Athens Journal of Law - Volume 10, Issue 1, January 2024 – Pages 29-46

Dispositivity in Russian Business Law

By Vladimir Orlov[*]

The principle of dispositivity is developed based on the concept of party autonomy that is characteristic of civil law regulation that covers business activities and is realised through the application of, in addition to directly applicable imperative norms, dispositive norms that imply the freedom of the parties to perform (to acquire, realise and dispose of) their rights on their own discretion. Particularly in respect of the civil law relations the law provides the parties with large possibilities to determine their relations in accordance with their autonomy of will and in default of such determination offers the applicable rules. Essentially important in realisation of the principle of dispositivity in the civil law are also initiative norms through the application of which the civil law relations emerge, change and cease. Related particularly to the contract and corporate law regulation in Russia, the traditional totality of the legislative law has been challenged in the pragmatic approach supported by the Russian highest judicial body. According to the Ruling of the Plenum of the Supreme Arbitrazh Court of 2014, the norm that determines the rights and obligations of contractual parties but does not include the expressed provision of its dispositivity or imperativity, ought to be recognised as dispositive or imperative in accordance with the interpretation of its aims, and this indicates of favourable attitude towards business activities as well as of reasonable implementation of the pragmatic attitude that is characteristic to common law to Russian law. In particular, the favouring of the principle of dispositivity in respect to business law regulation, by the concentration of the valuation of the dispositivity of a legal norm in the sphere of successive control, instead of previous control, actually promotes the real freedom of business activities, and makes the regulation flexible. This is particularly important for small and family enterprises that are very common in Russia.

Keywords: *Dispositive Norm; Initiative Norm; Contract Law; Corporate Law; Pragmatic Approach*

Introduction

The subject of the article is related to the civil law regulation of business activities in Russia that is performed to a considerable degree by dispositive norms, the application of which is dependent on the will of the parties in accordance with the principle of dispositivity (dispositiveness) that are the main subject of the presentation.

[*]Dr. of Legal Sciences; Professor, Herzen State Pedagogical University of Russia, Saint Petersburg, Russia. Kauppakartanonkatu 22 G 58, 00930 Helsinki, Finland.
+358443236249
Email: vladimir.orlov@saunalahti.fi

https://doi.org/10.30958/ajl.10-1-2 doi=10.30958/ajl.10-1-2

Business activities are, for the most part, regulated in Russia by the Civil Code that is the main civil law source, containing imperative (compulsory) and dispositive legal rules. In addition to the Civil Code, civil law norms are contained in other civil laws. In certain cases, international law is also applied, particularly to entrepreneurship relations. Civil (business) law rules can be included into other normative acts (substatutory acts). Customs are recognised as legal sources, while the use of standard contract conditions and analogy application are also known in Russian civil law. Furthermore, judicial practice is not totally excluded from sources of Russian law, and the decrees of supreme judicial bodies are recognised as having precedent value in Russia. In Russia, civil law regulation is also realised on nonnormative level, for instance, by single law-application acts and usage, course of dealing and course of performance. Furthermore, since Russian civil law is codified to such an extent that the norms of Russian civil code contain actual legal principles, objective interpretation is the main rule in Russian law. In principle, officially only the Constitutional Court is empowered to deviate from the text-bound interpretation of the legal norms. Also, according to the rules on interpretation of contract, the starting point of interpretation is the literal meaning of the words and expressions contained in the contract.[1]

Related to civil law the principle of dispositivity is implied in freedom of contract grounded on the freedom of the parties' will. In the Russian international private law, the principle of autonomy of will is expressed in the basic rule regarding the law applicable to the issues belonging to the contract statute. The principle of party autonomy covers also procedural law issues.

The article starts with some personal background notes related to the presentation and its starting points, including my value orientation to the subject, that is, a positive attitude to business activities and civil law regulation of them.[2] The actual part of the presentation begins with the genesis and traditional concepts of dispositivity, handles the genesis and role of legal dogmatics as well as present understanding or traditional concepts of dispositivity, and then is devoted to their

[1]For more on the subject *see* Orlov (2019) at 117–136.

[2]Among the factors that have influenced my empathy towards entrepreneurship that I regard as being a means to general social welfare was successful post-war small entrepreneurship before its total statisation, as well as good neighbourhood shared with the Georgian retailer and the Caucasian Jewish family in the time of my living in the Soviet Union. Also, the necessity of reforms of the Soviet command economy and changes in the general linear thinking seemed obvious to me. Furthermore, the entrepreneur family background of my wife has supported my positive attitude to entrepreneurship. Due to all these factors, I see the participation in socially beneficial activities as the purpose of my life, and the input to the solution of economic and business issues I regard particularly significant. Among the important stages of my CV are working as a lawyer in different enterprises, and then research and teaching as well as consulting on the issues related to the business law in Russia and Finland. Notable is that I miss the experience of serving in the law enforcement bodies. Thus, since I have not been particularly burdened with problems of public law regulation, I dare to be bold in posing challenging questions about the real necessity of the total power of the law in regulating (entrepreneurial) commercial and production activities of enterprises. Furthermore, I believe personally that the professional mentality of the lawyer and the entrepreneur are not reconcilable. However, lawyers who are sophisticated in the peculiarities of business activities as well as entrepreneurs that can arrange their routine of activities to correspond to the legal requirements are not exceptional for me.

problematisation and end up with some proposals on conceptual renewal of dispositivity in the civil law regulation of business activities.

The starting point of my paper, related to the civil law regulation of business, is a realistic understanding of law[3], according to which it exists in the concepts that are textually presented in the applicable legal norms containing legislative and judicial acts, resulted from the application of legal norms. Such an understanding of law includes my support for its practical orientation that implies in securing favourable conditions for normal routine business activities with adequate means to solve possible problems. It concerns particularly cases burdened with the issues related to the regulatory difficulties, due, for instance, to the uncertainty and unpredictability of circumstances, that are ordinarily outside of the legislator's concern[4].

