAS-3439/12 on case No. A32-33325/2010 describes the following.

The agreement for purchase and sell of November 13, 2007 specified that the purchasers (V. Y. Arutyunov and V. V. Maksimov) will pay for their share after they get the documents of title to the real estate item. This circumstance (issuing of the documents of title) is not characterized as inevitable, as it depends on the will of the purchasers of the share, and for this reason it does not fall within the requirements of Item 2 of Article 190 of the RF CC. Correspondingly, when reviewing the dispute, the courts reasonably proceeded from the premise that the payment due date was not determined in the agreement. The complainant's arguments about the incorrect interpretation of Article 157 of the RF CC were rejected because the provisions of that article are not applied to disputable legal relations[1].

At the same time, the analysis of the latest arbitration practice allows for a conclusion that the law executor has recently relaxed its approach and increased its confidence in potestative conditions of the transaction. For example, Resolution of the RF SAC Plenum of July 12, 2012 No. 42 "On Some of the Issues of Settling Disputes Related to Suretyship" runs that the courts need to have regard to the fact that the suretyship agreement can be concluded with a condition (Article 157 of the RF CC). The suspensive conditions that precondition the suretyship agreement's coming into force (Item 1 of Article 157 of the RF CC) can include such circumstances as concluding other security transactions between the creditor and the debtor/ other third parties (for example, a mortgage agreement), changing participating parties/ managerial bodies of the guaranteeing company/ the debtor and etc. The suretyship agreement can contain a dissolving condition (Item 2 of Article 157 of the RF CC), which can provide for the termination or invalidation or reversal of other security transactions concluded between the creditor and the debtor[2]. Obviously, Article 157 of the RF CC does not contain any direct prohibition to include a potestative condition into the transaction, the article just emphasizes that it is not known if the corresponding circumstances are going to occur.

Russian Conceptual Model of Counter-Performance

The necessity to give a special attention of the researchers to the Russian conceptual model of counter-performance is largely explained by the circumstance that counter-performance can be qualified as a type of conditioned fulfillment of obligations. For example, according to Item 1 of Article 328 of the RF CC, counter-performance is the performance of the obligation by one of the parties conditioned by the other party's performance of his / her obligations. As it is reasonably noted in scientific literature, counter-performance of an obligation shall be understood as the performance which should be effected only after the other party performed his / her obligation [10, pp. 620–621].

It seems reasonable to suggest that the power of the parties to obligation to independently determine the conditions of counter-performance has certain limits and cannot be implemented in such a way that the counterparty's / other parties' rights are ultimately restricted, as this can be treated as abuse of right. For example, in one of the court cases, OOO PRP Energo (defendant) pleaded that PAO Mosenergo did not provide OOO PRP Energo with the document of payment / demand for payment, thus failing to comply with Items 7.2 and 7.3 of the heat supply agreement, and so by Article 327.1 of the RF CC there were no grounds for employing contract liability measures toward OOO PRP Energo to recover damages, for the reason of failure to counter-perform contractual obligations by PAO Mosenergo. In this case, the complainant has fully performed his obligations on supplying heat energy and heat carrier to the defendant, and so the defendant's reference to RF CC Article 327.1 is irrelevant[3].

Let us add that conditioned fulfillment of obligations suggests that the obligation fulfillment and exercising / change / termination of certain rights under the contractual obligation can be conditioned by performing or non-performing of certain actions by only one of the parties to obligation

[1] Decision of the RF Supreme Court No. VAS-3439/12 on case No. A32-33325/2010 of April 5, 2012. Access from the legal reference system ConsultantPlus (accessed 27.02.2018).

[2] Regulation of the RF SAC Plenum No. 42 "On Some Issues of Settlement of Disputes Related to Suretyship" of July 12, 2012. *Ekonomika i Zhizn* – Economics and Life. Vol. 34. August 31, 2012 (accountant's application).

