COMMENTARIES

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MIXED CONTRACTS IN THE RUSSIAN LEGAL DOCTRINE: CONTRIBUTION OF KAZAN CIVIL LAW SCIENCE

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Abstract: The article presents an interesting issue of the Russian legal doctrine, mixed contracts, and the way the research of this question was developing. The author highlighted the contribution of Kazan civil law science which had a significant input for the mixed contracts theory. The author provides the historical overview of the issue and gives an impressive literature review, discusses the main issues of the theory of mixed contracts, their elements and essential terms. The study of mixed contracts is a traditional direction of the civil law school of Kazan University. A.A. Simolin, M.Yu. Chelyshev worked a lot on the phenomenon of mixed contracts. The author also worked together with Professor M.Yu. Chelyshev and published some joint works. The approach proposed by them was useful not only for solving the problems of civil law doctrine, but also for describing a number of special issues in the development of legal practice.

Keywords: mixed contracts, limits (borders) of freedom of contract, named contracts, non-named contracts, hybrid contract, gemischte Vertrage, classification, cross-branch interaction, principaliter mixta, per accessionem mixta.

1. Mixed Contracts: Background

D. Nettelbladt apparently was the first to mention mixed contracts in Russian legal literature. He noted: "Mixed contracts can be of two types. There is a mixed contract, consisting of many contracts, which together constitute a new type of agreement different

from its constituent parts. There are also mixed contracts formed by joining one contract to another. In the first case, contracts are called initially mixed (*principaliter mixta*), and in the second case mixed through accession (*per accessionem mixta*)"[1].

After that A.A. Simolin, L.S. Tal[2], G.F. Shershenevich[3], V.I. Sinaisky[4], I.A. Pokrovsky[5] subsequently studied mixed contracts in their scientific works.

A number of issues related to the doctrine of mixed contracts were raised in the works of Soviet time scholars[6]. The question of mixed contracts has been studied before and after 1991 by highly respected Russian civil law scholars such as I.B. Novitsky and L.A. Lunts[7], O.S. Ioffe[8], O.N. Sadikov[9], M.I. Braginsky and V.V. Vitryansky[10] and other well-known specialists[11].

However, in Russian literature with rare exceptions[12], there were no special monographic and dissertation works on mixed contracts until 2008. The degree of research and the volume of scientific discussion on the issues of mixed contracts are totally insufficient in view of the doctrinal and practical significance of this legal category.

The study of mixed contracts is a traditional direction of the civil law school of Kazan University. One of the pioneers in this area was A.A. Simolin[13], a well-known civil law scholar, a graduate, and later a professor of Kazan University.

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1 Nettelbladt D. The initial foundation of universal natural jurisprudence, adapted to the use of the foundation of positive jurisprudence and translated from Latin. Moscow, 1770, p. 171.

2 Tal L. S. Positive law and unsettled contracts, *Legal notes of Demidov Law Lyceum*. Vol. III (XIII), Yaroslavl, 1912, pp. 386-434.

3 Shershenevich G.F. Commercial law course. 4th ed., vol. 2. Product. Trade deals. St. Petersburg, 1908, pp. 240–241.

4 Sinaisky V.I. Russian Civil Law. Vol. II. Obligatory, family and inheritance law. Kiev, 1915, pp. 87–90.

5 Pokrovsky I. A. The main issues of civil law. Moscow, 1998, pp. 126–127.

6 See, for example: Oygenzikht V.A. Atypical contractual relations in civil law. Training allowance. Dushanbe, 1984; Sobchak A.A. Mixed and complex contracts in civil law, Soviet State and Law. No. 11, 1989, pp. 61–66.

7 Novitsky I. B., Lunts L. A. General doctrine of commitment. Moscow, 1950, p. 102.

8 Ioffe O. S. Law of Obligations. Moscow, 1975, pp. 37–38.

9 Sadikov O. N. Atypical institutions in Soviet civil law, Soviet State and Law. no. 2, 1972, pp. 36–37.

10 Braginsky M.I., Vitryansky V.V. Contract law: general provisions. Moscow, 1997, pp. 331–334.

11 See, for example: Efimova L.G. Banking transactions: law and practice. Moscow, 2001, pp. 243–246; Romanets Yu. V. System of contracts in the civil law of Russia. Moscow, 2006, pp. 74–80.

12 Braginsky M.I. The fundamentals of the doctrine of unnamed (unmarked) and mixed contracts. Moscow, 2007; Pischikov V.A. Mixed and atypical contracts in the civil law of Russia. Diss. Cand. of Legal Sc. Moscow, 2004.

13 Simolin A. 1) Mixed treaties and exercises on individual liability, Law. Weekly legal newspaper, 1911. No. 47, art. 2619-2626; 2) Mixed gift agreement, Bulletin of civil law. 1917, no. 3-5, pp. 26–48. For a brief sketch of the life and work of A.A. Simolin, see: Em V.S., Komarova T. E., Simolin A.V. "Chekhov type" professor (on the 125th anniversary of the birth of Kazan civilist A.A. Simolin (10 (22).10.1879 – 12.23.1919)), Legislation. 2004, no. 12, pp. 75–82; Em V.S., Komarova T.E., Simolin A.V. The sphere of freedom, Simolin A.A. Retribution, gratuitousness, mixed contracts and other theoretical problems of civil law. Collection of works. Moscow, 2005, pp. 7–47; Krotov M.V., Maksotsky R.A., Shcherbak N.V. A study interrupted by the revolution, Ibid., pp. 48–90.

Modern representatives of Kazan civil law, including Professor Mikhail Yuryevich Chelyshev, who headed the revived Department of Civil and Business Law at Kazan University, as well as the author of these lines, a graduate of Kazan University, continued the study of mixed contracts.

Our scientific views with Professor M.Yu. Chelyshev on the phenomenon of mixed contracts were set forth in joint publications[1]. Not all scientific plans were implemented during the unfairly short but vibrant life of Mikhail Yuryevich. Our work on a monograph on mixed contracts was interrupted by the tragic death of Professor Chelyshev when he was saving members of his family. Mikhail Yuryevich was not only a wonderful friend, a brilliant scientist and an excellent co-author, but he was also an example of personal courage and determination in everyday life.

Our proposed approach to the study of mixed contracts resonated among Russian researchers – civil law scholars[2], including researchers of private international law[3], as well as representatives of other branches of legal science[4].

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[1] 1) Ogorodov D.V., Chelyshev M.Yu. Mixed contracts in private law: some issues of theory and practice, Legislation and Economics, 2005, no. 10, pp. 50-53; 2) Id., On the question of the types of mixed contracts in private law, Legislation and Economics. 2006, no. 2, pp. 53-59; 3) Id., Mixed contract and questions of the theory of legal regulation, Legislation and Economics. 2007, no. 3, pp. 49-55; 4) Id., On mixed contracts in part four of the Civil Code of the Russian Federation, Intellectual property. Industrial property. 2007, no. 10, pp. 49-58; 5) Id., Some debatable problems of the doctrine of mixed contracts, Izvestiya vuzov. Pravovedenie [Universities bulletins. Jurisprudence]. St Petersburg, 2007, no. 6, pp. 41-63; 6) Id.,The design of a mixed contract in civil (private) law, Transactions: problems of theory and practice: Collection of articles, ed. M.A. Rozhkova. Moscow, Statut Publ., 2008, pp. 310-355.

[2] Braginsky M.I. Fundamentals of the doctrine of unnamed (unmarked) and mixed contracts. Moscow, Statut Publ., 2007; Novitskaya A.A. Invalidity of a part of the transaction: comparative legal analysis of Russian and German legal regulation, Bulletin of Civil Law, 2011, no 1, pp. 4-51; Karapetov A.G., Savelyev A.I. Freedom of concluding unnamed contracts and its limits, VAS Bulletin of the Russian Federation, 2012, no. 4, pp. 12-56; Karapetov A.G., Savelyev A.I. The freedom of the contract and its limits: in 2 vols. Moscow, Statut Publ., 2012, vol. 2: The limits of freedom to determine the terms of the contract in foreign and Russian law ("ConsultantPlus"); Aliev T.T. Differentiation of unnamed contracts from mixed contracts, Lawyer, 2016, vol. 9, pp. 20-22; Savelyev A.I. Some issues of legal regulation of mixed contracts in Russian and foreign civil law, VAS Bulletin, 2011, no. 8, pp. 6-39; Romanets Yu.V. The system of contracts in the civil law of Russia, 2nd ed. Moscow, Norma, Infra-M Publ., 2013; Kulakov V.V. Obligation and complications of its structure in Russian civil law, 2nd ed. Moscow, RAP, Walters Clover Publ., 2010; Bychkov A.I. Mixed contract in the civil law of the Russian Federation. Moscow, Infotropic Media Publ., 2013; Didenko A.A. An agreement on the use of a part (structural element) of a thing , Lawyer, 2013, no. 18, pp. 24-29; Gapanovich A.V. The legal nature of the agreement on the payment of the registration fee and its relationship with the law on placing orders, Lawyer, 2013, no. 1, pp. 30-33; Uralova A.A. Mixed contract bypassing the law, Lawyer, 2014, no. 3, pp. 13-15; Fetisova E.M. Mixed contracts as an implementation of the principle of freedom of contract, Law, 2013, no. 2, pp. 146-159; Levushkin A.N., Fedechko F.I. The legal essence of an unnamed contract and its implementation within the framework of the principle of freedom of contract, Legal World, 2014, no. 4, pp. 27-30; Safonova N.S. Mixed contracts with elements of a contract agreement, Eurasian Law Journal, 2016, no. 2 (93), pp. 194-195; Pilipson E.G. The genesis of contractual inheritance and its legal evolution, Social Sciences, 2016, no. 1, pp. 297-311; Baturina A.A. Mixed contract and some related civil-law constructions: correlation, Siberian Law Journal, 2017, no. 4, pp. 37-43; Bulygin A.V., Kryukova Yu.Ya. Hidden clause on a guarantee in a contract between legal entities: interpretation problems, Eurasian Law Journal, 2018, no 10 (125), pp. 136-138.

[3] Mazhorina M.V. The choice of applicable law to cross-border mixed and unnamed contracts, Journal of Russian Law, 2012, no. 10, pp. 72-81.

[4] Korshunova T.Yu. The question of the possibility of including the conditions of a civil law nature into a labor contract (as exemplified by the discussion of "golden parachutes"), Civil Law and the Present: a collection of articles dedicated to the memory of M.I. Braginsky, ed. V.N.Litovkina, K. B. Yaroshenko.

The proposed approach was useful not only for solving the problems of civil law doctrine, but also for describing a number of special issues in the development of legal practice. The publications listed in the footnotes here cover the following issues:

- procedural law[1];
- corporate law and the securities market[2];
- tax law and currency legislation[3];
- regulation of concession agreements and public-private partnerships, issues of technology-innovative zones[4];
- regulation of auctions and tenders[5];
- regulation of energy and energy supply[6];
- settlements and banking law[7];
- legal problems of capital construction, common ownership in housing and utilities and the management of apartment buildings[8];

Moscow, Statut Publ., 2013; Mikryukov V.A. On the interindustry analogy in the practice of overcoming the gaps in the legal regulation of the payment of "golden parachutes ", Important Problems of Russian Law, 2018, no. 7 (92), p. 100-107.

1 Shemeneva O.N. Discussion issues of the concept of procedural agreements in the works of Russian scholars, Herald of Voronezh State University, Series: Law, 2016, no. 2 (25), pp. 110-120.

2 Osipenko K.O. Agreements of participants (shareholders) in Russian and English law, Legislation, 2010, no. 4 "Garant"; Shitkina I.S. Some problems of legal regulation of education and activities of the sole executive body, Economy and Law, 2011, no. 4, pp. 3-17; Borodkin V.G. Corporate agreement during the reform of the Civil Code of the Russian Federation, Law, 2014, no. 3, pp. 160-174; Vasilchenko D.D. On the acquisition and alienation of shares (stocks) in an agreement on the exercise of the rights of members of a company, Law and Politics, 2017, no. 4, pp. 158-171; Shitkina I.S. Chapter XII. Legal support of corporate governance, Corporate law: training course: in 2 volumes, E.G. Afanasyeva, V.A. Waipan, A.V. Gabov and others, ed. I.S.Shitkina. Moscow, Statut Publ., 2018, vol. 2.

3 Shitkina I. The legal nature and procedure for corporate registration of an agreement on the creation of a consolidated group of taxpayers, Economy and Law, 2012, no. 5, pp. 3-23; Pykhtin S.V. Mixed contracts from the standpoint of the requirements of the currency legislation on issuing a transaction passport, Banking law, 2015, vol. 2, pp. 20-24.