And even though such regulation mainly consists of simple easily applicable norms, it is not to be understood only as a static collection of basic, albeit unavoidably necessary abstract constructs. Moreover, in the legal decision-making, the applicable norms are not necessarily to be handled mechanistically[5] without their positivisation or judiciary concretisation, and, if necessary, revision under the criteria of their practical reasonableness. It is, for instance, characteristic for civil law regulation that a concrete case requires the clarification and consideration of the applicability of more than one rule to it, and, also, it is often necessary to consider that the result of the decision of the case ought also to correspond to legal principles. Furthermore, the presence of dispositive elements is characteristic for civil law regulation, in accordance with which the content of the legal relation is determined by *the parties' will.* There are also applicability difficulties related to the subject of regulation, to its unpredictability, because of dynamic and risky character of business activities, characteristic for which are relative spontaneity and unpredictability.[6]

The other starting point of my presentation, related to the previous one, is critical attitude to that the social reality is traditionally, particularly, in Russian law regarded as causally determined[7] truly existing world that is reflected in the jurisprudence (legal dogmatics). Following this, the Russian legal norms are still often presumed to be followed as such (in fact as officially established/recognised truths), and truth believers you can meet among the legal scientists[8]. I shall present

[3]Meaning acts and actions that are understandable within borders of the realistic approach as law, or legal acts consisting of legislative and judicial acts.

[4]Real business law problems seem to be ignored also by legal doctrine but not by judiciary as the activities of the Russian Supreme Court show it. *See*, for instance, Orlov (2022) at 479.

[5]Linear explanations are, however, necessary elements of the scientific cognition usually playing the intermediary role in the building of adequate knowledge. Otherwise, it is only artistic (emotional) displaying reality that have the capability of the directly adequate perception of it.

[6]For more critique on the Russian legal doctrine *see* Razuvaev (2019) at 6–8.

[7]On the problem *see*, for instance, Zolo (1986) at 115–117.

[8]In respect of crimes, for instance, it is still ordinary in Russia to use the term "truth" ("verity") that is established by the investigator and confirmed by the prosecutor is to form the basis of the crime imputed by the court. In respect of crimes, for instance, it is still ordinary in Russia to use the term "truth" ("verity") that is established by the investigator and confirmed by the prosecutor is to form the basis of the crime imputed by the court. Concretely, however, the task of the investigator is to establish the facts and other requirements for the investigation of the crime, whereas the task of the

further below my critique concerning the adequacy of traditional truth-based legal dogmatics to the business regulation.

Genesis

In general, business rules have had practical roots, representing genuine dispositivity that gradually had become institutionalised in customs and later took a legislative shape. The civil law regulation began its shaping and civil law dogmas started to develop in ancient Rome, when the ideas of ancient *ius naturale* became incorporated into Roman law with its developed skills to produce and handle legal items[9], and the abstract norms of *ius naturale* became positivised (realised in the concrete rules) of Roman law, and the doctrinal development began with the conceptualisation and typification of jural material.[10] In addition to the ownership claims, also obligation claims became legally protected, meaning that voluntarily agreed *ex contractu* obligations became subjected to remedies. The recognised *ex contractu* actions included initially only the enlisted ones and later were extended to concern any agreement.

The civil law regulation began its shaping in ancient Rome factually with the situations, where public power provided remedies against the breach of a private obligation upon the application of the injured party; and it means the emergence of initiative dispositivity that has become immanent to the private law regulation. In Middle Ages, the judiciary have started recognizing the situations where public protection and intervention was necessary by applying the principles of Roman law, discovered and further developed in European universities. Furthermore, in *the Medieval period*, when Roman law and canon law formed the European *ius commune*, the principle *pacta sunt servanda*, according to which any agreement is binding, was legally enforced[11]. As such, it has served as a kind of platform for development of freedom of contract, a total embodiment of dispositivity. The *Corpus Juris Civilis*, as the basic source of the European law, was respected by the founders and followers of the dogmatic doctrine obviously as "holly" true document, and it has factually preserved its axiomatic nature until now.

Important for the development of modern civil law, particularly, related to the regulation of business activities, was the emergence and institutionalisation of customary law in western Europe. In fact, the reception of Roman law as the

---

prosecutor is to establish the requirements for the prosecution of the crime, and the task of the court is to establish the requirements for the condemnation of the crime. In fact, truth believers are civilised (progressive) followers of the Enlightenment, characteristic for which has been the Cartesian (René Descartes) believe in Reason identified with truth. The Enlightenment, aimed at conquering the wild world, ought to be regarded as representing a soft form of the European civilization of the world started with the crusades at the 11th century. The real merit of the Enlightenment ideas is, among others, in the law codifications in Europe.

[9]In the preclassical period of the history of the Roman law, the tasks of the person who could be called a (*iurisprudent*) lawyer contained drafting lawsuits and transactions (*cavere*), dealing with cases in court (*agere*) and advising citizens on legal issues (*respondere*).

[10]*See*, for instance, Strogov (2022); Tumeneva (2019); and Razuvaev (2019) at 12–14.

[11]For more on the subject *see* for instance Zimmerman (1996) at 576–582 and Giaro (2021).

essence of European *ius commune* occurred without prejudice to the continuation of the use of (local) customs by judges at the royal courts, who had been educated in (universal) Roman law and canon law. Moreover, the emergence of customary law occurred along with the process of centralisation of the state and unification of the law and expansion of its regulatory role, where the legal doctrine has begun to play the constitutive function emerging the rule of law. In the process of judicialisation of custom, judges at the royal courts created new legal rules that became the basis of the national civil law shaped in the civil codes—where *ius commune* became positivised in national legislation—, as for instance, the French *Code Civil.* Furthermore, the judicialisation of custom meant that custom was gradually removed from the sphere of individual (*in casu*) behaviour to the sphere of collective mass regulation[12], without, however, reducing the significance of dispositivity in business relations. The French *Code Civil* adopted the subjective theory of contract or the will theory, in which the freedom of contract has become shaped; it has emphasised the party´s intentions or will, meaning the dispositivity, in the formation of the contract[13].

The French codification included *Code civil* (1804) that had followed the traditional Roman civil law structure, and *Code de commerce* (1807) that contained the supplementary provisions to the *Code civil* as regards issues of commercial law, was followed by the German, based on the academically developed pandect codification, realised in the *Burgerliche Gesetzbuch* (Civil Code) and the *Handelsgesetzbuch* (Commercial Code) provided to regulate primarily the legal relations of merchants[14]. In general, the modern civil law in continental Europe is codified and is still characterised by legislatively fixed distinction of cases of dispositive (as well as imperative) nature. Also, the dominance of legal positivism favouring mechanistic concepts of law, related to linear reasoning, and the expansion of societally oriented (mainly imperative) legislation is characteristic of the modern law.