[3] Decision of the Arbitration Court of the Moscow Circuit No. F05-18945/2016 on case No. A40-22961/2016 of February 1, 2017. The document has not been published. Access from the legal reference system ConsultantPlus (accessed 19.02.2018).

but not by both of them simultaneously, as this will inevitably lead to the situation when fulfillment of the obligations by the parties will be mutually conditioned. For example, A. Bychkov notes that a mixed contract under which the obligation fulfillment of each party depends on the obligation fulfillment by the other party, should be invalidated, because "the rights and the duties in this case are tightly interwoven within one transaction and intercross each other" [12, p. 12].

Conditioned Fulfillment of the Obligation and Conditioned Transaction: the Necessity to Differentiate

As V. V. Vitryansky was correct to say: "Article 327.1 of the RF CC was introduced to take conditioned fulfillment out of the sphere of application of RF CC Article 157, which covers transactions effected under condition. Thus, by implication of Article 327.1 of the RF CC, the parties can conclude an agreement that provides for a specific procedure for the obligation fulfillment. For example, the agreement is signed, and one of the parties shall start its obligation fulfillment after the other party provides it with an independent guarantee or makes an advance payment. This construction and constructions similar hereto, which establish potestative conditions (i. e. the conditions depending on the will of the parties), should not fall within the application sphere of RF CC Article 157"[1]. This thesis is a starting point for this section of the scientific article, which covers the necessity to differentiate between Russian Federation Civil Code Article 327.1 and Article 157, which deals with legal regulation of transactions effected under condition.

As is known, it was the Roman private law that developed the famous approach according to which the obligatory legal relation between the parties of the deal effected under a suspensive condition appears just at the moment of this condition occurrence [42, pp. 370–371; 99; 100, pp. 717–719]. Such an approach is also applicable in modern law: for example, it is adopted in some of the international legal acts (Article 16:101 of the *Principles of European Contract Law*, Article 1:106 of Vol. 3 of the *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference – DCFR*).

Importantly, when distinguishing between the conditioned fulfillment of the obligation and the conditioned transaction, it is of the essence to establish the so-called "terminological cleanness" of the scientific research. This is because the majority of foreign legal systems use such category as "conditioned obligation" (for example, the Civil Code of France[2], the Swiss Code of Obligations[3] and etc.), while the Russian legislator only uses term "conditioned transactions". Probably, this is why the phrase "conditioned obligations" was rarely used in the pre-revolutionary civil law science [20, p. 173; 40, p. 7], Soviet scientific sphere and modern Russian jurisprudence in general. In this context, V.V. Vasnev should be supported in his idea that "the non-conformity of terminology is caused not by the doctrinal mismatches but by the specific structure of the civil law legislation acts – the availability or the absence of the general provisions covering transactions in those acts" [15, p. 23]. Thus, a conclusion has to be made that effecting a conditioned transaction results in conditioned obligation legal relation (in other words, in conditioned obligation).

Of special interest is the problem of the juridical relations that existed between the contractors until the condition occurred or was annulled. For example, legal literature demonstrates a prevailing opinion about the existence of some legal connection that has an enormous number of various characteristics [51; 59; 74; 80; 85; 92].

For example, M. Planiol describes this connection between the parties to the conditioned obligation as "a legislatively protected hope to become a creditor one day" [39, p. 94]. In the opinion of R. Savatye, there appear "undefined relations" [44, p. 271]. Y. S. Gambarov's position is that this relation shall be qualified as "an interim and unsettled status of right" or as a "status of inaction" [19, p. 760]. Y. V. Vaskovsky proposed to characterize the targeted legal relation as a "hesitative status" [16, p. 169]. K. P. Pobedonostsev called the legal relation in question "the legal relation with no direct execution" [40, p. 8]. Besides, legal doctrine contains some other definitions of the conditioned obligation, being a complicated phenomenon

[1] Vitryansky V. V. Question-Answer. Access from the legal reference system ConsultantPlus (accessed 21.02.2018).

[2] Civil Code of France (Napoleon Civil Code). Moscow, Infotropic Media Publ., 2012. Pp. 4–592.