4 Rachkov I., Sorokina A. Lacunae in the Federal Law "On Concession Agreements", Law, 2007, No. 4, pp. 141-145; Dyatlova N.A. The legal nature of the public-private partnership agreement, Herald of St. Petersburg University. Law, 2017, vol. 8, no. 3, pp. 306-313; Trotsenko O.S. The question of complex legal nature of public-private partnership agreements, Legal thought, 2018, no 5 (109), pp. 74-79; Gromova E.A. The agreement on the implementation of technological development activities in special economic zones. Moscow, Justicinform Publ., 2015.

5 Belyaeva O.A. Legal issues of auctions and tenders. Moscow, Yurisprudenciya [Jurisprudence], 2011.

6 Balzhirov B.V. The modern design of the energy supply contract, Lawyer, 2013, no. 2, pp. 3-6; Grachev N.K. Energy service agreement as a developing institution in Russian law, Issues of Russian and international law, 2018, vol. 8, no. 5A, pp. 149-156.

7 Churakov R.S. Escrow account in Russian law, Law, 2007, no. 8 ("Garant"); Sadykov Renal R., Sadykov Rishat R. The settlement forward contract in bank practice and its judicial protection, Legal work in a credit organization, 2009, no. 3 ("Garant"); Mikheeva I.E. Security deposit in banking practice, Legal work in a credit institution, 2014, no. 2 ("Garant"); Popkova L.A. Legal structure of a syndicated loan, Moscow, Prospect Publ., 2018.

8 Kozlova E.B. The system of contracts aimed at creating real estate, Moscow, Contract Publ., 2013; Korneeva S.V. Ways to improve legislation in the field of investment in construction, Legislation,

- exclusive rights (intellectual property)[1];
- issues of sports law[2];
- regulation of outsourcing and outstaffing[3];
- authors of works on family law topics[4], including legal aspects of surrogacy[5], as well as social services[6];
- land and environmental law[7].

It is gratifying that the responses differ significantly: some scholars positively evaluate our ideas, some sharply criticize them. This means that the questions raised in the cited works are not scholasticism. These questions spark keen interest among colleagues; it is a starting point for discussion and, therefore, for the further development of legal science.

Our approach – mine and M.Yu. Chelyshev's approach – to mixed contracts including the concept of poly-branch contracts have found support in Russian jurisprudence over

2008, no. 12 ("Garant"); Kropotov L.G. Commercial investment in capital construction projects: legal regulation, Moscow, Infotropic Media Publ., 2012; Bychkov A.I. Distribution of apartments according to the model of a complex contract, Family and Housing Law, 2012, no. 2, pp. 36-39; Yurieva L.A. Management agreement for an apartment building, ed. I.D. Kuzmina, Moscow, Justicinform Publ., 2011; Gordeev D.P. Management agreement for an apartment building: qualification, concept and content, Laws of Russia: experience, analysis, practice, 2009, no. 2, 3 ("ConsultantPlus"); Nazarov R. Legal issues of the activities of managing organizations in the light of the decisions of the judiciary (second article), Housing Law, 2012, no. 9, p. 49-64.

[1] Vitko V.S. Civil law nature of the license agreement. Moscow, Statut Publ., 2012; Rainikov A.S. Commercial concession agreement. Moscow, Statut Publ., 2009; Evstafieva I.V. Problematic issues of the transfer of exclusive copyright to official publications, Law and Politics, 2011, no. 11, pp. 1956–1959; Kanatov T.K. The iplementation of exclusive rights of authors and related rights in contract use in the EEU countries, 2017, no. 2 (27), pp. 57-61; Vitko V.S. The legal nature of relations in the creation of official publications, Economy and Law, 2018, no. 9 (500), pp. 69-78.

[2] Alekseev S.V. Labor relations in sports: a general characteristic of labor regulation of athletes and coaches, Law and State: Theory and Practice, 2016, no. 9 (141), pp. 102-106; Vaskevich V.P. Contractual regulation of professional sports activities, Laws of Russia: experience, analysis, practice, 2009, no. 1 ("ConsultantPlus"); Govorov P.S. Some issues of the legal regulation of the activities of athletes in team sports, Civilist, 2013, no. 1, pp. 109-114; Kozykin I.V. The question of the employment law nature of the transfer contract, Young scientist, 2016, no. 3-2 (107), pp. 26-29.

[3] Vitko V.S., Tsaturyan E.A. Legal nature of outsourcing and outstaffing contracts, Moscow, Statut Publ., 2012.

[4] Plieva S.E. The legal nature of the marriage contract in modern family law of Russia, Laws of Russia: experience, analysis, practice, 2014, no. 4., pp. 95-101; Saveliev D.B. Family agreements: study guide, Moscow, Prospect Publ., 2017 ("ConsultantPlus"); Barkov A.V. The legal nature of the social assistance agreement for children without parental care, Civil Law, 2008., no. 4, pp.25-27; Zubareva O.G. The legal nature of the agreement on the implementation of guardianship or wardship (foster family agreement), Legislation, 2011, no. 3 ("Garant"); Ksenofontova D.S. The ratio of contracts on the provision of support in family law, Bulletin of notarial practice, 2011, no 2, pp. 22-24.

[5] Mubarakshina A.M. The legal nature of surrogacy agreement, Family and housing law, 2014, no. 4., pp. 24-27.

[6] Barkov A.V. The contract as a means of legal regulation of the social services market. Moscow, Lawyer Publ., 2008.

[7] Luneva E.V. The legal regime of land in specially protected natural areas, Moscow, Statut Publ., 2018 ("ConsultantPlus").

the past ten years. For example, our views were positively evaluated by M.I. Braginsky in his work on mixed contracts[1].

Of course, criticism was also expressed, especially among the labor law scholars. They did not accept our concept of poly-branch mixed contracts combining the concepts of labor and civil law[2].

However, it must be said that labor law was formed into an independent branch of law during the USSR. To date the independence of the branch of labor law in relation to civil law is subject to the specificity of the legal system of the Russian Federation, the successor of the USSR, the successor not only in the narrow international law aspect. Lawyers in the sphere of labor law uphold the status quo inherited from the legal system of the USSR. They are jealous of what even resembles the "civilian annexation" of the subject of labor law in modern Russia.

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Our views with M.Yu. Chelyshev on the phenomenon of a mixed contract as they were in December 2008 will be set forth below.

Undoubtedly, legislation and the Russian civil doctrine have changed since 2008. We are talking about the reform of the Civil Code of the Russian Federation (not successful in everything), about the publication of new works[3] on this issue. Today, we would formulate some arguments in a slightly different way and more accurately, pay special attention to the justification of some details…

In any case, the author of these lines can only attest that Professor M.Yu. Chelyshev made every effort to ensure that this modest contribution of Kazan civil law to the study of a mixed contract would benefit the domestic legal system. Now it is your turn to assess the extent to which our goal has been achieved...

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[1] Braginsky M.I. Fundamentals of the doctrine of unnamed (unmarked) and mixed contracts. Moscow, 2007, pp. 51-52, 58, 60.

[2] See, for example: Korshunova T.Yu. The possibility of including in a labor contract conditions of a civil law nature (for example, the discussion of "golden parachutes"), Civil law and the present time, collection of articles dedicated to the memory of M.I. Braginsky, ed. V.N. Litovkina, K. B. Yaroshenko. Moscow, Statut Publ., 2013 ("ConsultantPlus"); Eremina S.N. Property relations in the sphere of labor and civil law: Problematic issues of the subject of legal regulation, Russian Justice, 2015, no 6, pp. 8-12; Kuznetsova V.V. The work of the head of the organization. Legal regulation, ed. Yu.P. Oryol. Moscow, Contract Publ., 2016; Lushnikov A.M., Lushnikova M.V. On the interpretation of the employment contract, News of universities. Jurisprudence, 2005, no. 2, pp. 62-70; Lushnikov AM, Lushnikova MV. The course of labor law, vol. 2, 2009, Moscow, pp. 368-371; Lushnikov A.M. The development of the doctrine of the employment contract in the post-Soviet period: an overview of some issues, Herald of labor law and social security law, 2016, no. 10, pp. 26-48; Tarusina N.N., Lushnikov A.M., Lushnikova M.V. Social contracts in law. Moscow, Prospect Publ., 2017; Chesalina O.V. The legal nature of the contract on the provision of labor for workers, Journal of Russian Law, 2015, no. 4, pp. 66-77.

[3] For example, A.I. Bychkov published a work that absorbed a number of his journal publications: Bychkov A.I. Mixed contract in the civil law of the Russian Federation. Moscow, Infotropic Media Publ., 2013.

2. Mixed contracts: main issues

The formulation of the main provisions of the doctrine of mixed contracts is under development and needs to be studied on indicated as well as other aspects of this issue, including consideration of the specifics of regulation of mixed contracts in private international law; comparative legal studies of the institution of mixed contracts are relevant as well. The analysis of a number of other pressing issues is required, including the following questions:

1. the relationship of the terms (elements) of various contracts that are part of the mixed contract;
2. classification of mixed contracts;
3. separation of mixed contracts from other similar legal phenomena;
4. limits of freedom of will during the conclusion of mixed contracts;
5. characteristics of obligations derived from mixed contracts;
6. validity of mixed contracts (including questions of loss or invalidity of contracts);
7. breach (of terms) of mixed contracts and legal consequences of their breach;
8. questions connected with the termination (including volitional termination) of mixed contracts;
9. possibility of the existence of poly-branch mixed contracts and their specificity.

The appearance of a mixed contract in legal science and legislation is based on the diversity of real economic life, which is much richer than the formalized constructions.

Nowadays, the category of "mixed contract" is one of the main categories of civil law, since with its help one of the facets of the fundamental principle of freedom of contract is revealed (Article 1 and Article 421 of the Civil Code of the Russian Federation). A mixed contract allows to bring specific contractual forms closer to the specific circumstances of legal reality and the needs of the parties to the contract, while not at all weakening the effectiveness of civil regulation.

3. Elements of a mixed contract

One of the most important tasks in the context of understanding the meaning of a mixed contract is the understanding of the category of "contract elements". This is connected to the fact that the legislator in paragraph 3 of Art. 421 of the Civil Code of the Russian Federation, as well as researchers on this issue define mixed contracts through the category of "elements". Strictly speaking, the elements of contracts may be understood as different legal phenomena based on the context in which we consider the contract: transaction, contractual relationship (obligation), contract-procedure, or contract-document.

Without going into a discussion about the essence of a civil law contract, we refer to paragraph 1 of Art. 420 of the Civil Code of the Russian Federation, according to which the contract is an *agreement* of two or more entities on the establishment, amendment or termination of civil rights and obligations.

Given this legal definition, it appears that in paragraph 3 of Art. 421 of the Civil Code of the Russian Federation the legislator described the contract as a transaction, and we are talking about combining in a contractual form the *content (i.e. terms)* of several different agreements (contracts).

The terms of the contract in the Russian doctrine are usually understood as a way of fixing the rights and obligations of the parties arising from the contract legal relationship(s)[1]. As Yu. A. Tarasenko points out in this case, "when speaking of the content and terms of the contract, we mean the content of the rules of conduct that the parties have established for themselves and which constitute an agreement (consent)"[2].

Thus, a mixed contract involves a combination of several groups ("bundles") of terms that are characteristic of several different contracts. These large structural units that make up the content of a mixed contract can be conditionally referred to as component contracts.

4. Essential terms of a mixed contract

What are the requirements for essential component contracts of a mixed contract? The essence of this issue is whether the general form of a mixed contract can give "vitality" to one of its component contract, for which there is no agreement of the parties on all the essential terms of this component contract and which would, in ordinary circumstances (in the form of an unmixed contact), be "not viable", that is, recognized as not concluded.

In our opinion, a mixed agreement requires all the essential terms (first of all, terms in relation to the subject) that are necessary for recognition of each of the component contracts that make up the mixed contract.

There is interesting interpretation used by the legislator in paragraph 3 of Art. 421 of the Civil Code of the Russian Federation for the expression "the elements of *various* contracts". Apparently, the indicated contractual structures should be understood as contracts the dissimilarity of which is indicated in the Civil Code of the Russian Federation, in other laws, as well as in decrees of the President of the Russian Federation or in resolutions of the Government of the Russian Federation[3]. This conclusion follows

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[1] Braginsky M.I., Vitryansky V.V. *Dogovornoe pravo: obshchie polozheniya* [Contract law: general provisions]. Moscow, p. 238.

[2] Civil law: important issues of theory and practice, ed. V.A. Belov. Moscow, 2007, p. 413 (author of essay 11 – Yu. A. Tarasenko).