The specificity of the civil law that in Russia regulates business relations is related to the fact, that the modern Russian law had roots[15] in the Byzantine law[16] and the czarist Russian[17] society was not much familiar with the market economy

[12]*See*, for instance, Seong-Hak Kim (2019) at 186-211.

[13]The concurrent objective theory of contract, in U.S. law, has required that the existence of a contract is determined by the legal significance of the external acts of a party to purported agreement, rather than by the actual intent of the parties or then unexpressed intentions.

[14]In addition to dispositive norms the *Handelsgesetzbuch* contains administrative prescriptions.

[15]The historical background of Russian law was formed by old customs, Byzantine canon law heritage, and influences of' western law that has been generally respected as an ideal to be striven for. *See*, for instance, Orlov (2021) at 476.

[16]The joining of Russia to the Byzantine church and law occurred after the adoption of Christianity in the 10th century, when the Byzantine Empire was one of the most powerful militarilly and culturally developed states. However, the canonical and legal realities as well as the cultural and socio-political realities of Byzantium and Rus were significantly different, wherefore the use of the imperial laws and canons in the territories of newly enlightened people with their own language did not seem possible. But in any case, the Russian legal tradition is primarily based on the influences from the Byzantine Empire with its law that was essentially a continuation of Roman law with increased Christian influence**.** *See*, for instance, Orlov (2021) at 467-469.

[17]Czar (Imperial) Russia existed from 1721 to 1917.

tradition. Strong enterprises, independent from the state power were absent in Russia, and business activities were mainly subject to public law regulation that was aimed to secure, in the first instance, public interests.[18] Particularly in the 19th Century the capitalistic development in Russia met with obstacles which were connected to the dominant social structure, particularly the autocracy and serfdom. Thus, the conditions for organic capitalist market economy development were insufficient, and the state made efforts to promote business activities by legal means, and the promotion of industry and trade became prioritised in the Government's policy particularly since the 19th century.[19] Thus, the modern Russian law have been developed under the influence of continental, particularly, German law[20]. Contrary to that western business law rules have had practical roots as being originated in the institutionalised customs and later legislatively shaped, Russian business law, including dispositive regulation[21], still almost totally consists of the dogmatic transplants of the western business law norms and practices, directly represented in the civil legislative norms. The Russian legal norms are presumed to be followed as such (in fact as officially established/ recognised truths).

The doctrinal exploration of civil law in Russia started with the establishing the legal education in the Russian universities[22]. In particular, the legal societies organised at the universities with law faculties played a vital role in promoting academic legal studies. As a result, in the 19th Century, many traditions and institutions of Western European civil law were adopted in Russia. Moreover, the Russian traditional dogmatic thought was reinforced by German as well as French legal dogmatics. The *Corpus Juris Civilis* was respected by the founders and followers of the dogmatic doctrine obviously as "holly" true document, and it has factually preserved its axiomatic nature until now. After the legal reforms of 1860-1870 years, aimed at the modernisation of the Russian law, the doctrinal development of civil law in Russia was intensified and brought the necessity of Russian positive law studies[23]. German historical school played a significant role in the development of Russian civil law.

---

[18]For more on the subject *see*, for instance, Orlov (1999) at 363 and the material cited therein.

[19]In the years between 1861 and 1874, Czar Alexander II decreed his reforms that concerned Russia's social, judicial, educational, financial, administrative, and military systems. The reforms liberated roughly 40 percent of the population from serfdom, created an independent judicial system, introduced self-governing councils in towns and rural areas, eased censorship, transformed military service, strengthened banking, and granted more autonomy to universities; furthermore, in the 19th Century, many traditions and institutions of Western European civil law were adopted, and law became the main source, while customs were placed second. However, the modernisation of the imperial (absolute) Russia and its capitalist future was ended up with the Russian Revolution of 1917.

[20]*See*, for instance, Orlov (2021) at 466–477; Poldnikov (2017) at 697. Also, the US business law concepts have been largely adopted in the Russian legislation.

[21]Czar Russian legal scholars were acquainted with the concept of dispositivity that has, however, no particular significance in the country, where private law regime was unknown, and where, the civil law regulation of business activities has not been practiced.

[22]At Moscow State University, lectures on western law were given in 1756 by the German professor Philip Dilthey. But systematic lectures on law (given by guest German professors) began in the 1764, and since 1767, law lectures were given also in Russian. For more on the subject *See*, for instance, Nechaev (1895).

[23]*See*, for instance, Poldnikov (2017) at 708.

German teachings had become adopted doctrinally since the mid-nineteenth century, but the shaping of the legislative basis started in the Soviet period of the Russian history. The adopted German doctrine got expression in the codified legislation since 1923; later, under the influence of the historical school, the dominance of the characteristic for Russia (state-established) statutory law ended with the recognition of custom as a legal source in the present Russian civil law.
Business activities in the Soviet Union were subject to the economic law regulation standing for civil law provisions strengthened by compulsory norms that concerned the formation of contract and its content as well as settlement of disputes.[24] In the Soviet economic law relations it was even prohibited for the socialist enterprises to disobey the plan tasks submitted (yearly) by the state. However, apart from the economic law relations, the Russian civil law regulated other property relations following the continental law patterns, where applicable were dispositive as well as imperative rules; in general, the dispositive norms have been regarded as being permitted by the state. The attitude to the dispositive regulation has radically changed (at least declaratively) in the post-soviet Russia, where freedom of economic relations is regarded as the constitutional basis of the country.

Role of Legal Dogmatics

The specificity of the civil law that regulate business relations is mainly grounded on the role that legal dogmatics has played in its development. And, traditionally, the main purport of legal dogmatics is to secure the process where a legal rule prescribed in the established procedure in the legislative act is to be realised in the concrete legal court decision or judicial act through the jurisprudential procedure that is grounded on legal dogmatics or jurisprudential act[25].

