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TÍTULO: Problemas de recepción de construcciones legales extranjeras en la ley rusa de obligaciones.

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RESUMEN. En el artículo, los autores señalan que el deseo de utilizar la experiencia extranjera ha llevado a la duplicación de las instituciones legales existentes y establecidas desde hace mucho tiempo en Rusia. Ellos concluyen que la recepción de normas e instituciones legales extranjeras influyó en la tendencia general de la socialización del derecho civil, la intensificación de los inicios de la disponibilidad, la expansión de la orientación restaurativa de las normas del derecho civil y el desarrollo del principio de conciencia, y que en este proceso, se deben tener en cuenta las diferencias en el ámbito público y legal de la Federación de Rusia y de otros estados, de modo que las construcciones y normas prestadas puedan aplicarse de manera efectiva en las realidades rusas.

PALABRAS CLAVES: La recepción de normas y construcciones legales, la socialización del derecho civil, la honestidad, el comportamiento inescrupuloso del partido, el principio de la desechabilidad.

TITLE: Problems of foreign legal constructions reception in the Russian law of obligations.

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ABSTRACT: In this article, the authors note that the desire to use foreign experience, in a number of cases, has led to the duplication of existing and long-established legal institutions in Russia. The authors come to the conclusion that the reception of foreign legal norms and institutions influenced on the general tendency of civil law socialization, the intensification of the beginnings of disposability, the expansion of the restorative orientation of civil law norms and the development of conscientiousness principle. During the performance of this process, differences in the public and legal sphere of Russian Federation and other states should be taken into account, so that the borrowed constructions and norms can be applied effectively in Russian realities effectively.

KEY WORDS: the reception of legal norms and constructions, the socialization of civil law, honesty, unscrupulous behavior of the party, the principle of disposability.

INTRODUCTION.

The existing legal systems of different states provide interaction and mutual influence on each other. As a rule, no national legislation takes place without taking into account and borrowing certain foreign experience. In this regard, the reception is aimed at legal regulation effectiveness increase of various spheres of social relations; especially this process is relevant for private law, based on the autonomy of participant will, the principles of subject disposability and equality.

DEVELOPMENT.

Materials and Methods.

The general scientific (logical and historical, system-structural approach, analysis and synthesis, etc.) and private-science methods (comparative legal, specifically sociological, formal-logical, comparative law) were used in the study. Comparative method allowed comparing the norms of the current Russian civil legislation with the provisions of the Anglo-American legal system.

Results and Discussion.

In the process of reception, it is worth noting the emerging trend of modernization concerning the Russian law of obligations. So, we can confidently say that at the moment we witness the process of civil law socialization, accompanied by the curtailment of the positivist approach in law, in essence the change in the legal paradigm, when the principles of conscientiousness, justice and reasonability, which are super-imperative in relation to the ordinary norm of law, come to the forefront.

According to A. Watson, "Bills are not always the product of a specific state experience, not always the experience of its development; the laws of the state can be borrowed from other countries when their effectiveness is proved" [Watson A., 1993]. However, the author goes on to say about the possible negative consequences of reception (or according to A. Watson's terminology - "transplantation"), recognizing, that thus "a significant amount of legal norms will operate in the society that differs significantly from the one in which they were created originally" [Watson A., 1993].

As Charmont rightly notes, "the cult of written law, the habit of ignoring everything except for its text, isolates the right, separates it from other social sciences, turns jurisprudence into a secondary craft. A lawyer ultimately loses the sense of what is right and what is unfair, what is humane and what is inhumane. He does not evaluate the law; he simply loves it as such, seeing the charm, above

all, in symmetry, in architectonics, and not noticing that it is cruel and not entirely reasonable" [Kabryak R., 2007].