[3] Swiss Code of Obligations. Federal Act on the Amendments to the Swiss Civil Code. Part Five: The Code of Obligations of 30.03.1911 (as on 01.03.2012). Moscow, Infotropic Media Publ., 2012. P. XVII–XXXV, 1–526.

in terms of the juridical certainty of the legal status: “the start of the juridical relations” [36, p. 49], “the rudiments of right” [27, p. 618], “potential right” [21, p. 776].

In our opinion, a transaction made under a condition can be “conditionally” divided into two periods of its existence: (1) a period before the start of the condition agreed by the parties to the transaction, and (2) a period after the condition start / fail to start. Both the first and the second periods in complex are the periods of the obligation legal relations’ existence, which means that there is certainly a juridical connection between the contractors. The following arguments can be used to prove it: a conditional transaction is considered to be concluded from the moment it was effected, it is covered by the rule of prohibition to unilaterally refuse to fulfill obligations, a conditional obligation can be secured with the means of securing an obligation which are listed and not listed in the RF CC, a conditional obligation may be terminated through providing a compensation / substitution of the obligation / using other grounds for termination and etc. One more argument for the above position is the cession of right resulting from the conditioned transaction. For example, L. A. Novoselova was right to pay attention to the fact that “the possibility of the cession of right which can be exercised... under a condition has been never contested neither in foreign nor in domestic civil science” [37, p. 170].

To support the stated position concerning the presence of the juridical relation between the parties to the conditioned transaction, the rule of Item 1 of Article 425 of the RF CC can be mentioned, which runs that the contract shall come in force and shall become obligatory for the parties from the moment of its conclusion. From the literal interpretation of this norm, it clearly appears that the parties to the obligation resulting from a condition-containing contract actually become the parties (i. e. gain the corresponding subjective and juridical duties) at the moment when the contract is concluded, in our case – at the moment of effecting the conditioned transaction.

The position of the majority of German civil scientists is that before the suspensive condition occurs or fails to occur, the creditor is characterized by having the so-called right to expect (Anwartschaftsrecht) [32, pp. 5–6; 63; 95]. Foreign literature describes the right to expect as some legal status under which “some part of the actual circumstances for acquiring the right has already occurred, while there are no other / the rest of the components of the full set of actual circumstances” [57, pp. 3–4].

L. Enneccerus understood the right to expect as “a preparatory step to obtain a right, with this right developing out of this step by accumulating definite preconditions, with no necessity to perform additional actions for its acquiring” [50, p. 279]. Thus, it can be concluded that until a certain condition occurs or fails to occur, the parties to the conditioned transaction will be in the process of waiting and are, so to say, characterized by having a right of expectation.

Let us note that the structure of the “right of expectation”, which was thoroughly studied in works by L. Enneccerus, in many ways resembles secundarius (Gestaltungsrechte) rights, described by E. Zekkel “that comprise an ability to set (change) a specific legal relationship through a unilateral transaction” [28, p. 211]. As a reminder, the author of the term “secundarius rights” (Gestaltungsrechte), used in the modern civil law framework, is A. von Tur [48].

With this, one needs to keep in mind that L. Enneccerus’s right to change the right, which comprises the structure of “the right to expect” cannot be fully equated with the right-generating right of Zekkel, as the latter is characterized by a narrower range of methods of its exercising. A similar view was expressed by I. A. Emelkina: “Anwartschaftsrecht is not identical to secundarius rights” [26, p. 47].

It would also be right to pay attention to the fact that some of the representatives of foreign civil science did not recognize the necessity to separate out the rights of expectation, as in their opinion those do not have a legal meaning [53; 55; 64; 88, p. 3; 98].

Within the framework of our study, the position demonstrated by V.A. Belov is of interest: “Making a transaction more complicated by incorporating a condition results in specific juridical consequences in the form of secundarius rights and the status of juridical constraint associated with them” [7, p. 141]. In our opinion, it is possible

to agree with this position, as it reflects the legal status of the civil relation subjects in a conditioned transaction".