[3] S.A. Khokhlov pointed out this nuance: "Part two of the Civil Code does not solve the question at which level of legal regulation the allocation of new types and varieties of agreements is possible. This is a problem to be solved in the first part of the Code... According to the literal meaning of this article (we are talking about Art. 421. – D.O., M.Ch.), named, typical contracts can be provided and regulated in addition to the Civil Code by other federal laws, as well as by decrees of the President of the Russian Federation and resolutions of the Government of the Russian Federation." (Khokhlov S. A. The conceptual basis of part two of the Civil Code, Commentary on the Civil Code of the Russian Federation (part two), ed. O. M. Kozyr, A L. Makovsky, S. A. Khokhlova. Moscow, 1996 ("ConsultantPlus").

from the fact that according to paragraphs 3-4 of Art. 3 of the Civil Code of the Russian Federation other legal acts containing civil law norms include two types of regulatory legal acts: decrees of the President of the Russian Federation and resolutions of the Government of the Russian Federation. This should be taken into account, since paragraph 3 of Art. 421 of the Civil Code of the Russian Federation mentions various contracts stipulated by law or other legal acts. In other words, the law describes contracts named in civil law, i.e. unitary (unmixed) contracts.

The difference in contracts may be due either to the structure of the contract itself, enshrined in legal norms, and / or due to the structure of a regulatory legal act (for example, in the Civil Code of the Russian Federation the rules on different contract types are placed in different chapters, while the rules on different subtypes of contracts within the type are mentioned in different paragraphs).

In our opinion, it follows that various contracts, according to the meaning of paragraph 3 of Art. 421 of the Civil Code of the Russian Federation, shall be appended with *different types* of contracts (purchase and sale, lease, contract, etc.) or *different classes* of contracts within the same contract type (e.g., the terms of contracts for the supply and sale of real estate may constitute a mixed contract).

The system of civil contracts enshrined in law is an objective phenomenon. This is seen as one of the manifestations of the fundamental property of law – *the formal certainty of civil law norms*[1]. This is expressed, in particular, in the fact that the normative models of contracts (sets of terms and other essential contractual signs established by law) are formalized.

It is important to emphasize that when named (unitary, unmixed) contracts are indicated, it is a question of the existence of a specific contractual model, rather than simply mentioning the name of a contract. The name of the contract implies the existence of its special regulation, expressed in fixing the elemental and non-elemental features of the contract. The direct (indication of the name) or indirect reference to the mixed agreement should be distinguished from named contracts. For this reason, it is hardly possible to agree with some authors who propose to distinguish mixed contracts designed by the legislator[2], citing as such a lease-sale contract (Article 501 of the Civil Code of the Russian Federation).

To our opinion, mixed groups should include two groups of such contracts:[3]

- mixed contracts combining elements of contacts known only to objective law as named contracts;
- mixed contracts combining elements of contracts which are both named and unnamed in objective law. In relation to this case, it is worth noting that even

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[1] Regarding the problem of formal certainty of law, see for example: Shaburov A. S. Formal certainty of law. Diss. Cand. of legal sciences. Sverdlovsk, 1973.

[2] Tatarskaya E. V. Op. cit.

[3] M.I. Braginsky does not deny the possibility of such a combination, see: Braginsky. M.I. Fundamentals of the doctrine of unnamed (unmarked) and mixed contracts ... P. 60.

when mixing the terms of a named and unnamed contract, we need a regulatory model ("name") of at least one component contract. In other words, the terms of at least one named contract must be in the mixed contract. The combination of the terms of two unnamed contracts, from the point of view of the legislator, does not lead to the formation of a mixed contract.

When the mixed contract consists of the terms of the named and unnamed contracts, then the provisions on certain types of contracts are applied to unnamed component contracts only by analogy (clause 1, Article 6 of the Civil Code of the Russian Federation), since there are simply no special provisions on the subject.[1]

The construction of a mixed contract is clearly necessary for those cases when there arises the question of the qualification of the contract and the competition of the rules applicable to it: is it a barter, or a "barter-like", but legally different contract, a joint venture contract or a mixed contract combining loan, contract award and agency service? In this case, the single-order phenomena are compared: the contracts provided for in part two of the Civil Code of the Russian Federation (whereas it hardly makes sense to compare, for example, the contract of sale and agreement on forfeit, or contract award and pledge agreement).

Apparently, contracts on ensuring the fulfillment of obligations[2], due to their accessory character and other characteristics, do not form mixed agreements in combination with the terms of the agreements of the second and fourth parts of the Civil Code of the Russian Federation. At the same time, if we are talking about a combination of terms of single-order (accessory) nature of contracts – contracts to ensure the fulfillment of an obligation (say, a forfeit agreement with the terms of a pledge agreement), then, it seems, this combination can be recognized as a mixed contract.

5. Does a mixed contract produce a single obligation or a number of obligations?

One of the key issues in the doctrine of the mixed contract is its characterization as a fractional (fragmentary) or unified (even syncretic)[3] structure. Upon discussion of this issue, we can point out the question of the unity of the content of the mixed contract.

In the academic works there is an opinion regarding a *single obligation*, which always arises by conclusion of a mixed contract. For example, A.A. Sobchak, describing a mixed contract, wrote: "In fact, when a buyer accepts an obligation to perform certain action instead of paying the purchase price, the relationship that has arisen can be divided into two separate obligations (purchase and sale, performance of action) only purely

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[1] Actually, it is the absence of specific normative regulation that characterizes unnamed contracts.

[2] See for example Gongalo B.M. The doctrine of securing the obligations. Moscow, 2002.

[3] Syncretic (from Greek synkretismos – connection) – consisting of heterogeneous, contradictory elements, but being holistic.

theoretically. In reality, a single obligation of a mixed nature arises."[1] Moreover, according to A.A. Sobchak, "it is precisely such a combination within the framework of a single obligation that determines the uniqueness of mixed contracts."[2]

In support of this position, D.I. Stepanov argues: "A mixed contract should be distinguished from a complex contract: the first contract, combining the elements of different contracts, serves as the basis for the emergence of a single obligation, and the second one generates two or more obligations combined by a single economic goal."[3] According to V.A. Pischikov, in the case when the contract of sale is modified in such a way that payment of the purchase price is replaced by counter-performance of the work (transfer of the thing versus performance of the work), a certain *"single mixed obligation"* arises.[4]

In our opinion, such a conclusion is hardly correct, at least because of the relative autonomy of the parts of the contract, which, in particular, is indicated by the content of Art. 180 of the Civil Code of the Russian Federation.

Most contracts give rise to a certain set of known obligations. In the fair opinion of I.B. Novitsky and L.A. Lunts, "a mixed contract is a contract, which gives rise to obligations that are part of two or more typical contractual relations regulated by law".[5]

Obviously, for example, the obligation to transfer the property to the buyer by the seller cannot in any way be part of another obligation, or be identified with it (e.g. the obligation to pay for the purchased item by the buyer), regardless of whether it is the mixed or the unitary contract formed the basis of both obligations.

At the same time, the contract is a construction of *interrelated* obligations.[6] Otherwise (if this mutual connection did not exist), for example, a contract of sale could be qualified as two separate donation contracts (donation of things and donations of money).

Most contracts are bilaterally binding and equivalently reimbursable. This is reflected in the presence of, as a rule, *two different obligations* which are reciprocal and interdependent:

- non-monetary property obligation (for the transfer of ownership of a thing, the provision of services, the performance of work, transportation, the provision of other property not in the form of money);[7]

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1 Sobchak A.A. Mixed and complex contracts in civil law, Soviet State and Law, 1989, no. 11, p. 64.

2 *Ibid*. P. 64.

3 Stepanov D.I. Services as an object of civil rights. Moscow, 2005, p. 209.

4 Pischikov V.A. Op. cit., p. 70.

5 Novitsky I. B., Lunts L. A. A general doctrine of commitment. Moscow, 1950, p. 102.

6 See for example: Rybalov A.O. "Simple" and "complex" obligations (some aspects of the dispute about the concept of obligation), Lawyer, 2005, no. 5, pp. 2-7.

7 In international private law, these obligations are commonly referred to as characteristic performance of a contract or performance that is critical to the content of the contract. This category is of key importance for the purposes of conflict regulation using dispositive norms based on the lex venditoris binding. In Russian law, this is carried out in paragraphs 1–4 of Art. 1211 of the Civil Code of the Russian Federation.

- monetary obligation, the performance of which (payment of money) economically compensates the performance of a non-monetary ("commodity") obligation.

Different types of contracts differ mainly in their non-monetary property obligations. A monetary obligation (payment of money) is the same for any onerous contracts, whether it is a payment for the purchased goods, or a payment of rent, or payment for the services provided. Whereas the content of a commodity obligation is specific for each type of agreement: transfer of ownership of a thing or transfer of a thing for temporary possession and use, etc. The above also confirms that the price, as a rule, is not an essential condition of the contracts and can be replenished in other ways (clause 3, Article 424 of the Civil Code of the Russian Federation), while the condition on the subject is always essential (paragraph 2 of clause 1 of Article 432 of the Civil Code of the Russian Federation).

Given the foregoing, it seems important to distinguish between mixed contracts in which:

- non-monetary ("commodity") obligations are non-reciprocal, and a monetary obligation is opposed to them; for example, a party to such a mixed contract is a debtor in all non-monetary property obligations (say, in an obligation to transfer things into property and in a obligation on performance of services); the other side of the mixed contract is the debtor only for a monetary obligation;
- non-monetary obligations ("commodity") are reciprocal and interdependent; such a contract is not legally a barter, although in an economic sense it is similar to it.[1]

The indicated nuance is important both for the classification of mixed contracts and for solving the practical *question of restrictions on the conclusion of mixed contracts* (on restrictions on freedom to conclude a mixed contract, see above).

Thus, it seems that *no specific* ("mixed", etc.) *obligations* by virtue of concluding a mixed contract *are formed*.

The obligation to transfer things into property from a mixed contract is exactly the same as if it arose from a unitary contract of sale. A monetary obligation from a mixed contract is no different from the same obligation, but from a unitary contract. Actually, this is what determines the applicability of the same rules to both unitary and mixed contracts – the generated obligations are the same.

The obligations of the mixed contract, considered separately, are not specific.[2] They are united only by the fact that the set of all these obligations has a *common ground*, a single legal fact (conclusion of a mixed contract) and a single goal. One mixed contract

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[1] See Information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation dated 24 September 2002, no. 69 (Bulletin of the Supreme Arbitration Court of the Russian Federation, 2003, no. 1), which states the following: bilateral transactions involving the exchange of goods for services that are equivalent in value do not relate to the barter contract (clause 1); a contract under which goods are transferred in exchange for the right to claim property from a third party cannot be regarded as a barter contract (clause 3).

[2] In particular, A. A. Simolin relied on this logic in his reasoning, see: A. Simolin. Mixed contracts and studies on particular obligations. P. 2623-2625.

replaces several legal facts (contracts), acting as a single common form for several different groups of contractual terms.

On the other hand, in the group of obligations from a mixed contract, there exists not just a mutual conditionality of obligations, but a interrelation between obligations that are characteristic for *different contract types* (classes) at the same time, and this interrelation can have legal significance.

In other words, neither in a unitary nor in a mixed contract occurs or can occur a merger of two (or more) completely different obligations. The practical significance of this argument lies in the fact that each of these obligations may be fulfilled or not fulfilled (improperly performed). This affects the fate of the mixed contract in different ways, depending on the design of a particular contract and, accordingly, the significance of this obligation for the system of other obligations generated by this mixed contract.[1]

The boundaries of freedom of contract in concluding mixed contracts. One of the aspects of studying the design of a mixed contract is the problem of the limits of civil law regulation. The very subject of civil law makes it unreasonable to excessively regulate the contractual relations. The norm on mixed contracts, formulated in paragraph 3 of Art. 421 of the Civil Code, is of course a measure of freedom in the field of contract law. At the same time, this norm acts as a normatively established boundary between the discretion of the parties and the imperativeness of legislation.

Considering the problem of the limits of freedom of contract in relation to the conclusion of mixed contracts, it is necessary to highlight and discuss, in particular, the following issues:

- the question of the compatibility of the terms of different contracts in the structure of a mixed contract;
- cases of concluding a mixed contract with the abuse of contractual freedom.

A potentially large number of options for mixed contracts, which can be concluded by "collecting" them from the terms of the named contracts, is balanced by certain restrictions on contractual freedom. From a theoretical point of view, such restrictions may be due to:

1) formal legal basis, if it is a direct prohibition of the law in a particular situation (for one person or another) to conclude a mixed contract, including adding the terms of other contracts to a binding contract, making it mixed;

2) the essence of the transaction (contract) and / or *obligations* arising from it, which exclude mutual combination with each other; the normative categories "*essence of the obligation*" (Article 156 of the Civil Code of the Russian Federation), "*essence of the transaction*" (Articles 310–316, 397, 406, 417 of the Civil Code of the Russian Federation) cover a different range of restrictions on concluding a mixed contract, including restrictions due to:

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[1] A number of practically significant questions of this kind were posed and considered by Yu.A. Tarasenko: can any part of a mixed contract be declared void (invalid) or is it possible to terminate a mixed contract due to violation of any part of its terms? (Tarasenko Yu.A. Mixed contract, Arbitration justice in Russia, 2007, no. 4).