It should be recognized that in the legislation of a number of foreign law and order, the departure from positivist legal understanding occurred earlier than in Russia; in particular, the Art. 3 of the Spanish Civil Code provides that "the provisions of the Code should be interpreted according to the natural meaning of a text in its connection with the relevant context, historical and legislative background of law adoption, social realities at the time of law application and taking into account the spirit and the objectives of the law" [Civil Code, 2006]. According to paragraph 2 of the Art. 6.2 of the Civil Code of the Netherlands "any rule is not applicable unless it is unacceptable in specific circumstances according to the criteria of reasonableness and fairness" [Dutch Civil Code. Boek 6, 1994].

The approach of the German doctrine is of interest, according to which the main method of law interpretation is an objective theological method that takes into account the modern values and needs of society ... The court is bound not only by law, but also by constitutional and other legal principles, as well as by the established ideas about justice ..." [Zippelius R. 2008, p. 44]. As M. Hesselink believes in this regard: "... during the regulation of relations entering into the subject of civil law, it is more expedient to pass from regulation by the means of norms to the regulation by the means of principles" [Martijn W. Hesselink. 2001, p.11].

In the process of Russian legislation reformation, this trend manifested itself in the introduction of the principle of good faith to the Art. 1 of RF Civil Code, according to which no one has the right to derive advantage from his illegal or unfair behavior, and in the implementation of this principle in a number of norms, including the paragraph 3 of the Art. 307, which provides for the rule that during establishing, fulfilling an obligation and after its termination, the parties are obliged to act in good faith, taking into account the rights and legitimate interests of each other, mutually providing the

necessary assistance to achieve the objective of the obligation, and also providing each other with the necessary information.

It should be noted that the Russian judicial practice has developed a special procedure to apply the principle of good faith. So the behavior of one of the parties can be recognized as unfair not only at the presence of a reasonable statement by the other party, but also on the initiative of the court, if an apparent deviation from good conduct in respect of participant actions is observed in civil traffic. In this case, the court, during the consideration of the case, submits for discussion the circumstances clearly indicative of such an unfair behavior, even if the parties did not refer to them (Article 56 of RF Code of Civil Procedure, Article 65 of RF CCP) [Resolution of RF Supreme Court Plenum No. 25 "On the application of certain provisions of Section I, Part One of RF Civil Code by courts" issued on 23.06.2015]. The application of the principle of good faith finds its expression in the specific legal norms of the law of obligations, a number of which has been perceived by Russian legislator from foreign experience.

A characteristic feature of the recent reform of the liability law was the reception of individual legal constructions inherent in the Anglo-American legal system. In particular, this concerns the application issue of such structure as estoppel in Russian civil law.

So paragraph 5 of the Art. 166 of RF Civil Code provides for the rule that an application for the invalidity of a transaction is not of legal significance if a person invoking the invalidity of the transaction acts in bad faith, in particular, if its conduct after the conclusion of the transaction has given rise to other persons to rely on the validity of the transaction. Thus, this statement on the recognition of the transaction as invalid will not have legal consequences.

The provision of paragraph 5 of the Art. 166 of RF Civil Code is regarded in the scientific literature as analogous to the rule of estoppel, spread in the Anglo-American legal system and developed in international law [Ostanina E.A., 2010, pp. 38-45; Koblov A.S., 2012, p.212-219; Egorova, M.A.,

2014, p. 13-16]. However, in our opinion, the use of the Anglo-American doctrine of estoppel in Russian civil law should be cautious for a number of reasons: first, the doctrine of estoppel, in particular one of its species used in obligation relations based on a promise, - promissory estoppel - is the result of reciprocal satisfaction doctrine prevalent in the countries of common law - consideration, the essence of which lies in the principle of do ut des (I give that you give) and is considered fulfilled, as K. Zweigert and H. Ketz determine. "If the promise is to fix the price for rendering the counter service to the promised requester, and if the one to whom the promise is given, provides such a counter service to get this price, having promised or fulfilled something in his turn" [Zweigert K. & Ketz H., 2011, p. 388]. Since the practice of the "counter satisfaction" doctrine does not require the equivalence of mutual obligations of the parties, the promise leads to the emergence of an obligation, even if the counter satisfaction was nominal or symbolic. The design of the promissory estoppel was designed just to avoid the unfair consequences of the "counter satisfaction" doctrine application.