Let us emphasize that judging from the court interpretation given above (Item 23 of the Resolution of the RF Supreme Court Plenum of November 22, 2016 No. 54), we come to a firm conclusion that the law executor differentiates between conditioned fulfillment of the obligation and a conditioned transaction. At the same time, in our opinion, finding an answer to the question about the similarity or the difference between the conditioned fulfillment of an obligation and the conditioned transaction largely depends on the correct qualification of the obligation fulfillment as part of the legal facts qualification. For example, there is an opinion presented in legal literature that obligation fulfillment is a transaction [8; 18; 25, p. 133; 46, pp. 62–84; 49, p. 217; 60; 66; 77; 90]. However, O. A. Krasavchikov contested this approach with his idea that fulfillment of an obligation is a juridical act, i. e. a legitimate action having a legal effect which does not depend on the subjective goal-setting [31, p. 21]. There are supporters of this scientific approach in modern civil science [41, p. 7; 57; 68; 72; 86; 89; 91].

Thus, literal (textual) interpretation of domestic civil legislation covering conditioned transactions and transactions in general, and also conditioned fulfillment of obligations, allows for a firm conclusion that conditioned transactions and conditioned fulfillment of obligations are not the same for several formal characteristics (see Table 1), although there is certainly an indispensable link between them. In this respect, we totally share the position of O.A. Melnichenko, who thinks that the "introduction of RF CC Article 157 was not useful, because some of the researchers started to interpret conditioned fulfillment of obligations and exercising rights in isolation from the provisions covering conditioned transactions" [35, p. 124].

According to Items 1 and 2 of the RF CC Article 157, the suspensive condition creates *rights and duties of the transaction parties,* while the dissolving condition terminates *rights and duties of the transaction parties,* however it is absolutely obvious that the condition is imposed not on the transaction as a legal fact but on the rights and duties of the party to transaction, i. e. on the legal effect of the corresponding transaction. To prove it, the provisions of the international acts concerning private law unification can be taken into account, for example Article III.-1:106 of the Model Rules of European Private Law[1], and Article 5.3.1 of the UNIDROIT Principles[2], which when interpreted in complex allow for a conclusion that the parties' rights and duties are the subjects that are put under a condition, and so both contracts in general and individual obligations can be conditioned.

As practice shows, in the real property turnover, individual rights and duties are conditioned more often. For example, the following conditions are very common: the warranty for goods is terminated in case the purchaser breaks the seal, the contractor has the right to unilaterally refuse to perform under contract in case the currency exchange rate changes, the right of one of the parties to refuse to perform under contract if the financial status of the counterparty has significantly changed, the obligation of the purchaser to additionally pay for the procured goods in case the customs fee has increased and etc.

Correspondingly, the question arises about the applicability of the provisions of RF CC Article 157 to the obligation relationships which seem to have conditioned fulfillment in their structure. Considering this question, we would like to cite A.G. Karapetov, who noted the following: "There are also no reasons not to apply the provisions of Item 3 of RF CC Article 157 to conditioned obligations or secundarius (transforming) rights (for example, the right to cancel the agreement) and provisions of Item 3 of Article 157 of the RF CC about the bad faith interference or furtherance of the condition occurrence... Such a decision does no come from anywhere, it does not comply with the European private law tradition and it creates a legal vacuum with no reason, separating these partially conditioned transactions from both the mass of the legislative norms covering conditioned transactions (which are few in number) and the legal positions which are developed in the doctrine and court practice with regard to conditioned transactions in the context of interpreting Article 157 of the RF CC" [29, p. 78].

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[1] Model Rules of European Private Law. Transl. from English. Ed. by N.Y. Rasskazova. Moscow, Status Publ. 2013. 989 p.

[2] UNIDROIT Principles of International Commercial Contracts 2010. Moscow, Statut Publ. 2013. Pp. 450–552.