- subject composition, the availability of special legal capacity;
- the specifics of the content of the rights and obligations of the emerging legal relationship (obligation);
- the object of the emerging legal relationship (obligation).

The conclusion of a mixed contract as a form of *abuse of law*. Finding the optimal balance between the free will of the parties to the contract and the imperativeness of objective law, among other things, serves to achieve the effectiveness of civil regulation.

Clause 3 of Art. 421 of the Civil Code of the Russian Federation does not extend the freedom of contract per se: this freedom has already been established by norms of a more general nature (clause 2, Article 1 and Article 8 of the Civil Code). The value of clause 3, Article 421 of the Civil Code of the Russian Federation is different and it consists in the *stabilizing contractual practice and law enforcement*. Its goal is to create a legislative core for areas of contractual practice that need new flexible forms.

The general legislative construction of a mixed contract is a sort of a "spine" for flexible contractual constructions. For the market or business, not only freedom is important in the sense of a variety of contract types. No less, but often more important is the predictability and stability of the rules of conduct. No market is able to function effectively in the absence of well-known and consistent rules of the game. This entails the most difficult task: *to combine rigidity* (in the sense of structural harmony, clarity of the ratio of the *contractual construction* to the existing standards and, accordingly, its predictability) with the *flexibility and uniqueness of a specific economic situation*. This task is precisely solved by the normatively fixed structure of the mixed contract.

Attention should be paid to the paragraph 2 clause 3 Art. 421 of the Civil Code of the Russian Federation: *the rules on contracts*, the elements of which are contained in the mixed contract, *are applied* to the relations of the parties under a mixed agreement, *unless otherwise provided by the agreement of the parties* or the substance of the mixed contract.

From the literal interpretation of the above provision of clause 3 of Art. 421 of the Civil Code of the Russian Federation, it follows that the parties may by their agreement *exclude* the application to their relations of any (!) provisions of civil law (for example, the relevant imperative norms contained in the legislation on consumer protection). Thus, when a consumer concludes purchase and sale contracts and work and service contracts separately, the relations of the parties will be subject to the relevant imperative (and dispositive) rules. However, if one concludes a *mixed contract* with the specified subject composition, combining all the same conditions for sale, work and services, then the parties will formally be able to free themselves from the action of all imperative norms on contracts, elements of which make up the mixed contract.

In this case, we are talking about distortions, that is about the attempts to give a contractual construction a meaning that is completely non immanent to it, about the attempts to distort the key properties of the contract (presumption of retribution, etc.). In our opinion, in the studied case of clause 3 of Art. 421 of the Civil Code of the

Russian Federation, the legislator was inaccurate, allowing the parties to the contract to practically paralyze[1] the effect of imperative norms of contract law contained in part two of the Civil Code of the Russian Federation. This does not correspond to the true meaning of the design of the mixed contract on the scale of the whole mechanism of civil law regulation.

In these conditions, it is advisable to apply the position of clause 3 of Art. 421 of the Civil Code of the Russian Federation restrictively and in conjunction with clause 1 of Art. 422 of the Civil Code of the Russian Federation, not allowing the derogation from the relevant peremptory rules of contract law. In our opinion, freedom from the relatively clear framework of normative regulation of the system of named contracts should be granted only to unnamed contracts. It is they (and not mixed contracts) that can be based only on general provisions on obligations and the analogy of law.

6. Differentiation between mixed contracts and other phenomena of the law of obligations

First of all, mixed contracts, as mentioned above, should not be equated with *unnamed contracts*[2].

A named contract is notable for a certain rigidity of construction; and it is precisely this rigidity that does not always suit entrepreneurs and other participants in civil turnover.

An unnamed contract, on the contrary, is flexible, but its practical use and stability in the context of the relevant judicial arbitration practice are often unpredictable in nature – the conclusion of an unnamed contract is a kind of "leap into the unknown"[3].

In descending order of the existence of loopholes in regulation, reducing the degree of flexibility and atypicality of the contract, we can build the following linear series of contractual structures:

- Unnamed, completely novel contract. This is the most flexible structure, but also with the greatest likelihood of loopholes. Here the regulation is based on the

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[1] This apt word, used in the work of M.I. Braginsky and V.V. Vitryansky in the analysis of the construction of a mixed contract, very accurately reflects this legal situation (Braginsky M.I., Vitryansky V.V. Op. cit., p. 331) .

[2] This is also indicated by M.I. Braginsky, see: Ibid., pp. 7-8, 61.

[3] For example, some time ago, entering into unnamed contracts in the form of settlement forward contracts, entrepreneurs faced the problem of qualifying these contracts in judicial arbitration practice as aleatory transactions, and therefore not enjoying legal protection (see: Decree of the Constitutional Court of the Russian Federation of 16 December, 2002, no. 282-O "On the termination of proceedings in the case of verification of the constitutionality of Article 1062 of the Civil Code of the Russian Federation due to a complaint of Bank Societe Generale Vostok Commercial, joint-stock bank, Legislation Bulletin of the Russian Federation, 2002, no. 52 (part two), Article 5291.). To solve this problem, it was necessary to amend the Civil Code of the Russian Federation, which was subsequently done by the legislator (Federal Law of 26 January, 2007, no. 5-FZ "On Amending Article 1062 of Part Two of the Civil Code of the Russian Federation", Legislation Bulletin of the Russian Federation, 2007, no, 5, Article 558).

general norms of civil law on contracts (obligations), business customs[1], analogy of the statute and analogy of law[2].

- Mixed contract consisting of the terms of the named contracts combined with the terms of the unnamed contracts (partially unnamed contract). From the position of every participant in a civil turnover, a mixed contract is a compromise between the convenience, flexibility of the contractual structure, on the one hand, and the stability, predictability of law enforcement, on the other. Regulation is based on a combination of relatively free from loopholes regulation of named contracts with general rules on contracts (obligations), as well as business customs, analogy of statute and analogy of law.
- Mixed contract consisting only of the terms of the named unitary contracts. A fairly flexible construction is present here. The regulation of such contracts is relatively loophole free, however, the general originality of the contractual structure as a whole imposes some specificity in relation to unitary contracts. In addition, in relation to these contracts, there is a certain amount of judicial arbitration practice[3].
- Unitary contract (named in a regulatory act). This is the most stringent of all the legal structures listed above. However, with respect to unitary contracts, there is both the most loophole free legal regulation and the most established judicial arbitration practice.

It follows that civil law *rules on mixed contracts* can only be of a *general nature*. A mixed contract exists in the rule of law only in the form of general permission, but not in the form of a detailed legal model.

If the legislator proceeds to a detailed and thus largely imperative regulation of the contract, then such a contract will inevitably turn into a named type (variety) of contract. For example, a vehicle rental contract with the provision of management and technical operation services (rental of a vehicle with a crew[4]) is a complex multicomponent contract stipulated and regulated by civil law (Articles 632-641 of the Civil Code of the Russian Federation), based on elements of simple traditional contracts. At the same time, strictly formally, this contract is assigned by the legislator to independent contract types.

One can also cite as an example the debatable issue of classifying a contract on "report" transaction as a mixed contract, which is a purchase and sale contract with an obligation to repurchase[5]. In particular, V.A. Belov characterizes it as a complex

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[1] See, for example: Porotikov A.I. Custom in civil law, Extended abstract of Cand.Sc. (Law) Dissertation. Moscow, 2003, pp. 19-20.

[2] Braginsky M.I., Vitryansky V.V. Op. cit., pp. 328-329.

[3] See for example a number of provisions in the mentioned above Information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation dated 24 September 2002, no. 69.

[4] See Vavilin E.V. Rental of vehicles: Legal aspects. Moscow, Alfa-Press Publ., 2005, pp. 59-71.

[5] See Belov V.A. Civil law: General and special parts, course book. Moscow: Center YurInfoR Publ., 2003, pp. 210-211; Ivanova E.V. Settlement forward contract as a forward transaction. Moscow, Walters Kluver Publ., 2005, pp. 129-139.

contract[1]. In this case, the terms of two sequential and inverse ("mirror") purchase and sale contacts are combined. Herewith, both **contracts-components** will be the same not only in type, variety, but even in their subject, since in both cases the same securities are sold (whereas a mixed contract, in the generally accepted sense, involves a combination of contracts of various types or varieties). However, these contracts-components are *different* from the point of view that each of the parties to the "report" contract exchange the status of the seller and the buyer at a different time. In this regard, the question arises: should the "report" contract be considered a mixed one? In other words, should we interpret clause 3 of Art. 421 of the Civil Code of the Russian Federation in the sense that a mixed contract necessarily involves a combination of contracts of various types or varieties?

It seems very interesting to look at the question of the relation between mixed contracts and *contracts, named in part one of the Civil Code of the Russian Federation*.

The construction of a mixed contract is clearly necessary for those cases when the question arises of the qualification of the contract and the competition of the rules applicable to it. Is it a contract of exchange or a similar but legally different contract? Is it a joint venture contract or a mixed contract combining a loan, labour and agency service? And other situations. In this case, we compare the same order phenomena – the contracts provided for in part two of the Civil Code of the Russian Federation. Whereas it hardly makes sense to compare in a competitive context, for example, a purchase and sale contract and a penalty agreement, or a labour contract and a loan contract. Apparently, the security agreements of part one of the Civil Code of the Russian Federation[2], due to their security arrangements and other characteristics, in combination with the terms of the contracts of part two or part four of the Civil Code of the Russian Federation, do not form mixed contracts.

At the same time, part one of the Civil Code of the Russian Federation also mentions another variety of contracts (for example, the agreement on compensation – Art. 409), the combination of which with the contracts regulated in other parts of the Civil Code of the Russian Federation may perhaps be recognized as mixed contracts. Therefore, the question of the relation between mixed contracts and contracts of part one of the Civil Code of the Russian Federation requires further study.

One should not ignore the question of the relation between the mixed contracts and *contracts with the original name*.

The legal meaning of the "mixed contract" category follows directly from the content of clause 3 of Art. 421 of the Civil Code of the Russian Federation. In essence, it is introduced by the legislator for the purpose of ensuring the proper qualification of contractual forms concluded in the practice of civil turnover. In particular, in law enforcement it is extremely important to distinguish between the *novelty* of the

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[1] Belov V.A. Op. cit., p. 210. However, regarding the category of "complex agreement", the doctrine today lacks the unity of opinion. For more detailed analysis see Braginsky M.I. Fundamentals of the doctrine of unnamed (unmarked) and mixed contracts... Pp. 65-67.

[2] See, in particular: Gongalo B.M. The doctrine of securing obligations. Moscow, Statut Publ., 2002.

construction and content that are inherent in unnamed contracts and the superficial *originality of the name* of the contract.

This problem is relevant due to the fact that most of these contracts with new, original names ("investment contract", etc.) are actually mixed, not unnamed, contracts. A similar situation often arises in contractual practice when the parties uncritically, mechanically reproduce economic concepts ("investments", "business project", etc.), replacing the setting of the terms of the contract on the basis of civil law categories. As a result, specific actions for the execution of such contracts are still a combination of the execution of several traditional contracts (purchase and sale, labour, loan, joint adventure, etc.). In such cases, the construction of a mixed contract allows qualifying such contractual relations without prejudice to the interests of the parties, but with the preservation of the effectiveness of civil regulation.

The need to draw borders between the mixed contracts and *unitary contracts with delivery terms* cannot be ignored either.

We think that purchase and sale contract involving the delivery of goods to the buyer is not a mixed contract. In such cases, it is hardly possible to talk about the presence of the terms of the contract of carriage in the purchase and sale contract. In our opinion, we are talking only about changing the place of fulfillment of the seller's obligation to transfer the sold goods into the ownership of the buyer (Articles 316, 458, 497, 499 of the Civil Code of the Russian Federation), but not about a mixed contract. It does not matter for the buyer who exactly physically moves the goods to the necessary point in space (the seller himself and his employee, or delivery will be carried out by the carrier, seller's counterparty). Having delivered the goods to the required place, the seller will be deemed to have fulfilled precisely the obligation of the purchase and sale contract, and not a contract of carriage.

One should also distinguish between mixed contracts and *unitary contracts containing terms on the obligation of one of the parties to the contract to conclude other contracts* that relate to the subject of this agreement.