Secondly, in order to apply estoppel, according to the practice established in the UK, the following conditions are required:

1) There must be a contractual relationship between the parties [O'Sullivan J. & Hilliard J. 2010, p.120].

2) A party must rely on the promise made or the behavior of the other party.

3) The creditor is deprived of the right to refuse the made promise or to act not in accordance with his promise, if this can lead to an unfair result.

Thirdly, it should be noted that the main restriction of estoppel rule application in English law is that it cannot be used as the basis for making a claim on compelling another party to honor his promise (shield not a sword) [Poole J., 2012., pp. 148 -149]. Estpoppel can only be used if a party renounces its promise and resorts to coercive measures to exercise his right. At the same time,

according to the paragraph 90 (1) of the Code of Standards on US Contract Law (2nd ed.), the rule of obligatory estoppel allows the debtor to demand the performance of a promise from the creditor who made this promise, also by filing a lawsuit [Poole J., 2012., p. 154].

The doctrine of estoppel, as the British and American civilians state, has not been developed fully and is being applied in various ways in England, the United States and Australia [Poole J., 2012., pp. 153-155; Mcfarlane B., 2010, pp.135-136; McKendrick E., 2005, pp. 249-251]. At the same time, the application of the promissory estoppel rule implies that the parties are in contractual relations already, and these relations arose on legal grounds. Therefore, its application to invalid transactions does not fully correspond to the essence of this design.

The design of estoppel by representation, which is based on establishing the actual state of affairs and does not cover the intentions and promises of the parties, is closer, in our opinion, to the p. 5 of Art. 166 of RF Civil Code. The essence of this doctrine is that if a party has presented the actual state of affairs in such a way that it forced the other party to accept this state of things and act at a loss, such a party cannot act in contradiction with this presentation of facts any longer [McKendrick E., 2005, pp. 249-251]. At the same time, paragraph 5 of Art. 166 of RF Civil Code does not require that the bona fide party act at its own expense, this rule does not say anything about harming the bona fide party of the transaction.

Most foreign researchers recognize that the estoppel institute is based on the need for a conscientious behavior by the parties of a contractual relationship, the prevention of benefit extraction from their unfair behavior. "Estoppel is the principle of justice and equity" [Cooke E., 2000. The modern law of Estoppel. Oxford; pp.1-2].

It should be noted that according to paragraph 70 of the abovementioned resolution No. 25 by the Plenum of RF SC issued on June 23, 2015, a statement on the invalidity (nullity, challenge) of a transaction in any form and on the application of the transaction invalidity consequences (claim

filed to the court, the defendant's objection against the claim, etc.) has no legal value, if a person invoking the invalidity acts in bad faith, in particular if his conduct after the conclusion of the transaction has given rise to other persons to rely on the validity of the transaction (p. 5 of the Article 166 of RF Civil Code).

The analysis of this clause of the Resolution allows us to conclude the following:

First, the norm of the paragraph 5 of the Art. 166 of RF Civil Code extends not only to the disputable, but also to insignificant transactions and thus is aimed at the improvement (the convalidation) of invalid transactions.

Secondly, the statement about transaction invalidity has no legal value, if it was filed by an unfair party.

Thirdly, an unscrupulous behavior of the party may be expressed in such a behavior after the conclusion of the transaction, which gave rise to other persons and a counterparty to rely on the validity of this transaction.

A well-known example of the domestic judicial practice of estoppel is the paragraph 12 of RF Supreme Arbitration Court Plenum Resolution No. 13 issued on 25.01.2013: “On the Introduction of Additions to RF Supreme Arbitration Court Plenum Resolution No. 73”, “On Certain Issues of the Practice of RF Civil Code Application on Lease Contract" issued on 17.11.2011” [Bulletin of RF Supreme Arbitration Court, 2013].