Differentiation between the Institutions of the Conditioned Fulfillment of Obligations and the Conditioned Transaction

Differentiation Criterion	Conditioned Fulfillment of Obligations	Conditioned Transaction
Structural location of the norms that regulate the compared institutions	Article 327.1. The Conditional Execution of an Obligation Chapter 22. The Discharge of Obligations Subsection 1. The General Provisions on Obligations	Article 157. The Deals, Made Under a Condition Chapter 9. The Deals (§ 1. The Concept, the Kinds and the Form of the Deals) Subsection 4. Transactions. Decisions of Meetings. Representation
Jurisdiction of the compared institutions' norms	General provisions on obligations are applied to contractual obligations, to obligations resulting from causing harm and to obligations resulting from unjust enrichment, as well as to requirements arising from corporate relations, associated with effecting the consequences of the transaction invalidity.	General provisions on transactions are applied to all the actions of individuals and legal persons aimed at the establishment, changing or termination of civil rights and duties.
Phase of the legal relations development where the compared institutions can be used	*Fulfillment* of obligations, as well as *exercising, changing and termination of certain rights.* ⇩ Conditioned fulfillment of obligations *cannot affect the phase* of the obligatory relation commencement	The transaction is deemed made under a suspensive condition if the parties made the *occurrence of the rights and duties* dependent on the circumstance which may occur or not. The transaction is deemed to be made under a resolutive condition if the parties made the *termination of the rights and duties* dependent on the condition which may occur or not. ⇩ A conditioned transaction cannot affect the phase of *changing the legal relations*
Presence / absence of the legal relation between the parties before the condition occurred	Possible as part of the *already existing* contractual legal relation	*Does not result in the rights and duties* (except for the right to expect) *until a certain condition occurs* (a transaction with a suspensive condition) / discontinues the corresponding legal relation (a transaction with a resolutive condition)
Sphere of applying the condition	Fulfillment of obligations, as well as exercising, changing and termination of certain rights under a contractual obligation, i. e. the sphere of applying the condition may affect only certain duties or rights but not the whole obligation	A suspensive condition creates *rights and duties of the parties to the obligation to the full extent* / a resolutive condition discontinues the *rights and duties of the parties to the obligation to the full extent*
Character of the condition / circumstance	Performance or non-performance of the actions by one of the parties to the obligation or occurrence of other circumstances determined in the contract, *including those totally depending on the will of one of the parties*	Circumstances that *may occur or not*

While sharing in general the position of A. G. Karapetov, we will just note that the "dead end" of the situation with the legal qualification of conditioned transactions and conditioned fulfillment of obligations is in the fact that positive reforming of the general regulations on obligations, which was performed as part of the civil legislation reform (which particularly resulted in the norm about conditioned fulfillment of obligations), did not affect the general provisions for transactions in terms of improving norms covering conditioned transactions. As a result, a situation was created when potestative conditions are allowed but only as applied to the institution of conditioned obligations fulfillment, whilst conditioned transactions are still regulated by the old rule of the circumstance which can occur or not occur. It turns out that the executor of law actually finds himself in a situation when Articles 157 and 327.1 of the RF CC need to be used in different manners, depending on the situation they address.

It is important to pay attention to the fact that the Russian civil legislation rests on a classical pandect model of presenting norms and institutions. This cannot but significantly influence the understanding of the institutions under comparison – conditioned transaction and conditioned fulfillment of obligations. For example, Article 157 of the RF CC, regulating conditioned transactions and structurally arranged in RF CC Chapter 9 "Transactions", addresses all conditioned transactions (including unilateral, bilateral and multilateral), while the institution of conditioned fulfillment of obligation, provided for Article 327.1 of the RF CC included into structure of RF CC Chapter 22 "Discharge of Obligations", covers the category "conditioned obligation", which in fact arises from the conditioned transaction. As it was mentioned above with reference to Article 5.3.1 of UNIDROIT Principles of International Commercial Contracts 2010, the best examples of harmonizing private law do not demonstrate any difference between conditioned transactions in general and conditioned obligations. For example, the mentioned Article 5.3.1 of UNIDROIT Principles of International Commercial Contracts 2010 explicitly specifies the following: "A *contract or a contractual obligation* may be made conditional upon the occurrence of a future uncertain event, so that the contract or the contractual obligation only takes effect if the event occurs (suspensive condition) or comes to an end if the event occurs (resolutive condition)". A similar view on the problem under discussion was developed as far back as by the Roman lawyers [65; 69; 76; 96; 99; 100, pp. 716–741].