The modern European law has inherited the essential features of the religious law that are particularly presented in the legal dogmatics. In general, social relations has been subject to religious and legal regulation. In accordance with the *ius naturale*, historically mainly dominated in Europe concept of law, any law is of divine nature. This has been concerned Roman law, particularly started from the *Codex Juris Civilis*, the natural law element of which had originated in a divine lawgiver[26] and continued by the pandect law, and, consequently, the basics of

[24]*See*, for instance, Orlov (2021) at 476.
[25]It is a rule prescribed in the established procedure to be realised through the established procedure in the concrete legal decision. Compare with Varga (2008) at 254 where he cited Wróblewski (1948) at 184. Varga introduces correspondingly the law (to legislative act), the application of law (to judicial act) and the jurisprudence (jurisprudential act). Compare also with Razuvaev (2019) at 5, where he states that implementation of regulatory functions is carried out by doctrine in three ways, namely, through legislation, jurisprudence and law enforcement practitioners. We have the law in books, the stuff of desiderata with normativity derived from its valid, and we have also the *law in action* composed of series of deductions based on the former in form of actual positivisation decisions to convert positive rules into practical reality, within the social understanding of the law's final ordering force in society.
[26]For more on this subject *see*, for instance, Tyler, Jr. (2014).

Roman law were shaped dogmatically—the general principles as the statements used as major premises were presumed true. And such an apodictic[27] statement, as being *universally (absolutely) true, contained* the ability to produce true statements through deductive reasoning, meaning the application of a general rule to a concrete case, that has emerged the juridical conceptualism and pandect systematisation in the continental law doctrine. The natural law element strongly linked to religion ended up with the German historical school resulted in *Burgerliche Gesetzbuch*, *BGB*, according to which the law is grounded in a form of popular consciousness called the *Volksgeist*; law develops with society and dies with society[28].[29]

German legal dogmatics became perfect in the conceptual jurisprudence. In general, *Begriffsjurisprudenz* or conceptual legal dogmatics ordinarily stands for a conceptual and mathematical orientation in jurisprudence. It is constructed on three postulates:

(1) that the given law contains no gaps,
(2) that the given law can be traced back to a logically organised system of concepts ("pyramid of concepts"),
(3) that new law can be logically deduced from superordinate legal concepts, which themselves are found inductively ("method of inversion")[30].

The conceptual legal dogmatics was aimed at containing proper answers to any legal question supported with the idea of the only one right (true) decision. The teachings of *Begriffsjurisprudenz* or pandect law served as conceptual fundament for the German Civil Code (*Bürgerliche Gesetzbuch, BGB*). At present, however, the conceptual jurisprudence that reflects the idea of the only one right decision has no scientific value, but as legal dogmatics—using scientific tools in the jurisprudence—it is practically important in establishing the content of the applicable law. Furthermore, it provides to the legal system the conceptual instruments necessary for the maintenance of the logical (formal dogmatic) consistency in law and the substantial coherency of the legal provisions, meaning their being bind with the value system of the legal order.[31]

Russian civil law jurisprudence, as stated above, began to take shape under the decisive influence of the German Historical School and the Pandectists. The borrowed (axiomatically accepted) dogmatic constructs became legislatively supported and as recognised scientific (jurisprudential) tools, have been dogmatically followed as such without any real problematisation in Russia[32]. The

[27] Apodicticity or apodixis is a *logical* term, applied to judgments which are demonstrably, necessarily or self-evidently true, for instance, as of mathematical conclusions.
[28] For more on this subject *see*, for instance, Reimann (1990) and Mihailov (2023) at 220–418; as well as https://indianlawportal.co.in/friederich-karl-von-savigny
[29] Thus, civil law has become nationalised and secularised in Germany.
[30] Haferkamp (2011).
[31] For more on this subject *see*, for instance, Reimann (1990) and Mihailov (2018).
[32] Russian lawyers and scholars usually obtain legal knowledge from study books and translations of foreign legal literature. It ought to be mentioned that in general legal German is not easy for foreigners, wherefor translations are popular. A similar situation concerns also other foreign languages.

heritage of the unity of the religious and secular law concepts became axiomatised in the legal dogmatics through the believe in the scientific truth in Russia. In any case, in the Soviet (socialist) and post-Soviet science legal dogmatics has had very strong position[33].

Present Understanding

In Russia, the legal regulation has been traditionally identified with the application of imperative or compulsory rules that mainly represent the public law; the meaning of the imperative norms is that, the prohibitions they contain, are to be unexceptionally obeyed. In turn, the dispositive norms as a means of flexible regulation have been usually regarded as exceptions in Russian law, mainly related to contract regulation. The concepts of imperative and dispositive norms are well-established in Russian law, and they are used in the Civil Code. According to the rules enforcing the principle of freedom of contract, in the events when a term of contract is provided by a norm which is to be applied as long as the parties have not reached an agreement to the contrary (a dispositive norm), the parties may by their agreement exclude its application or establish a term different from that provided in it, and in the absence of such an agreement the term of the contract is to be determined by the dispositive norm (Art. 421.4). In turn, the rules on imperative norms are included in the norm of the Civil Code concerning relation between contract and law, according to which a contract must comply with rules obligatory for the parties established by a law and other legal acts (imperative norms), which are in effect at the time of its conclusion. The dispositiveness of a legal norm is determined in Russian law in a traditional way, which means that the norm itself expresses the application of it, unless otherwise provided by a contract. Such a provision could also cover a number of rules. In Russian law imperativeness rather than dispositiveness still continues to be presumed.[34]

In the Russian civil procedure literature of the late 19th - early 20th centuries the dispositive rules were purported like in Germany to be applied as rules to determine the procedural means of protection[35]. Later in the 20th century, the juridical construction of dispositivity, as the legally based freedom of the parties to

[33]*It is significant that* Orthodox Christianity was adopted in Russia at the time when the period of its dogmatic pursuits in Byzantine had ended. Therefore, the Russian religious consciousness has understood the Christian doctrine as being complete and not subject to analysis. Thus, openness to the problematisation of fundamental religious questions had not rooted in Russia. Non-critical attitude to the a priori knowledge has also been (and still is) characteristic for the Russian traditional societal, particularly social scientific, thought that has been oriented towards the exploration and elaboration of the (in the first instance universal) truth composing the system of linearly accumulated knowledge. *See*, for instance, Orlov (2021) at 468 and the literature mentioned therein. For more on this subject *see*, for instance, Mihailov (2018).

[34]For more on this subject *see*, for instance, Demieva (2016) and Kozhevnikov (2017).