For example, the seller's obligation to insure the goods being sold at the time of their delivery to the buyer is characteristic of international trade practice[1]. From this point of view, the following example, which is given as an illustration of a mixed contract (in terms of insurance terms), is not perfect: "For example, a contract for supply of goods may include conditions for its insurance, storage, carriage, loading and unloading, etc., which go beyond the traditional purchase and sale agreement, but at the same time do not require the conclusion of several contracts"[2]. Such conditions, as well as the condition for the transfer of goods to the buyer in a designated place, in our opinion, do not make the purchase and sale contract a mixed contract, since the seller does not

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[1] Thus, the seller's obligation to conclude an insurance contract is covered by the delivery bases of CIF and CIP Incoterms as in force in 2000 (publication no. 560 of the International Chamber of Commerce).

[2] See: Civil law: Course book, ed. Prof. E.A. Sukhanov, 2nd ed., vol. 2, part 1. Moscow, BEK Publ., 1999, p. 154.

become an insurer, and the buyer does not become their counterparty-insurant. In such cases, it is not a mixed contract between the seller and the buyer, but a reference to other independent contracts that one of the parties is required to enter into, along with other actual or legal actions to fulfill the obligations of the purchase and sale contract.

7. Classification of mixed contracts

In the domestic civilistic doctrine, it is customary to classify contracts on various grounds[1], highlighting following contracts:

- compensated and uncompensated;
- unilaterally binding and mutual;
- real and consensual;
- main and preliminary;
- free and binding;
- mutually agreed and adhesion;
- for benefit of parties to the contract or of the third party;
- fixed-term;
- conditional;
- aleatory and commutative;
- fiduciary and commercial;
- concerning all citizens and requiring special legal capacity of the parties to the contract[2].

Mixed contracts also make it possible to distinguish their various types, i.e. allow classification based on the grounds mentioned. The need for their classification is due to the fact that for each independent type of a mixed contract there may exist a fundamentally different legal regulation.

At the same time, looking ahead, we note that, apparently, the above mentioned traditional classification of contracts is applicable only to **mono-branch** (single-branch) mixed contracts, in their well-established narrow civic understanding.

As regards **poly-branch** (different-branch, many-branch) mixed contracts, the applicability of this classification requires a separate discussion (such contracts will be discussed in more detail below).

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[1] For the classification of contracts, see in particular Belov V.A. Civil law: General and special parts, course book. Moscow, Center YurInfoR Publ., 2003, pp. 179-181; Braginsky M.I., Vitryansky V.V. Contract law: general provisions. Moscow, Statut Publ., 1997, pp. 308-323; Civil law of Russia. General part: Course of lectures, ed. O.N. Sadikov, Moscow, Yurist Publ., 2001, pp. 724-729; Civil law: Course book, ed. E.A. Sukhanov, 2nd ed., vol. 2, part 1. Moscow, BEK publ.,, 1999, pp. 156-163; Civil Law: Course book, ed. Yu.K. Tolstoy, A.P. Sergeeva, vol. 3, 6th ed. Moscow, Prospect Publ., 2003, pp. 594-602; Ioffe O.S. Law of obligations. Moscow, Juridical literature Publ., 1975, pp. 33-38.

[2] e.g. the status of an entrepreneur (for a commercial concession contract) or license (for a bank account contract, insurance contract), etc.

Let us consider some types of mixed contracts in the context of the particular basic contractual classifications mentioned above.

Speaking of the division of contracts into **main** and **preliminary**, it should be emphasized that the preliminary contract may precede the conclusion of various contracts, including mixed ones. However, the preliminary contract itself cannot due to this relate to mixed contracts, since its meaning consists only in the parties accepting the obligation to conclude the main contract in the future (Article 429 of the Civil Code of the Russian Federation).

A mixed contract can be either **unilaterally binding** (for example, a combination of the terms of gratuitous loan (uncompensated use) and interest-free loan), and **mutual**.

On the basis of the presence of a counter property grant, mixed contracts can be divided into **compensated** and **uncompensated**.

As a general rule, the presumption of compensatory nature of contracts applies to mixed contracts (clause 3 of Article 423 of the Civil Code of the Russian Federation). An example of an uncompensated mixed contract is an agreement combining elements of donation (Article 582 of the Civil Code of the Russian Federation) and a loan (Article 689 of the Civil Code of the Russian Federation). However, uncompensated mixed contracts should be distinguished from contracts in which there are two or more counter non-monetary property obligations. For example, an agreement on the transfer of an item into ownership with a counter obligation to perform work (such an agreement has compensated nature).

In our opinion, it is the existence of mixed compensated-uncompensated (or vice versa) contracts is also theoretically permissible. For example, the donor, under a single contract, presents an item and provides paid services to the donee, receiving payment not for the item, but for the named services. In this case, gratuitousness takes place in the gift obligation following from the contract, and compensatory nature is present in another obligation of the same contract – for the provision of services.

There is also a classification of mixed contracts into **real** and **consensual**. In the framework of this classification, in our opinion, one should admit, firstly, the existence of generally consensual mixed contracts (for example, purchase and sale contract or services contract), which are in the majority. Secondly, there can be real mixed contracts (loan and one-time transportation of goods). Thirdly, the possibility of concluding a contract, which in a single form covers the terms of consensual and real contracts, is not excluded. For example, this may include a contract that combines the terms of a services contract and a loan contract.

Thus, it can be argued that the application of the established classification of contracts does not represent the complexity of civil law mixed contracts that combine the same or extremely close component contracts, say, purchase and sale and labour (both contracts are compensated, consensual, mutual). And, on the contrary, the usual classification should be applied with certain reservations when it comes to mixed

contracts, which involve a combination of very heterogeneous component contracts (a real and unilaterally binding loan contract together with a consensual bilaterally binding lease contract).

The above classifications are mainly dichotomous, therefore, a unitary contract cannot have both mutually exclusive features that underlie the classification: a consensual contract (compensated, unilaterally binding, etc.) itself cannot be real at the same time (uncompensated, bilateral, etc.), and vice versa. A mixed contract, by virtue of its synthetic nature, contains the features of several mixed contracts at once. At the same time, such synthetics should not be absolutized, because although a mixed contract combines the terms of several contracts in a single form, there is no complete merger of all the properties of component contracts.

The opposite features of the various component contracts that are part of the mixed contract do not, as one might think, give rise to a single by nature compensated-uncompensated or consensual-real agreement. A mixed contract is an autonomous system of contracts (contractual terms) united by a common form, therefore it is obvious that such a *system is characterized by individual qualities* of each of its *elements*. However, despite the commonality of their form, the component contracts still remain different contracts. This is especially pronounced at the stage of the implementation of various contractual terms, when we are talking about a contract-procedure.

Accordingly, it is important to understand that the *generally accepted dichotomous classification refers to its individual component contracts*, but not to the mixed contract as a whole. This removes the apparent inconsistency in the classification of mixed contracts on generally accepted grounds. Thus, for example, it is impossible to conclude a contract that *simultaneously* combines the conditions of sale and gift of *the same item* (the impossibility of simultaneously qualifying a separate contractual obligation both as compensated and uncompensated).

According to the **type and** variety of mixed contracts de lege lata, mixed civil law contracts in their generally accepted interpretation should be divided into:

- Mixed contract *within one contract type* (type – single, varieties – different). In particular, a combination of certain types of purchase and sale contract is not excluded. Thus, this can be the sale of real estate (Article 549 of the Civil Code of the Russian Federation) and delivery (Article 506 of the Civil Code of the Russian Federation), if the seller's obligation to transfer real estate (building) and deliver movable property (equipment specifically for this real estate property) is established by a single contract. It is also permissible, for example, to combine the terms of construction contracts (Article 740 of the Civil Code of the Russian Federation) and the contract for design and survey work (Article 758 of the Civil Code of the Russian Federation), etc.
- Mixed contract consisting of *different contract types*. In particular, the practice allows for the combination, as noted above, of the terms of a purchase and sale contract and labour contract, or a sales contract and paid services contract. It

seems that *such combination* within a mixed contract of various contractual terms is of the *most common (typical) nature*. It should be noted here that some contracts (in the sense of the totality of the contractual terms) are not capable of independent existence, and are usually objectified only within the framework of another contract. For example, this includes the condition of a commercial loan (clause 1, Article 823 of the Civil Code of the Russian Federation). Therefore, we can say that the existence in the agreement of such provision (even if it is the only provision) automatically makes the contract where it appears a mixed contract[1].

In addition, speaking of mono-branch mixed contracts, the temporal characteristics of the emergence of legal relations generated by a mixed contract should be taken into account, in particular, the following:

- *simultaneous* emergence and existence of several *obligations* characteristic to various contracts;
- *stage-by-stage, gradual* emergence and existence of *obligations* characteristic to various contracts. An example of such a staged approach is obligations arising from such mixed contracts as a hiring-sale one (Article 501 of the Civil Code of the Russian Federation), when prior to the transfer of ownership of goods to the buyer (Article 491 of the Civil Code of the Russian Federation), the buyer is the hirer of the goods transferred to them; a rent with the subsequent redemption of the rented item (Article 624 of the Civil Code of the Russian Federation), when, on the contrary, obligations first arise from the rent, and then replaced by other obligations[2].

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[1] S.S. Zankovsky, emphasizing the fact that the provision of a commercial loan is inextricably linked with the contract the condition of which it appears, he writes: "Any mismatch in time of counter obligations under the concluded contract when goods are delivered (work is performed, services are provided) before payment or payment made prior to the transfer of goods (performance of work, rendering of services) can be considered as a commercial loan", see Commentary on the Civil Code of the Russian Federation (part two), ed. T.E. Abova, A.Yu. Kabalkin, Moscow, Urite Publ., 2003 ("ConsultantPlus") (author of the commentary – S.S. Zankovsky).

[2] M.I. Braginsky, V.V. Vitryansky rightly notes in this regard: "In other cases (outside the framework of privatization), the inclusion in the lease of the terms for the purchase of the leased property by the tenant means the transformation of the lease into a mixed contract" (Braginsky M.I., Vitryansky V.V. Contract law. Contracts on the transfer of property. Book 2, ed. 4. Moscow, Statut Publ., 2002 ("ConsultantPlus")). However, some authors reject the qualification of such a contract as a mixed contract. Thus, E.N. Vasilyeva writes: "The transfer of ownership of the leased asset from the lessor to the lessee (purchase of the leased property) is an independent basis for the transfer of ownership of the contract, one of the derivative methods of the emergence of ownership. It should not be mixed with other grounds, such as a purchase and sale contract. Purchase and sale can also formalize relations, the result of which will be the transfer of ownership of the leased item from the lessor to the lessee. However, these relations are governed by the sale and purchase rules, and in this case the parties enter into a sale and purchase agreement" (Commentary on the Civil Code of the Russian Federation (part two) / Edited by T.E. Abova, A.Yu. Kabalkin. Moscow, Urait Publ., 2003 ("ConsultantPlus") (commentary by E.N. Vasilieva). The second position is also supported by other authors (see: Sergeev A., Tereshchenko T. Contract of property lease with the option to purchase, Corporate Lawyer, 2007, no. 1, p. 44–45).

Other classic contractual classifications are applicable to mixed civil law contracts. Moreover, among mixed contracts, in our opinion, it is necessary to distinguish the following:

- *free* contracts and contracts obligatory for conclusion (including public contracts);
- *mutually agreed* contracts and *contracts of accession* (the latter require special attention with respect to the possibilities of the abuse of freedom of contract upon their conclusion; see the above example with the contract practice of credit history bureaus);
- contracts *in favor of their participants* and contracts *in favor of third parties* (however here we should separate actually mixed contracts and related legal phenomena, as mentioned above);
- *fixed-term* mixed contracts in their different variations;
- mixed contracts concluded under *suspensive* or *dissolving conditions*.