Summarizing what was said above, let us note that a correct usage of the legal tools of the modern pandect model in the Russian civil legislation necessitates the cumulative interpretation of RF CC Article 157 and Article 327.1, implying that they correlate as the "general" and the "specific" norm.

Conclusions and Research Results

In the conditions of the new (digital) economy, which can function only upon availability of the developed normative platform complying with the needs of the modern property circulation, updating of the institution of the conditioned obligation fulfillment as one of the legal concepts ensuring the modern digital civil circulation, including with regard to "smart contracts", is one of the requirements for increasing competitiveness and enhancing investment attractiveness of the Russian legal system.

Such legal exceptions as the conditioned fulfillment of obligations did not appear spontaneously in the law but were conditioned by objective reasons – they resulted from social relations becoming more complicated and from the development of civil circulation. Correspondingly, they are the objective needs of economy that determined the emergence of the civil legal construction of complex obligation.

In general, a conclusion shall be made that legal acknowledgment of the institution of conditioned fulfillment of obligations can surely be recognized as one of the necessary conditions for increasing the investment attractiveness of the Russian legal system, as constructing the conditioned legal effects is the constitutive element of proper contractual work. The foregoing, with reasonable certainty, can justify the critical need for an efficient and internally consistent doctrine of conditioned legal relations in modern civil circulation.

The conditioned fulfillment of obligations is a structurally complicated civil law construction, which deviates from a simple obligation set by Article 307 of the RF CC. Speaking about the complexity of the conditioned fulfillment of obligations, one should note that this "complexity" is manifested first of all via a special potestative condition

– i. e. performance or non-performance of certain actions by one of the parties or occurrence of other circumstances stipulated in the contract, including those totally dependent on one of the parties' will.

We deem it is reasonable to consider the power to perform or not to perform a certain action by one of the parties to obligation, when using the mechanism of conditioned fulfillment of obligations to be a secundarius one. Exercising this right leads not to the emergence of the legal relation but to its changing. A conditioned right arising from a transaction made under a potestative condition should be qualified as a secundarius right, because such a right provides for an opportunity to acquire an unconditional right on the basis of the creditor's actions.

We consider it reasonable to think that by effecting secundarius powers for performance or non-performance of certain action when using the mechanism of the conditioned fulfillment of obligations, a party to the obligation is making an auxiliary transaction, which does not have its own juridical meaning. Such an auxiliary transaction is aimed at fulfilling the obligation within the framework of the already existing legal relations between the creditor and the debtor. This transaction implies changing the legal relations but within the limits that were preliminary agreed in the contract terms.

When the structure of the obligation gets more complicated within the context of the institution of conditioned fulfillment of obligations, this significantly influences the term of this obligation fulfillment through establishment of certain condition or circumstance in the contract.

After the norm of Article 327.1 of the RF CC is legally acknowledged, the term which is determined by specifying the event which is not inevitable shall be deemed agreed.

The analysis of the latest court arbitration practice allows for a conclusion that the law executor has recently relaxed his approach in recent years and started to feel more confidence in potestative conditions of transactions.

Conditioned fulfillment of obligations means that fulfillment of obligations, exercising, changing and termination of rights under contractual obligation can be dependent on performance or non-performance of certain actions by only one party to the obligation, but not by both of them simultaneously, and this will result in a situation when fulfillment of the parties' obligations will be mutually conditioned.

It is noteworthy that when solving the issue of distinguishing the conditioned fulfillment of obligations from the conditioned transaction, a great importance is attached to establishing the so-called "terminological purity" of the scientific study. This is because the majority of the foreign legal systems use such legal category as "conditioned obligation" (for example, the Civil Code of France, the Swiss Code of Obligations and others), while the Russian legislator uses only the "conditioned transactions" term. Probably, for this reason the term "conditioned obligations" is seldom used in the pre-revolutionary civil science, in the Soviet scientific sphere and in modern Russian jurisprudence in general. Thus, it should be stated that entering into a conditioned transaction results in the occurrence of the conditioned obligation relation (in other words, to a conditioned obligation).