[35]Related to a civil law dispute, characterised as dispositive, the significance of the dispositivity is still generally implied in that an unpresented or unproven statement as well as a statement recognised by the court in its procedure as rejected, in default of the further procedural activities of the parties, is to be outside of the scope of law, or such a statement ought to be considered legally non-existent, regardless how trustworthy in reality it is.

perform (to acquire, realise and dispose of) their rights on their own discretion, has become shaped in the different branches of law. As related to Russian civil law, the principle of dispositivity is reflected in that the main parts of the civil law norms (contained in the Civil Code of 1994-2006) are dispositive. Their application is dependent on the will of the parties. The application of a dispositive legal norm may be excluded, or it may be deviated by them. Civil law regulation is performed in Russia also by facultative norms. These mean norms, the application of which requires that parties have agreed on their application, and such an agreement must be expressed in a positive way. Furthermore, also reference norms are known in Russian civil law. By using them generally in contract regulation, the rule regulating certain legal relation (contract) is to be applied to the other, usually similar ones.

The principle of dispositivity is developed based on the concept of party autonomy that belongs to the fictitious postulates of civil law related to the Kantian metaphysical word. The principle of dispositivity is characteristic of civil law regulation that covers business activities and is realised through the application of dispositive norms. Particularly in respect of the civil law relations the law provides the parties with large possibilities to determine their relations in accordance with their autonomy of will, and in default of such determination offers the applicable rules. Related to civil law the principle of dispositivity is implied in freedom of contract grounded on the freedom of the parties' will. The principle generally connotes the liberty of the parties to the contract to define the content of their agreement at their discretion and determine the courts before which and the law according to which any disputes should be governed. In turn, in the Russian international private law, the principle of autonomy of will is expressed in the basic rule regarding the law applicable to the issues belonging to the contract statute. According to Article 1210 of the Civil Code on the choice-of-law-clause, the contracting parties may, at the conclusion of the contract (of international character) or thereafter, choose by agreement the law that will govern their rights and duties under the contract. The principle of party autonomy has also been recognised in Russian law of arbitration – where parties may similarly choose the law according to which their arbitration agreement and its procedure (curial law) should be governed.

Essentially important in realisation of the principle of dispositivity in the civil law are also initiative norms through the application of which the civil law relations emerge, change and cease.[36] A great part of civil regulation in Russia consists of initiatively dispositive norms, the application of which requires introductive acts, for instance, the application of contractual remedies is possible, only after entering a contract. As to the international private law regulation, its switching on requires an initiation of the international private law dispute. The presence of initiative norms by applying of which the subjects of law perform their interests to acquire, realise and dispose of their rights is characteristic particularly for the private law regulation and often even for the public law regulation.

[36]The presence of initiative norms by applying of which the subjects of law perform their interests to acquire, realise and dispose of their rights is characteristic particularly for the private law regulation and often even for the public law regulation.

In general, the dispositivity stands for legally fixed capacity of the subject of law to realise his subjective rights at his discretion and implies in dispositive norms, in accordance with which the parties may agree on their rights and obligations, and, in default of this, the law provides the rule of the law obligatory for them. However, the purport of the dispositivity is not necessarily only in filling the gaps in the expressions of will but also in granting freedom of expression to the parties to some extent.

Among the civil law dispositivity norms, absolutely and relatively dispositive norms are known in Russian law. Absolutely dispositive norms stand for the situation where there are no obligatory standards of behaviour that are set by the law, and the law subjects granted with the discretionary freedom. In turn, in relatively dispositive norms the discretionary freedom of the participants is legally limited, and such limitations often mean setting of several variants of decision with the right of choice or requirements for the proper decision. The variants of decision may be alternative, where several variants are due but the application of one is sufficient, or facultative, where in addition to the basic rule there is its additional (compensatory) variant.

Furthermore, the dispositivity may be divided differently between the parties of the legal relation. In the event of a unilaterally dispositive norm, the dispositivity is granted only to one party, and this often means that the active party enjoys the full freedom of action (as it is) in the absolute. In turn, bilaterally dispositive norm stands for the situation when both parties enjoy the dispositive power to the same extent.

The generally applicable, particularly in respect of contracts, principle of civil law dispositivity means that everything which is not forbidden is allowed; usually this refers to the prohibitions provided by the *ordre public*. In turn, the public law dispositivity is generally ruled by the opposite to the civil law dispositivity principle proclaiming that everything which is not allowed is forbidden. It is characteristic for public law regulation where the interests of the society and state are prioritised and means that an action can only be taken if it is specifically allowed.

However, the distinction between the civil law and public law dispositivity has been sometimes blurred by the generalisation of the allowness to cover the civil dispositivity cases presented sometimes in the sentences that "allowance and permissibility are to characterise the Russian civil law" and that it is generally “the permissive type of legal regulation”.[37]

In fact, such a generalisation is diminishing the significance of dispositivity, particularly, related to business law regulation, where freedom of business activities is among the economic rights and freedoms that are recognised, guaranteed and directly effective in Russia as existing *apriori* and not as established and granted by the state (sovereign or legislator). Consequently, the realisation of those rights and freedoms does not require any high allowance or permission. In fact, such an

[37]The Soviet legal science was based, as being positivist and etatist oriented, on the idea that the state allows the possibility for the parties to choose the most proper behaviour pattern for them provided it is formally legal; and this was later corrected by applying the requirements of fairness and non-abuse of rights as well as the concept of human rights. *See* Demin (2016).

allowance, could mean the existence of the publicly established prohibition that may be subject to its exclusion.

Related to a contract the dispositivity provides the contracting parties with the possibility to establish the contract relation by expressing their wills. According to the rules enforcing the principle of freedom of contract of the Civil Code[38], in the events when a term of contract is provided by a norm which is to be applied as long as the parties have not reached an agreement to the contrary (a dispositive norm), the parties may by their agreement exclude its application or establish a term different from that provided in it, and in the absence of such an agreement the term of the contract is to be determined by the dispositive norm, and in the absence of this, by the customs, applicable to the relationships between the parties. It is still specific for the Russian contract law that dispositive norm has priority over business custom in Russia with some exceptions.[39]

Freedom of contract determined in accordance with the principle of dispositivity also provides the possibilities to change or even rescind it and it may be occurred automatically that requires the dynamic feature of contract and consequently means the impossibility of the final definition of its conditions. Thus, it is principally impossible to clearly distinguish the character of legal norms and accordingly finally fix the conditions of a contract because, for instance, also of the subjective factor. So, any contract condition could be declared in the negotiations by the party as essential, the agreement on which is necessary for the contract to be formed.