Along with the indicated traditional classifications of mixed contracts, other divisions can be distinguished. In our opinion, mixed contracts *de lege ferenda* can be divided into:

– mixed contracts *combining elements only of contracts known to objective law, named therein*. An example is a mixed contract with a consumer, including the terms of a retail sale contract, and containing the provisions of a household contract (work on connecting purchased goods). In some cases, a very peculiar mixed contract may be concluded, which, although it includes well-known elements, but in general is not related to named contracts. This, for example, is a combination of counter-directed sale and purchase that occurs in practice: despite the economic similarity of such a mixed agreement with a barter agreement, it seems impossible to qualify it as a unitary barter agreement[1];

– mixed contracts, *combining elements of named in objective law, as well as elements of unnamed contracts*. Strictly formally based on clause 3 of Art. 421 of the Civil Code of the Russian Federation, a contract containing elements of a contract named in regulatory enactments and elements of an unnamed agreement will not be considered a mixed one (as mentioned above), however, in our opinion, such an excessively narrow interpretation does not meet the principle of freedom of contract (Articles 1, 421 of the Civil Code of the Russian Federation). In this regard, mixed contracts should include the contracts that combine elements of both contracts already known to the law and elements of unnamed contracts. In particular, this may be a contract formalizing the institute of surrogate motherhood, or a contract on bearing children (these contracts will be discussed below), which along with family law terms, may contain the terms of a contract for the gratuitous

[1] In clauses 1, 3 of the Review of the practice of resolving disputes related to a barter agreement (Information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation dated 24 September 2002, no. 69 "Review of the practice of resolving disputes arising from a barter agreement", VAS Bulletin of the Russian Federation, 2003, no. 1) formulated, in particular, such provisions that are directly related to the institution of a mixed contract: bilateral transactions involving the exchange of goods for services equivalent in value, do not apply to the barter agreement (clause 1); an agreement under which goods are transferred in exchange for the assignment of the right to claim property from a third party cannot be considered as a barter agreement (clause 3).

use of property, a contract for the provision of medical and other services, using the design of the contract in favor of a third party, etc.

It is possible to distinguish mixed contracts depending on the **socio-economic field of their application**. On the one hand, these are *consumer* mixed contracts (with the participation of consumer citizens). On the other hand, in contrast to consumer mixed contracts, it is necessary to distinguish mixed contracts of *business* and other economic significance.

Consumer mixed contracts (with the participation of consumer citizens) contracts are quite widespread in civil circulation. For example, they include sales contracts with the conditions for the installation of purchased equipment and training of the buyer. In this case, we can talk about the existence of the conditions of a household contract (installation of equipment), or the provision of services (setting up equipment, training). At the same time, it should be noted that sales contracts with the condition of delivery of goods to the buyer are not mixed contracts (see below for more details).

In connection with the conclusion of mixed consumer contracts, the problem of hard-selling of the consumer goods, works and services that are not necessary to the consumer is often quite acute, which is expressly prohibited by Art. 16 of the Law of the Russian Federation of 7 February 1992 no. 2300-1 "On the Protection of Consumer Rights"[1] (as amended by the Federal Law of 9 January 1996 no. 2-FZ). In this case, there may be an unprofitable and unwanted by the consumer combining the terms of the contract for the sale of goods and the terms for the service (but at a price higher than the average market price). This hard-selling takes place due to the fact that contracts with the participation of consumer citizens are usually done by way of accession (Article 428 of the Civil Code of the Russian Federation).

Mixed agreements of business and other economic significance may be the following:

- Contracts with legal entities. Thus, in many cases, a contract will be mixed when concluded by the issuer of securities with the organizers or underwriters of the issue[2], often represented by a large bank or group (syndicate)[3] of banks often acts. Of course, such contracts will have different legal qualifications, depending on the particular economic model underlying them, but they may include, for

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[1] *Vedomosti* [Bulletin] of the Congress of People's Deputies of the Russian Federation and the Supreme Council of the Russian Federation, 1992, no. 15, Art. 766; SZ RF, 1996, no 3, Art. 140; 1999, no. 51, Art. 6287; 2004, no 52, Art. 5275; 2006, no. 31 (part 1), Art. 3439; no. 48, Art. 4943.

[2] Such agreements of issuers of securities with the organizers (underwriters) of the issue in foreign practice are usually referred to as the "Underwriting Agreement". In addition, the functions of the organizer of the issue, financial adviser to the issuer, the underwriter of the emission or payment agent (for settlements with purchasers of placed securities) in a number of cases are performed by one person (for more details, see, for example, Carro D., Juillar P. International economic law: Course book, translation from French. Moscow, International Relations Publ., 2001, p. 554-567; Nobel P. Swiss financial law and international standards, translation from English. Moscow, Walters Kluver Publ., 2007, p. 832-833 onwards).

[3] If the organizers of the issue are a group of banks under the auspices of the parent bank ("Lead Manager"), then, in principle, a mixed contract may also be the agreements (in particular, "Agreement Among Underwriters") concluded between member banks of such a syndicate (see Carro D., Juillar P. Decree, op. cit., p. 556-557, 561-563; Nobel P. Decree, Op. cit., p. 834).

example, the terms of the commission agreement (or agency agreement) along with the terms of the agreement for legal and consulting services, or combine the terms of the agreement on the acquisition of placed shares (bonds)[1] with the terms of the contract for the provision of the same services. Another example of such contracts is indicated by A.V. Kachalova: syndicated loans (loans provided by a group (syndicate) of banks, usually for significant amounts) should often be qualified as mixed contracts[2];

- Contracts with a counterparty – with an individual. These are, in particular, agreements with the head of the organization (such agreements are subject to Articles 273-281 (chap. 43) of the Labor Code of the Russian Federation, but may also include civil law conditions). Contracts in the field of professional sport and contracts with creative workers also often combine labor and civil law conditions. Of course, not all contracts involving these categories of persons are mixed. Moreover, as a rule, such mixed contracts will be classified as poly-branch contracts (see below).

Mixed contracts have another gradation. And here again we quote the opinion of I.B. Novitsky and L.A. Lunts, who wrote: "A contract is a mixed contract, if it gives rise to obligations that are part of two or more typical contractual relations regulated by law"[3]. Scholars give examples of two varieties of mixed contracts: transfer of ownership of an item for work performed and provision of a dwelling for a fee for use along with the provision of services (agreement with a holiday home, sanatorium). And then they write: "In the first example, the obligation regulated by law in relation to various typical contacts is established by the mixed contract partly in relation to one party, and partly the other party; in the second example, these combined obligations take place in respect to one party."[4]

The indicated nuance is important, because most of the contracts are bilaterally binding and equivalently reimbursable contracts, which is expressed, as a rule, in the presence of two counter-directed and interdependent obligations:

- property *non-monetary obligation* (on transfer of ownership of an item, provision of a service, performance of work, transport, provisions of other property not in the form of money)[5];

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[1] Such a transaction, when it comes to the purchase of placed securities from the issuer directly, is not a sale and purchase agreement, as V.G. Horovater rightly points out (Horovater V.G. Transactions in the placement of shares, Important problems of civil law, issue 11, collection of articles, ed. O.Yu. Shilohvost. Moscow, Norma Publ., 2007, p. 92-95).

[2] Kachalova A.V. Legal features of the conclusion of agreements on the provision of syndicated loans, Legislation, 2006, no. 2 ("Garant").

[3] Novitsky I.B., Lunts L.A. General doctrine of commitment, Moscow, Gosyurizdat Publ., 1950, p. 102.

[4] *Ibid*.

[5] In international private law, these obligations are usually called "characteristic performance of the contract" or "performance that is critical to the content of the contract." This category is of key importance in international private law for the purposes of conflict regulation using dispositive norms based on the lex venditoris binding. In particular, in Russian law this is implemented in clauses 1-4 of Art. 1211 of the Civil Code of the Russian Federation.

- *monetary obligation,* the performance of which (payment of money) is economically compensated for the performance of a commodity obligation.

Different types of contracts differ primarily in **these** property **non-monetary** obligations, since a monetary obligation (payment of money) is the same for any onerous contracts, whether it is payment for the purchased goods or payment of rent or payment for services rendered. Whereas exactly the content of a commodity obligation is specific for each type of agreement: transfer of ownership of a thing, or transfer of a thing into temporary possession and use, etc. The aforementioned confirms that the price, as a rule, is not an essential condition of the contracts and can be replenished in other ways (clause 3, Article 424 of the Civil Code of the Russian Federation); while the terms on the subject are always an essential condition (paragraph 2 of clause 1 of Article 432 of the Civil Code of the Russian Federation).

Based on the above mentioned, it is important to distinguish between mixed contracts in which:

- *non-monetary obligations are not of a counter-character,* and a monetary obligation is opposed to them. One party of such a mixed contract is a debtor in all non-monetary property obligations (for example, the obligation to transfer things into property and the contractual obligation). The other party of the mixed contract is the debtor only for the monetary obligation(s). Often, a person paying for all civil rights received by this person is a consumer citizen (for example, one party combines the status of a seller and a contractor (executor), while the other is a buyer and a customer, under the terms of a sale and contract, respectively);
- *non-monetary liabilities are counter-directed* and interdependent. Such an contract is not legally a barter, although in an economic sense it is similar to a barter[1].

An important classification basis for mixed contracts of private law nature is their division into mixed contracts *complicated by a foreign element*, and into contracts that are not marked with such specificity (*without a foreign element*).

The first group – is mixed contracts complicated by a foreign element[2] – needs to be considered independently. The importance of the analysis of its constituent contracts (in practical terms) is due to the current specifics of the domestic economy, when the establishment by Russian entrepreneurs of legal entities abroad (primarily the so-called offshore companies) is widely used as a specific form of ensuring property interests and guaranteeing business security. Therefore, a significant part of contracts with such companies has a Russian character one way or another[3].

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[1] See the Review mentioned above, approved by the Information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation dated 24 September 2002, no. 69.

[2] As N.I. Marysheva points out, a foreign element in a legal relationship can manifest itself in various ways, for example, "Art. 1186 of the Civil Code mentions civil law relations with the participation of foreign persons "and complicated by another foreign element, including in cases where the object of civil rights is abroad" "(Commentary on the Code of Civil Procedure of the Russian Federation, ed. M.S. Shakaryan. Moscow, Velby, Prospect Publ., 2003, p. 629).

[3] Suffice to say that according to the Federal State Statistics Service, among the leading countries in terms of foreign investment in the Russian economy in 2006 are the Republic of Cyprus and the British

The structure of a mixed contract is in great demand in the field of international economic relations. On the one hand, this is due to the diversity and heterogeneity of such relationships. On the other hand, the construction of a mixed contract is manifested in the form of a wide distribution of procedural and legal conditions (elements) in private law contracts complicated by a foreign element, and we are talking mainly about arbitration clauses[1].

The freedom of a contract complicated by a foreign element, as is well known, is additionally manifested in the ability to subordinate the contract to one or another rule of law. The principle of autonomy of will (*lex voluntatis*), enshrined in Art. 1210 of the Civil Code of the Russian Federation, is also valid for mixed contracts. In turn, this requires consideration of the issue of divisibility (*or splitting) of collision binding*[2]. Thus, in contracts complicated by a foreign element, a very interesting phenomenon can occur when the contract not only has a mixed content, but each of the groups of contractual terms will be subject to the rule of law of different states. In the domestic legal system, the basis for this is paragraph 4 of Art. 1210 of the Civil Code of the Russian Federation, where the domestic legislator positively resolved the question of the divisibility of the obligatory statute of the treaty complicated by a foreign element[3].

Thus, it is not difficult to imagine a mixed contract between Russian and foreign entrepreneurs, which includes three groups of contractual terms: work, purchase and sale, and on-the-spot provision of services, and by virtue of an agreement of the parties:

- the terms of the contract will be subject to Russian law;
- the terms of the sales contract will be subject to German law[4];

Virgin Islands – a quasi-state entity, the overseas territory of Great Britain (see: http: // www .gks.ru / free_doc / 2007 / b07_11 / 23-12.htm). As you know, these are the institutions of offshore companies that are popular among Russian entrepreneurs. It is noteworthy that Cyprus in terms of investment is ahead of Germany, France, the UK and the United States. This circumstance is known and taken into account by state authorities, in particular, by the Federal Antimonopoly Service (see: Lebedev V. The true owners of offshore and antitrust laws (Review), Mergers and Acquisitions, 2003, no. 2, p. 4-6.).

[1] Their wide distribution is associated not least with great opportunities for the enforcement of decisions of arbitration courts abroad (international commercial arbitration), due to the existence of a universal international agreement – the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded in New York in 1958 (Bulletin of the Supreme Arbitration Court of the Russian Federation, 1993, no. 8), in which the Russian Federation also participates. The execution of judicial acts of state courts abroad, as you know, is a more difficult task, in the absence of a corresponding universal international agreement.

[2] Lunts L.A. The course of international private law: in 3 vols. Moscow, Spark Publ., 2002, p. 237-238.

[3] See Commentary on the third part of the Civil Code of the Russian Federation, ed. A.L. Makovsky, E.A. Sukhanova. Moscow, Yurist Publ., 2002 ("Garant") (commentary, article 1211 – A.S. Komarov); Commentary on the Civil Code of the Russian Federation, part three, ed. T.E. Abova, M.M. Boguslavsky, A.G. Svetlanova. Moscow, Yrait-Izdat Publ., 2004 ("Garant") (authors of article 1211 – E.V. Kabatova, M.M. Boguslavsky, I.S. Zykin, M.P. Bardin).