In our opinion, a transaction made under a condition can be "conditionally" split into two periods of its existence: (1) the period before the condition occurs that was agreed by the parties of the transaction; (2) the period after this condition occurs or does not occur. The first and the second periods together are the periods when the obligation legal relation exists between the contractors. This means that during both of the periods there is a juridical connection between the parties. This can be proved by the following: a conditioned transaction is considered to be made at the moment of its effecting and is covered by the rule of inadmissibility of the unilateral refusal to settle the transaction; a conditioned obligation cannot be secured with methods used for securing the fulfillment of obligations established and not established in the RF CC; a conditioned obligation can be terminated through providing a compensation / substitution of the obligation / using other grounds for termination and etc. One more argument supporting the above position is the opportunity to cede the rights arising out of the conditioned transactions, although there is a position in the court practice which is precisely the opposite[1].

[1] Resolution of the Federal Arbitration Court of the North-Western Circuit on case No. A56-13186/2010 of September 4, 2012. The document has not been published. Access from the legal reference system ConsultantPlus (accessed 02.03.2018).

The resolution of the issue of the equity or difference between the conditioned fulfillment of obligations and conditioned transaction, in our opinion, largely depends on the correct qualification of fulfillment of the obligations based on qualification of the legal facts. Summarizing the foregoing, let us note that the correct usage of the legal tools of the modern pandect model of the Russian civil legislation leads to the necessity to jointly interpret Article 157 and Article 327.1 of the RF CC, with implication that their relation is the same as the one of the "general" and "specific" norms.

At the current phase of the civil knowledge development, in the conditions of the legal acknowledgment of general provisions on obligations, it is necessary to perform the complex analysis of the European experience, to study modern foreign doctrine of conditioned relations, to pay attention to the forgotten results of the pre-revolutionary civilians on the subject in question, and also to critically evaluate the court arbitration practice data that demonstrate a significant gap in how both the civil circulation participants and the law executors understand conditioned relations and the Russian legislator's approach to their regulation.

The majority of the questions addressed as part of this scientific study require further discussion and thorough doctrinal consideration, that is why this article does not claim to be the last word in the discussion. The two known facts are especially disappointing: in the Opinion of the Legal Administration of the Central Office of the RF State Duma of February 11, 2015, No. 2.2-1/602 "Concerning Draft Federal Law No. 47538-6/9 "On Introducing Changes to Part One of the Civil Code of the Russian Federation and Federal Law "On Introducing Changes to Chapter Four of Part One of the Civil Code of the Russian Federation and On Annulment of Certain Provisions of Legislative Acts of the Russian Federation" it is mentioned that "in draft Article 327.1 of the RF CC the *subject of regulation is not determined*"[1], and in the earlier discussed Explanatory Note "Concerning Draft Federal Law "About Introducing Changes to Parts One, Two, Three and Four of the Civil Code of the Russian Federation and Certain Legislative Acts of the Russian Federation" a hope is expressed that the concepts of the conditioned fulfillment of obligations, potestative conditions of the transaction and conditioned transactions in general would be finally clarified "*only in court practice*, judging from the fundamental idea that a condition of a transaction should not imbalance the interests of the parties".

[1] Opinion of the Legal Administration of the Central Office of the RF State Duma No. 2.2-1/602 on the draft federal law No. 47538-6/9 "On Amendments to Part I of the Civil Code of the Russian Federation" and federal law "On Amendments to Chapter Four of Part I of the Civil Code of the Russian Federation and On Annulment of Certain Provisions of Legislative Acts of the Russian Federation" (repeatedly for the second reading) of February 11, 2015. The document has not been published. Access from the legal reference system ConsultantPlus (accessed 02.03.2018).

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