A contract concluded with a foreign person may be subject to the application of international private law or choice of law rules. According to these rules applicable may be the law chosen by the parties except for directly applicable norms and *ordre public* rules. According to the interpretation of the Russian Supreme Court of 2019 of Article 1210(5) of the Civil Code, the parties to a contract attributed with a foreign element may choose in their choice of law agreement also the law of a country that has no relation to the contract or its parties (choice of neutral law). The parties may also choose soft law documents containing the rules recommended for participants of the turnover by international

[38]In respect of contracts, the provisions of the Civil Code that is the main civil law source, containing imperative (compulsory) and dispositive legal rules may be generally hierarchised, in accordance with the Civil Code, as follows: the first are imperative norms of the law, and the second are the terms of the contract agreed upon by the contracting parties. The third in contract regulation are dispositive norms which shall be applied in default of the contractual terms, and the fourth are customs (business customs) that are applicable in default of both contractual terms and dispositive norms. In the event a commercial custom or dispositive norm is included in the terms of the contract, it is regarded as a condition of this.

[39]There is an exception to the general rule prioritizing a dispositive norm in relation to commercial custom. It is contained in the rules of the Civil Code concerning the performance of obligations (Art. 311 and 312) there is an exception to the general rule prioritizing a dispositive norm in relation to commercial custom: commercial custom takes priority in those rules. The Russian contract law rules contain also the exclusion to the general rules on the hierarchy of contract conditions concerning imperative norms. In accordance with the Article 422.2 of the Civil Code, the terms of contract could take priority over the imperative norms, if these are enacted after the conclusion of the contract. And it is only the law (not any other normative act) which may include a provision which supersedes the term of contract.

organisations or state unions[40]; such rules are applicable only in case of explicit agreement of the parties.[41] Thus, the principle of the free will or *lex voluntatis* is enforced in the Russian international private law.[42]

The corporate law regulation is usually related to the civil law regulation, characteristic for which is the presence of the dispositive law element that is essentially important for securing adequate base for business activities in corporate form. Corporate law regulation is also based on the application of imperative norms, many of which are necessary for securing the public interests, as well as the rights of the participants and creditors of the corporation.

The dispositive basis of the corporate law stands for initiative dispositivity that is characteristic of it. The foundation of a corporation requires the initiatives or the expressions of will of its founders or founding documents ought to be executed properly in the form of registered documents that determine the legal relationship. In the absence of the expression(s) of will the legal relation is not to be emerged; the will expression(s) or initiated acts are also necessary for changing or terminating the legal relation, and they are to be registered. The rules of Russian international private law contained in the Civil Code that regulate incorporation and membership agreements allow the choice of law by the parties. They may not, however, exclude the application of the imperative norms of the country in which the juristic person has been founded.

Traditional dogmatically conceptualised civil law regulation of business activities deserves critique, since it does not adequately correspond to the modern business realities, though it pretends to be scientific. Particularly the *claims of the scientificity* of law in Russia, where the social reality is regarded as causally determined[43], truly existing world, are inconsistent with modern understanding of law, since for instance, it is ignored that social scientific world does not operate by following causal determination patterns, wherefore attempts of the scientific handling of legal phenomena are usually meaningless. Axiomatic (true) propositions are not to be regarded as scientifically valid even related to exact sciences, not to mention behavioural sciences that represent, if not explanatory interpretations of behavioural acts, then speculative notions about them, due to the absence of

[40]For instance, UNIDROIT Principles of International Commercial Contracts, Principles of European Contract Law, Model Rules of European Private Law.

[41]Issues that are not to be resolved in accordance with such documents, as well as with the universal principles on which they are based, ought to be resolved in accordance with the national law determined in accordance with the agreement of the parties or by conflict of laws rules. *See* para 31 of the ruling of the plenum of the Russian Supreme court no 24 of 9 July 2019 on application of the international private law norms by the Russian courts (Ruling 24).

[42]It comprehends, firstly, that the contracting parties may define the content of their contract at their discretion and determine the law applicable to it by the choice of law clause. *See* Russian Civil Code, art. 1210.1.

[43]In the raw reality (left scientifically unconquered), any explanatory proposition of a causal nature implies infinite references back in innumerable different directions, and every effect it preceded by an infinite number of causes, as every cause is followed by infinite number of effects. Furthermore, any claim to explain a social phenomenon causally on the basis of its effects implies belief in a deterministic ontological-metaphysical conception of the social order. Such an order is hardly to be found from the Kantian metaphysical speculations. For more on the subject *see* Luhmann (1991) at 9-30 and Zolo (1986) at 116-117.

adequate measure instruments for social phenomena for establishing and verifying social phenomena.[44]

Thus, the present (secular) law may not exist as providing the only one (scientifically) proper or true legal solution. In general, the law is a rule prescribed in the established procedure[45] to be realised through the established procedure[46] in the concrete legal decision[47]. The regulation mechanisms related to these procedures have however become so sophistically differentiated, and in the absence of the exclusive authority that divines a solution or determines what is true[48], it seems obvious that there are no means to secure any predictable legal solution, particularly, if the law application stage as a process may not be exactly defined.

Towards Positivisation

Traditional dogmatic use of the concepts of civil law, including dispositivity, has been otherwise problematic in Russia due to the ignorance of the practical reality. It seems important to understand that the business law regulation, although this mainly consists of simple easily applicable norms, is not a static collection of separate abstract constructs. It is obvious that the applicable norms are, though unavoidably necessary in the legal decision-making, are not necessarily to be handled linearly, for instance, following causal determination patterns. It means directly understanding law as a living phenomenon, as well as, that the judiciary application of law or its positivisation—its actualisation by the legally proper decision aimed at concretisation of the legislated norm, when it became the real legal norm—is to be considered as a part of the process aimed at legal solution of a concrete problem. Moreover, it is, for instance, characteristic for civil law regulation that a concrete case requires the clarification and consideration of the applicability of more than one rule to it, and, also, it is often necessary to consider that the result of the decision of the case ought also to correspond to legal principles. This also makes the use of traditional dogmatics in business law difficult.