[4] In particular, of practical importance for the execution of such a mixed contract will be the fact that German civil law is characterized by such a feature as abstract property contracts (see Vasilevskaya L.Yu. Doctrine on property transactions under German law. Moscow, Statut Publ., 2004; Zhalinsky A., Roericht A. Introduction to German law. Moscow, Spark Publ., 2001, p. 322-323, 421-422). See also

- the terms of the consultation services contract will be subject to French law.

However, it is worth considering that the Russian legislator does not encourage such a form of realization of the autonomy of will, allowing it only by the explicit will of the parties to the contract, when they consciously, based on the actual specifics of the agreement and taking into account all legal consequences, let their contractual relations be subject to such complex fractional regulation. By default, the dispositive norm of clause 5, Article. 1211 of the Civil Code of the Russian Federation, which, firstly, prevents the splitting of the obligatory statute of the mixed contract, and, secondly, ensures the establishment of a competent law and order in the absence of an agreement on the applicable law.

Let us consider in more detail the dispositive rule for determining the obligatory statute of a mixed contract. In domestic law, such conflict regulation is based on the principle of the closest relationship ("Proper Law of the Contract") [1] and is presented in clause 5 of Art. 1211 of the Civil Code of the Russian Federation, *which provides that a contract containing elements of various contracts is applicable, unless otherwise provided by law, the conditions or the substance of the contract or the totality of the circumstances of the case,* ***the law of the country with which this contract, considered as a whole, is most closely related***.

It seems that in conjunction with clause 5 of Art. 1211 of the Civil Code of the Russian Federation, the provisions of clauses 3 and 4 of Art. 1211 can be used to justify the close connection of the mixed contract, considered as a whole, with one or another rule of law. However, it is worth noting here that on the basis of the conflict rules noted, it is relatively easy to determine the applicable law for those mixed contracts where non-monetary obligations (characteristic performance) are not counter-directed, and are carried out by only one party to the contract, say, it acts as both the seller and the contractor. If in a mixed contract the characteristic performance is counter-вшкусеув (sale against a contract, etc.), then relying on the dispositive rules of clauses 3, 4 of Article 1211 of the Civil Code of the Russian Federation will be significantly more complicated.

The following circumstance should be mentioned here. The legislator has established that for domestic *substantive law* (clause 3, Article 421 of the Civil Code of the Russian Federation) the quantitative aspect (the proportion of the terms of a particular contract) is not of fundamental importance, as a result of which such a contract is governed by all those

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the comparative legal characteristics of this institution, given to him by E.A. Sukhanov, who draws attention to the uncharacteristic nature of property contracts (transactions) for the Russian civilistic tradition (Sukhanov E.A. On types of transactions in German and Russian civil law, Civil Law Bulletin, 2006, no. 2. p. 5-26).

[1] However, there is a debate in the literature about whether the principle of closest connection is a proper conflict binding. See, for example, Zvekov V.P. Conflicts of laws in private international law. Moscow, Walters Kluver Publ., 2007, p. 133-135; Kabatova E.V. Changing the role of the collision method in private international law, Private international law: modern practice, collection of articles. Moscow, TON-Ostozhye Publ., 2000, p. 9; Private international law: Course book, ed. G.K. Dmitrieva, 2nd ed. Moscow, Velby. Prospect Publ., 2008, p. 385-393 (author of the chapter – G.K. Dmitrieva); Khodykin R.M. The criterion of the closest connection in private international law, Moscow Journal of International Law, 2002, no. 4, p. 208-221.

rules that apply to the relevant terms of contracts[1]. It is worth noting that on the basis of this article of the Civil Code of the Russian Federation, the substantive qualification of not only ordinary (Russian) mixed agreements, but also those mixed agreements complicated by a foreign element that are subject to Russian law, is carried out.

A different situation develops within the framework of the conflict regulation of mixed contracts complicated by a foreign element: in clause 5 of Art. 1211 of the Civil Code of the Russian Federation, for the purpose of formulating a conflict of reference, the legislator took a different (majority) approach, i.e. the contract is considered as a whole, on the principle of "or / or". This approach to regulation can be seen in Art. 3 of the UN Convention on Contracts for the International Sale of Goods of 1980, which stipulates that this Convention does not apply and does not regulate c*ontracts for the sale of goods in which the obligations of the party supplying goods consist mainly of the performance of work or the provision of other services*. In other words, the quantitative aspect of the content of the mixed contract, and above all its price, can acquire important legal significance and become a significant help for the court or arbitration in the matter of qualifying the contract and determining the law applicable to it.

8. The issue of poly-branch mixed contracts (contracts based on the norms of several branches of law)

It is reasonable to talk about a combination of single-branch terms in a contract, or conditions belonging to different branches of law in a mixed contract, therefore *single-branch* and *poly-branch* mixed contracts can be distinguished.

A new understanding of civil contractual validity is provided, in particular, by a study of this area from the point of view of the issues of poly-branch relations of civil law. Moreover, such an analysis is carried out in two main directions: consideration of the influence of the public law sphere on the field of contractual regulation, and also study of the reverse process – the use of contractual and other related civilistic structures in the field of public law. Such studies constitute one of the areas of the school of civil law, which is taking shape at the Department of Civil and Entrepreneurial Law of Kazan State University as part of the scientific direction "Interconnection of Private and Public Law Regulation of Property and Non-Property Relations".

The category of a mixed contract can be also considered in the context of studying poly-branch relations of civil law, which allows one to distinguish such a variety as a poly-branch mixed contract, which will be discussed below.

Usually, mixed contracts are referred to as contracts that combine elements of the contracts indicated in the second part of the Civil Code of the Russian Federation. Given the content of the above norms of Art. 421 of the Civil Code of the Russian Federation, an understanding of a mixed contract in the narrow regulatory sense is

[1] In other words, a proportional or fractional approach to the regulation of mixed contracts is enshrined (application of the relevant norms to different contractual terms separately) in paragraph 3 of Art. 421 of the Civil Code of the Russian Federation.

permissible. In essence, this is a well-established view of a mixed contract as a purely civilistic phenomenon.

In addition to this, a mixed contract, in our opinion, should be considered in a broader context. Within a scientific discussion, we have put forward the thesis that such contracts can combine the conditions of private law (branches of civil, labor, family law) nature. In addition, we can talk about the combination of civil law and public law terms within a mixed poly-branch agreement.

We proposed to call such contracts *poly-branch mixed contracts.* The terminology we have chosen requires some explanation. Perhaps, it would be easier and more harmonious to use of the term "cross-sectorial contracts". However, when we talk about cross-sectorial legal phenomena (concepts)[1], we usually mean such legal categories that are either at the intersection of different branches (in the field of their joint action), or have direct connections corresponding to other phenomena in other branches.

The essence of the mixed contract, on the contrary, is that it is a synthetic phenomenon that *embraces* and *combines* several different in terms of the branch origin conditions within a single form. The essence of a mixed contract lies precisely in such a union. Therefore, we are talking about "poly-branch"[2] i.e. "multi-branch" contracts combining the conditions of several branches of law in a single form.

It might be uncustomary, but the category of poly-branch mixed contracts should be attributed to the number of legal constructions that are in demand due to the development of science, technology and the complexity of modern civil circulation.

As part of the discussion on poly-branch mixed contracts, we should consider their classification.

The first group includes relatively uniform poly-branch mixed contracts, covered only by the private law subsystem. In other words, these are mixed contracts that combine in their content conditions of **only private law origin**. These include poly-branch mixed contracts, consisting of:

- *civil and labor elements*, which may include:
- contracts with professional athletes,[3] persons of creative professions (show business, modeling business, etc.);

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[1] It should be noted that such an expression is used not only in legal science, but also in court practice. For example, the existence of such an intersectoral concept as" individual entrepreneurs is directly indicated in paragraph 2 of the Decree of the Constitutional Court of the Russian Federation of June 6, 2002 No. 116-O "On the refusal to accept for consideration a complaint of a citizen Prytula Galina Yuryevna about a violation of her constitutional rights by the provisions of the fourth paragraph of paragraph 2 of Article 11, Articles 39, 143 and 235 Of the Tax Code of the Russian Federation" (Collection of legislation of the RF. 2002. No. 29. Article 3007).

[2] The Greek prefix "poly-" introduces the meaning of "many", "malti-", see: Efremova T.F. The new dictionary of the Russian language. Interpretation and word formation. Moscow, Russian language Publ., 2000 (http://www.gramota.ru).

[3] For similar agreements, see, for example, Vaskevich V.P., Chelyshev M.Yu. Legal regulation of professional sports, Russian Justice, 2001, no. 7, p. 35-36; Vaskevich V.P. Civil law regulation of relations in the field of

- contracts with heads of organizations and members of collegial management bodies of legal entities;
- separate agreements between the employer and employee on non-disclosure of confidential information, or employment contracts containing such conditions, which will be discussed below;
- employment contracts containing conditions on the distribution of rights to official intellectual property objects (works, inventions, etc.).
- *civil and family law* elements (conditions), which, in particular, include:
  - o prenuptial agreement, which gives rise to both family law (regulation of alimony payments) and civil law consequences (changing the management of common joint ownership);
  - o contract with a surrogate mother for bearing a child[1];
  - o an agreement on the transfer of a child or children to foster care.[2]

The second group of poly-branch mixed contracts is represented by mixed contracts combining **conditions of private law origin** with **public law conditions.** Such contracts include:

- contracts combining civil law material and procedural elements[3], for instance,
  - o civil contract containing arbitration clause[4];

professional sports: Diss. Cand. Legal Scien. Kazan, 2006, p. 10, 17-18; Chelyshev M.Yu. Entrepreneurial activity in professional sports: some controversial issues of law and practice, Business, Management and Law, 2003, no. 3, p. 101-106.

[1] However, there is an opinion on the classification of this contract as a purely civil law one. For example, S.S. Shevchuk writes on this issue: "There is no doubt that, in accordance with part two of clause 4 of Art. 51 of the Family Code, between married persons and a surrogate mother, an agreement is concluded that is in the nature of a civil law contract that generates obligations between its participants" (S. Shevchuk. Some issues of legal regulation of the use of artificial reproduction methods, Lawyer, 2002, no. 9, p. 60-63). For works of other authors on such agreements, see Maleina M.N. Personal non-property rights of citizens: concept, implementation, protection, 2nd ed., Moscow, MZ Press Publ., 2001, p. 78-80; Aivar L.K. Legal status of surrogacy in Russia. Loopholes in legislation, Legal World, 2006, no. 2, p. 28-35.

[2] Decree of the Government of the Russian Federation of 17 July 1996, no. 829 "On the foster family", Collection of Legislative Acts of the Russian Federation, 1996, no. 31, Article 3721. See on this issue Mikheeva L.Yu. Guardianship and trusteeship: Theory and Practice. Moscow, Walters Kluver Publ., 2004 ("Garant").

[3] It should be noted that mixed private law contracts with procedural conditions should be distinguished from the **settlement agreement** in civil, arbitration proceedings, as well as in enforcement proceedings in civil disputes. This phenomenon, in our opinion, is not a poly-branch mixed contract, since it is a special agreement, although it is civil law in content, but at the same time it is enveloped in a special procedural form. M.A. Rozhkova gives the settlement agreement a slightly different characteristic, understanding it as an fusion of a civil law transaction and procedural actions in the form of an affirming court ruling (see M. Rozhkova Material and procedural agreements named in the Arbitration Procedure Code of the Russian Federation, Economy and Law, 2004, no. 1, p. 77).

[4] When analyzing this mixed contract, one should take into account the discussion in legal science about the legal nature (material, procedural, mixed) of arbitration proceedings and, accordingly, the

- civil law contract, which includes a condition on a state court resolving disputes arising from this contract (agreement on contractual jurisdiction, prorogation of jurisdiction);[1]
- civil contract containing a condition on the distribution between the parties to the contract of possible future procedural costs associated with the consideration and resolution by the arbitration court of a dispute under this contract[2];

- contracts covering elements of only substantive law, but relating to private (civil) and public law, in particular, administrative law. For instance, the construction of a poly-branch mixed contract is required by administrative and environmental law, the example of which is the so-called production sharing agreement[3]. It is obvious that this agreement is largely of public law nature, defined by rules of administrative and financial law; at the same time, the question of whether they have conditions of a civil law nature remains open.

In addition, when considering poly-branch mixed contracts, as well as for single-branch mixed contracts, it is important to take into account **the temporal characteristics** of the occurrence of legal relations generated by a mixed contract, and point out the following:

- *simultaneous implementation* of several cross-sectorial conditions of a mixed contract. Thus, legal relations of different nature arising from one mixed contract may appear simultaneously. An example of this is contracts with managers or professional athletes, when contractual conditions of a labor and civil nature can objectively be implemented (in the form of appropriate legal relations) parallelly;
- *stage-by-stage implementation* of cross-sectorial contractual conditions of a mixed contract. Stage-by-stage development occurs in those cases when the simultaneous implementation (in the form of appropriate legal relations) of cross-

nature of the arbitration clause itself. For the detailed analysis of the views existing on this subject, see Rozhkova M.A. To the question of the legal nature of arbitration agreements ("ConsultantPlus"); Rozhkova M.A. A global deal: commercial use. Moscow, Statut Publ., 2005, § 4.7 Arbitration record (compromise), p. 136-144.