An unscrupulous tenant cannot claim a lease agreement to be invalid because of its conclusion with an unauthorized landlord. We believe that the behavior of the party should be taken into account before and during the conclusion of the transaction. If the party by its conduct before and during the conclusion of the transaction gave grounds to another party to rely on the statement that the party considers it to be valid, then, after its conclusion, it cannot change its attitude to this transaction.

Fourth, it seems that paragraph 5 of the Art. 166 of RF Civil Code can be used only to protect a bona fide party. In the precedent of D. E C. Builders Ltd. V Rees (1966), the debtor used the restrained position of the lender to his advantage. The court decided in favor of the creditor, stating that the rule of estoppel is applied when the creditor acts in bad faith, refusing his promise, but is not aimed at the debtor's dishonest behavior protection (see: Poole J. Contract Law, 2012, pp. 150-151). The following case is interesting from the Russian practice: the fund, using budgetary funds, entered into loan agreements with small and medium-sized businesses in order to extract profits instead of financial support provision, which contradicted the statutory goals and the objectives of the fund.

The Presidium of RF Supreme Arbitration Court recognized the agreement as an invalid transaction (The Decree of RF Supreme Arbitration Court Presidium No. 10262/11 issued on 25 October 2011 on the case No. A14-6741/2010/146/13). Therefore, if it turns out that both parties to the transaction acted in bad faith, such a transaction should be declared invalid on the basis of the claim of the party that appealed. Besides, the so-called "floating" weak-end model is used in the design of the loan agreement, where, depending on certain conditions, the weak side should be either a borrower or a lender [Arslanov Kamil Maratovich, Khabirov Artur Ilfarovich, 2017, p. 330].

In England, the doctrine of estoppel is also used to prevent the party from presenting case evidence that contradicts its previous statements of any information. Such a case party is deprived of the right to refer to any facts or to dispute any facts because of its previous statements ("party estopped"). As Lord Edward Kok noted, a person's own act or his acceptance of something prevents him from doing anything and "closes his mouth" and he can't bring facts to his own justification within the framework of the trial, it deprives him of the right to object [Wilken, Sean & Ghaly, Karim, 2012, p.81].

It should be noted that the Russian court practice also knows similar examples of the prohibition application to the controversial behavior of a subject. So, in one of the cases, the Presidium of RF Supreme Arbitration Court explained that the failure to include the conditions for the necessity of fulfilling any additional obligations in the text of the amicable agreement means the agreement of the parties on the complete cessation of the civil conflict and entails the loss of the party right to new requirements (estoppel) arising from both the main obligation and from additional obligations with respect to the underlying obligation [The Decree of RF Supreme Arbitration Court Presidium No. 13903/10 on the case No. A60-62482/2009-C7 issued on March 22, 2011 // Bulletin of RF Supreme Arbitration Court, 2011, No. 7].

CONCLUSIONS.

The foregoing allows us to conclude that the construction of "estoppel" is the continuation of conscientiousness principle development in the law of obligations and a general prohibition on contradictory behavior stems from the Art. 1, 10 of CC as a general prohibition on the extraction of benefits from their unfair conduct, which in general, was demonstrated by pre-reform judicial practice. So, in one of the cases, the court explained that in a situation when an improper execution of a loan agreement was caused by the unscrupulous actions of the borrower himself who received and accepted execution from the creditor but did not fulfill his obligations to repay the loan and pay interest, his demand for a credit transaction recognition is invalid because of the form defect should be qualified on the basis of p. 1 art. 10 of RF Civil Code as the abuse of law [The Decree of RF Supreme Arbitration Court Presidium No. 10473/11 issued on 13.12.2011 on the case No.A07-16356/2009 // http://www.garant.ru/products/ipo/prime/doc/70038308].

Summarizing, it seems, that in many ways, the inclusion of special rules detailing the various variants of the controversial behavior of a subject is superfluous, since these cases are the forms of unfair behavior and fall under the prohibition of the Art. 1, 10 of RF Civil Code.

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