[44]In a concrete comparative study of the different legal systems, it is obviously hard to quickly find cognition that national legal systems are principally different, which is hardly to be explained through classical, rationalist and empiricist conceptions of cognition and scientific knowledge oriented towards searching for truth and objective laws and representing linear thinking. As embodied in meaningless metaphors like truth (verity) and objective laws of nature and development, such conceptions are inadequate to modern knowledge on cognitive processes and science. Universal criterion of truth (verity) is impossible, and, consequently, the idea of scientific (objective) laws is unproductive, particularly in relation to artefactual phenomena. This concerns especially the domains where concrete and personal realization of knowledge is essential, which is characteristic for law.

[45]meaning a legislative act,

[46]legal dogmatics,

[47]a jurisprudential act.

[48]Historically, scientific knowledge has religious roots, and the religious ground has been reflected in the legal science in the form of its absolutisation through the absolute authorities and dogmas, usually presented as being true (*veritas*); they are still used often as unavoidable metaphors of perfectness and eternity. For more on this subject *see*, for instance, Sigalov (2008).

The necessity of the legal (more exactly, judiciary) positivisation is particularly obvious in the event of the application of dispositivity rules to a contract and a corporate law relation. Such a relation is directly dependent on the parties' will that additionally is subject to changes, and it, consequently, means that there is the absence of the possibility and even necessity to predetermine legislatively or doctrinally the concrete content of the final judicial decision. Moreover, the unpredictability of a law application act may be directly related to the application of the civil law provisions restricting the use of dispositive power and its negative consequences (*ordre public*, directly applicable norms, the limits of exercising the civil rights)[49]. There are also difficulties to predetermine the concrete content of the final judicial decision that related to the subject of business law regulation, meaning its unpredictability because of dynamic and risky character of business activities.

Related particularly to the contract and corporate law regulation in Russia, the traditional totality of the legislative law has been challenged in the pragmatic approach supported by the Russian highest judicial body that is to be regarded as a remarkable step in the positivisation of the Russian business law regulation. According to the Ruling of the Plenum of the Supreme *Arbitrazh* Court[50] no 16 of 14. March 2014 on freedom of contract (Ruling 16), the norm that determines the rights and obligations of contractual parties but does not include the expressed provision of its dispositivity or imperativity, ought to be recognised as dispositive or imperative in accordance with the interpretation of its aims[51], and this indicates of favourable attitude towards business activities as well as of reasonable implementation of the pragmatic attitude, characteristic to common law, to Russian law. In particular, the favouring of the principle of dispositivity in respect to business law regulation, by the concentration of the valuation of the dispositivity of a legal norm in the sphere of successive control, instead of previous control, actually promotes the real freedom of business activities, and makes the regulation flexible. This is particularly important for small and family enterprises that are very common in Russia.

Equally important for the development of adequate system of regulation for business activities as the Ruling 16 of 2014 are the interpretive instructions of the Russian Supreme court that are contained to the ruling of its plenum no 24 of 9. July 2019 on application of the international private law norms by the Russian courts (Ruling 24). The instructive interpretations of the Supreme Court confirmed the answers to important questions raised in Russian judicial practice and considered

[49]For instance, according to the position of the Supreme Court, If the party has abused his right that follows from the contract conditions being different to the applicable dispositive norm or excluding the application of this, the court may evade the protection of his rights. *See* https://www.consultant.ru/law/podborki/imperativnye i_dispozitivnye_normy/

[50]The Supreme Court of the Russian Federation is the highest judicial body in the resolution of economic disputes and in civil, criminal, administrative and other matters that are within the jurisdiction of lower courts established in accordance with federal constitutional law. It exercises judicial review of the activities of the courts and provides explanations on matters of judicial practice. The plenums of the Supreme Court in Russia are competent to give not only decisions in concrete appeal cases, but also generalise the judicial practice and pass interpretative rules or guiding explanations on the applicable legal norms obligatory for the lower general courts.

[51]as an exception to the objective interpretation that is the main rule in Russian law.

in doctrine[52]. They are obviously to serve the jurisprudential needs aimed mainly at solution of social collisions. Practically they are definite and final positions of the highest judicial authority and as being even above the legislative text could not be legally overruled.

Both Rulings (16 and 24) indicate the shift of the Russian legal system towards practical solutions of actual legal problems through the adequate interpretations of legislative norms—positivising or transforming them into real legal (law-in-action) norms. Moreover, the Rulings obviously shows the aims of the Supreme Court to promote the further positivisation of the Russian civil law regulating business relations by enlarging the judicial discretion at the cost of favouring the litigation culture.

The present renovation of the Russian legal system obviously means shaping of the sophisticated legal system, where (jurisprudent) advocates and (jurisprudent) judges supported by the (jurisprudent) scholars, representing the emerging Russian legal society, are capable to secure functioning of the effective jurisprudential system that *provides justice* for society, including, more than simply mechanistically applying laws, assistance in favouring societally healthy business activities.

Conclusion

As concluded in this paper, and following the Ruling of 2014, it is important to mention that the legislator is not obliged or even competent to predetermine if the norm in question is imperative or dispositive, and if the parties have not determined the character of the norm, then the court is to decide if the norm in question is imperative or dispositive.

In the case the court is obliged to decide if the applicable norm is imperative or dispositive, then

1. in the event the norm does not contain the direct prescription on its obligatory application, there are no other prescription or ground for the public intervention *ex officio*, and none of the parties has applied for the application of the norm (in his claim or objections), there is no need to clarify the character of the norm in question; then
2. if there are the requirements for direct application of the norm in accordance with the prescription of the law, the demand of the party, or some other ground, the positivist (direct application) decision is to be taken;
3. the final (positivist) decision ought to be evaluated against the aims of the law (teleological aspect) as well as the acceptability of its application results (consequential aspect).

References

Demieva, A.G. (2016). ‘Соотношение императивного и диспозитивного начал в правовом регулировании отношений с участием предпринимателей’

[52]See Kolobov (2019).

[*Correlation between the Mandatory and Non-Mandatory Principles in the Legal Regulation of the Relations with Participation of Entrepreneurs*] in *Ученые записки Казанского Университета. Серия гуманитарные наук* [Proceedings of Kazan University: Humanities Series] 58(2):391–398.

Demin, A.W. (2016). 'Диспозитивность как общеправовой концепт' [*Dispositivity as a general legal concept*] in *Право и государство* [*Law and State*] 3(72):94–100.

Giaro, T. (2021). 'Medieval Canon Lawyers and European Legal Tradition' in *Review of European and Comparative Law* 47(4):157–187.

Haferkamp, H.-P. (2011). 'Begriffsjurisprudenz' (Jurisprudence of Concepts) in *Enzyklopädie zur Rechtsphilosophie.* https://enzyklopaedie-rechtsphilosophie.net/inhaltsverzeichnis/19-beitraege/105-)

Kolobov, R.Y. (2019) 'Новейшие тенденции развития международного частного права России (к принятию Постановления Пленума Верховного суда РФ от 9 июля 2019 г. № 24) [*Recent trends in the development of Russian private international law (to the adoption of the Supreme Court`s plenary decision of 9 July 2019 no 24*)] in *Сибирский юридический вестник* [Siberian Juridical Journal] 4(87):104–113.

Kozhevnikov, V.V. (2017). 'К проблеме диспозитивных норм частного и публичного права современной России' [*On Problem of Discretionary Rules of Private and Public Law of Modern Russia*] in *Журнал российского права* [Journal of Russian Law] 8:16–28.

Luhmann, N. (1991). Soziologische Aufklärung [Sociological Enlightenment] 1. Westdeutscher Verl.

Mihailov, A.M. (2018). 'Юридическая догма и формально-юридический (догматический) метод в постсоветском правоведении' [*Legal dogma and formal–legal (dogmatic) method in post-Soviet jurisprudence*] in *Проблемы постсоветской теории и философии права* [Problems of the post-Soviet theory and philosophy of law]:149–199.

Mihailov, A.M. (2023). *Сравнительное правоведение: догма романо-германского права*. [Comparative law study. Dogma of Romano-Germanic law]. Moscow.

Nechaev, V. (1895) 'Конструкция юридическая. Наука гражданского и римского права в России [Juridical Construction. Civil law and Roman law science in Russia]' in *Энциклопедический словарь Брокгауза и Ефрона* [*Brockhaus and Efron Encyclopedic Dictionary*]. XVI: 88–89.

Orlov, V. (1999). *Entrepreneurship in Russia*. Helsinki: Finnish Lawyers' Publishing.

Orlov, V. (2016). 'Особенности общественно-научного и юридического познания [Peculiarities of societal scientific and legal cognition]' in *Российский юридический журнал* [*Russian Juridical Journal*] 3:9–23 and 231.

Orlov, V. (2019). 'Legal Sources and Interpretation in Russian Civil Law' in *Athens Journal of Law* 5(2):117–135.

Orlov, V. (2021). 'Russian Legal Discourse' in *Athens Journal of Law* 7(4):463–484.

Poldnikov, D. (2017). 'Why Generalize Contract Law? The Russian Perspective on the Benefits of the Western European Legal Style during the Long 19th Century' in *European Journal of Legal History* 14:695–710.

Razuvaev, N.V. (2019). 'Юридическая доктрина как средство конструирования правовой реальности' [Legal Doctrine as a Means of Constructing Legal Reality] in *Теоретическая и прикладная юриспруденция* [*Theoretical and Practical Jurisprudence*]1:5–32.

Reimann, M. (1990). 'Nineteenth Century German Legal Science' in *Boston College Law Review* 31(4):842–895.

Seong-Hak Kim, M. (2019). 'Custom as a Source of Law in European and East Asian History' in Modeer, K.A., Masferrer, A. & O. Moreteau (Eds.). *Comparative Legal History Handbook*, pp. 186-211, Cheltenham: Edward Elgar Publishing.

Sigalov, K.E. (2008). 'Религиозное бытие права' [*Religious* existence of law] in *Juridical World* 7 (139):71–74.

Strogov, N.D. (2022). 'Природа ius resistendi в свете правовых школ и теорий' [Nature of *Ius Resistendi* in the Context of Legal Schools and Theories] in *Право* [Law] 22(3):339–345.

Sulikowski, A. (2019) '*Law After the Death of God. Jurisprudence and Some Assertions of the Contemporary Philosophy'* in Bator A., Pulka Z. (Eds.) *A post-analytical approach to philosophy and theory of law*, pp. 181-194. Peter Lang.

Tumeneva, N.V. (2019). 'Jus naturale и римское право: вопросы соотношения' [Jus Naturale and Roman Law: Issues of Correlation] in *Право* [*Law*] 19(3): 316–323.

Tyler, Jr. J.O. (2014). 'Justinian's *Corpus Juris Civilis.* Legal Validity' in *The Internet Encyclopedia of Philosophy*, ISSN 2161-0002. https://iep.utm.edu/legal-va

Varga, Cs. (2008). 'Law and its Doctrinal Study *(On Legal Dogmatics)'* in *Acta Juridica Hungarica* 49(3):253–274.

Wróblewski, H.B. (1948). *Jezyk prawny i prawniczy*. [Legal and Legal language]. Kraków, 1948.

Zimmerman, R. (1996). *The Law of Obligations. Roman Foundations of the Civilian Tradition*. Oxford University Press.

Zolo, D. (1986). 'Function, Meaning, Complexity: The Epistemological Premisses of Niklas Luhmann's 'Sociological Enlightenment' in *Philosophy of the Social Sciences* 16:115–117.

Courts' Rulings

Ruling of the Plenum of the Supreme Court of the Russian Federation no. 24 of 9 July 2019 on Application of Private International Law Norms by Courts of the Russian Federation [Постановление Пленума Верховного Суда РФ от 09.07.2019 № 24 «О применении норм международного частного права судами Российской Федерации»] in *Российская газета* [*Russian Gazette*] 2019.154. (Ruling 24).

Ruling of the Plenum of the Supreme *Arbitrazh* Court of the Russian Federation no 16 of 14 March 2014 on Freedom of the Contract and its Limits [Постановление Пленума Высшего Арбитражного Суда Российской Федерации от 14.03.2014 *№* 16 «О свободе договора и ее пределах»] in *Вестник Высшего Арбитражного Суда Российской Федерации* [*Herald of the Supreme Arbitrazh Court of the Russian Federation*] 2014, 5. www.arbitr.ru 03.04.2014. (Ruling 16).