[1] See Art. 37 and Art. 249 of the Commercial Procedural Code of the Russian Federation, Art. 32 and Art. 404 of the Civil Procedural Code of the Russian Federation.

[2] See part 4,Art. 110 of the Commercial Procedural Code of the Russian Federation.

[3] See, for example Voznesenskaya N.N. Agreements on production sharing in oil industry. Moscow, 1997; Drozdov I.A. Contracts on the assignment for use of natural resources. Moscow, Prospect Publ., 2001; Kalanda L.V. Issues of legal regulation of economic (entrepreneurial) activities in the oil industry. Moscow, 2004, p. 130-150; Platonova N. Issues of legislative regulation of production sharing agreements, Economy and Law, 1998, no. 3, p. 56-61; no. 4, p. 32-38; Salieva R.N. Legal support for the development of entrepreneurship in the oil and gas sector of the economy. Novosibirsk, 2001; Naletov K.I. Once again on the legal nature of the concession agreement in the field of subsoil use, Legislation and Economics, 2005, no. 10, p. 64-73. Here we consider only the legal side of the issue. The actual economic and political side of a number of production sharing agreements, in the context of Russia's national interests, is often subjected to justified criticism (see, for example G. Veliaminov, International Economic Law and Process: Course book. Moscow, Volters Kluver Publ., 2004, § 589-589 ("Garant").

sectorial conditions is objectively excluded. An example of such stage-by-stage implementation is the confidentiality agreement with the employee discussed below. Here cross-sectorial by nature legal relations in a single document agreement, arise only sequentially: first, the employee has a labour law obligation to not disclose a secret, then it is replaced by a civil law obligation of the same content.

9. A common example of a poly-branch mixed contract: a civil law clause in an employment contract

In our opinion, one of the theoretically acceptable and fairly common contacts in Russian contractual practice is a poly-branch mixed contract, generated by the inclusion of a civil law term into an employment contract.

We should note that judicial practice does not deny the possibility of such a combination of terms[1]. Thus, the Plenum of the Supreme Court of the Russian Federation recognized the combination of the terms of a civil law contract and the terms of an employment contract within one contract form (possibly one document) as legal[2].

This interaction between different branches of law should not be understood simplistically. For example, the fact of subsidiary application by the court of certain norms of civil law to labor relations does not make such an employment contract a mixed poly-branch contract, but merely represents a way for the court to overcome a gap in labor law within the framework of resolving a specific case.

By combining the conditions arising from different branches of law in one contract, **it is unacceptable to distort the essence of the branch contract**. Civil law terms may be aimed at additional solutions for civil issues that are related to the specifics of the work of a particular employee, but not the deprivation of their rights and guarantees provided for by labor legislation.

For example, an employer's obligation to pay salaries cannot be removed and replaced with a civil obligation to pay money. This also applies to various bonuses and rewards for workers of a typical employment nature[3].

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[1] Resolution of the Plenum of the Supreme Court of the Russian Federation of 17 March 2004 no. 2 "On the application by the courts of the Russian Federation of the Labor Code of the Russian Federation" (as amended by Resolution of the Plenum of the Supreme Court of the Russian Federation of 28 December 28 2006 no. 63), Bulletin of the Supreme Court of the Russian Federation, 2004, no. 6; 2007, no. 3.

[2] We should point out that the mixed poly-branch contracts concluded in practice are very different, and the legal qualifications of their constituent elements deserve separate consideration. In particular, this refers to the terms of providing (giving) apartments to the employees, various bonuses, options for the purchase of securities, etc., included in the employment contracts with employees in top management category. Should they be qualified as labor conditions, or as the terms of a civil contract? The answer here is not always obvious. However, most of these forms of rewards and guarantees, apparently, still have a labor nature, despite the novelty of their names ("bonuses", etc.), as a rule, borrowed from foreign contractual practice.

[3] Despite that, such solutions are proposed by some authors, see Kanunnikov A.B., Kanunnikov S.A. Civil law conditions in an employment contract with professional athletes, Labor Law, 2006, no. 8, p. 10-14.

The same rule applies to liability. Obviously, regarding the employee's liability under labor law (substantive and disciplinary), parties cannot agree to exclude the rules of the Labor Code of the Russian Federation, subordinating the employee's liability to the Civil Code of the Russian Federation.

However, such attempts are taking place. For example, E.P. Gavrilov, criticizing the current legislation on trade secrets, writes: "The only way out of this difficult situation is seen in the conclusion of civil law agreements on the employee's compliance with a certain policy of keeping and not disclosing official and trade secrets and civil liability for its disclosure, including for transfer to third parties"[1]. However, such proposals ignore the imperative provisions of labor law; therefore, the legal consequences of concluding such agreements on the replacement of the employee's labor liability by civil law will still be determined by the application of part 4 of Art. 11 of the Labor Code of the Russian Federation.

The first striking example of this category of contracts is an *agreement on non-disclosure by an employee of information*[2] *constituting a trade secret of the employer, when such an obligation of the employee is valid both during the period of labor relations and after their termination*. Such an agreement should be recognized as a poly-branch mixed contract, since the obligation of non-disclosure of information is of a labor nature during the work period, and after the termination of employment, it is civil in nature.

We should emphasize the fact that when an employment contract contains the *term that trade secrets are not disclosed only for the period of work*, the mixed contract is not present (here the obligation of confidentiality is just one of the typical duties of an employee that has a labor nature). However, if the condition on the employee's *obligation not to disclose trade secrets outside the employment relationship* (after their termination) is included in the employment contract, we are dealing with a civil law obligation: there are no separate labor law relations between the former employee and the employer, since there is no work relationship. At the same time, the employer's legitimate interest in maintaining their trade secrets, which was known to their former employee, is obvious.

A mixed employment contract containing the corresponding civil law confidentiality clause solves the practical task set here. Relations of various legal branches, based on a single document-contract, **arise only sequentially**: at first, the employee's obligation not to disclose a secret is a labor obligation, then it is replaced (renewed)[3] by a civil liability of a similar content.

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[1] Gavrilov E.P. On the issue of protecting trade, official and personal secrets. Civil law aspects, Management and law, 2003, no. 5, p. 28. The author confirmed his views in the future publications as well, see Gavrilov E.P. Issues of legal protection of trade secrets, Economy and Law, 2004, no. 11, p. 3-13; Gavrilov E.P. On trade secrets, Electronic publication, prepared for "ConsultantPlus", 2005.

[2] In practice, it can also be referred to as a "Confidentiality Agreement", "Non-Disclosure Agreement", etc.

[3] Of course, the term "renewed" is used here figuratively, and such dynamics of cross-sectorial relations is not an innovation in the civil law sense of Art. 414 of the Civil Code of the Russian Federation; here we are only talking about some similarities between innovation and the phenomenon being analyzed – replacing one relationship with another.

Thus, the employment contract, which includes the term that the employee does not disclose the employer's trade secrets, both during the term of the employment contract and after its termination, legally contains two conditions[1]:

- *the term of an employment contract* establishing the employee's labor obligation not to disclose trade secrets. The procedure for its implementation and the consequences of violation are regulated by labor law. Moreover, such an obligation of the employee ends with the termination of the employment relationship (dismissal);
- *a term of a civil law* contract defining the civil law obligation of a person (former employee) not to disclose trade secrets obtained during the period of work. This obligation arises at the time of termination of employment. The procedure for its implementation and the consequences of the violation are regulated by civil law.

Another typical example of poly-branch mixed contracts is employment contracts, which contain a condition on the distribution of rights between an employee and an employer for the results of intellectual activity. A number of professions (engineers, programmers, designers, artists, etc.) suggest the possibility of creating special property (inventions, works of fine art, topology of integrated microcircuits, etc.). These results of intellectual activity created by the employee in the course of their employment are commonly called official. The issue of the ownership of rights to these results in practice is one of the most pressing issues in the sphere of exclusive rights.

Part 4 of the Civil Code of the Russian Federation contains a system of contracts applicable in the field of intellectual property law (Article 1233 and others of the Civil Code of the Russian Federation), which also includes mixed contracts. For example, it is quite common to conclude mixed contracts combining elements of license agreements with respect to patentable results of intellectual activity (Article 1367 of the Civil Code of the Russian Federation) and contracts on transfer of rights to trade secrets (Article 1469 of the Civil Code of the Russian Federation).

Both in the legislation effective until January 1, 2008, and in part 4 of the Civil Code of the Russian Federation, the legislator widely uses the term "contract" when regulating relations regarding the services results of intellectual activity. Earlier, the legislator did not characterize the nature of such an agreement in any way: whether it is civil or labor law[2]. And this is despite the fact that a lot depends on the answer to this question, i.e. what the requirements for the form of the contract are going to be, and the consequences of non-compliance with it, the requirements for the content of this contract, liability for its violation, the procedure for resolving disputes, etc. The difference between these approaches is associated with the existence of differences in

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[1] Although this condition was fixed in the actual text – "The employee is obliged to keep secret during the period of work relations, as well as for 2 years after their termination" – the semantic indivisibility of such a condition is superficial – in fact, there are two cross-sectorial conditions here (labor and civil).

[2] It should be noted that the indication in the norms of civil law of the labor legal status of the parties to such an agreement in itself did not completely solve the question of the branch nature of this agreement.

civil and labor law regulation – as is well known, in labor and civil law the regulation of these aspects often differs significantly[1].

In the legal literature, this issue on the branch affiliation of agreements on the distribution of rights to official results of intellectual activity is debatable. Thus, O.V. Kostkova and V.A. Tymoshenko believe that the law of the Russian Federation "On Copyright and Related Rights"[2] refers to a civil law (copyright) agreement[3]. Whereas, for example, V.V. Pogulyaev, adhering to a different, more flexible approach, writes that "para. 1 clause 2 of Article 14 is a dispositive norm and is applied if the agreement between the employer and the author does not provide otherwise… Thus, the parties – the author and their employer – have the right to introduce the relevant provisions in the employment contract or conclude a separate copyright agreement, specifically stipulating the legal policy of future works"[4]. However, it is worth noting that in both cases, the authors are inclined to choose one of the two options of a mono-branch qualification of the agreement in question, not thinking of a poly-branch mixed contract.

One of the progressive introductions of Part 4 of the Civil Code of the Russian Federation was the use in a dispositive norm, by default distributing exclusive rights on official results of the intellectual activity in favor of the employer, of a unified verbal formula, "unless otherwise provided by an employment or other contract"[5]. In our opinion, this is the case of a civil contract, or a mixed poly-branch contract in the form of an employment contract complicated by a civil law condition.

Only clause 3 of Art. 1461 of the Civil Code of the Russian Federation on service topologies states that the exclusive right to a service topology belongs to the employer, unless otherwise provided by an agreement between them and the employee, i.e. in this case, the legislator uses the approach existing before 1 January 2008 to the issue analyzed here.

In our opinion, such a lack of normative reference to the possibility of choosing between concluding a mixed labor contract with a civil law term on the distribution of rights to

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1 For example, in civil law there is a presumption of guilt of the offender (clause 2 of Article 401 of the Civil Code of the Russian Federation), while in labor law the employee's guilt must be proved (see clause 4 of the resolution of the Plenum of the Supreme Court of the Russian Federation of 16 November 2006 no. 52 "On the application by the courts the legislation governing the liability of employees for damage caused to the employer", Bulletin of the Supreme Court of the Russian Federation, 2007, no. 1).

2 The Law of the Russian Federation of 9 July 1993 no. 5351-1 "On Copyright and Related Rights", Vedomosti of the Congress of People's Deputies of the Russian Federation and the Supreme Council of the Russian Federation, 1993, no. 32, Art. 1242; Collection of legislative acts, 1995, no. 30, Article 2866; 2004, no. 30, Article 3090.

3 Kostkova O.V., Timoshenko V.A. Article-by-article commentary on the Federal Law of 9 July 1993 no. 5351-1 "On Copyright and Related Rights ("ConsultantPlus").

4 Commentary on the Law of the Russian Federation "On Copyright and Related Rights" (article-by-article), V.V. Pogulyaev, V.A. Waipan, A.P. Lyubimov. Moscow, Justicinform Publ., 2006 ("ConsultantPlus") (commented by V.V. Pogulyaev).

5 See clause 2 of Article 1295 of the Civil Code of the Russian Federation on creative works; clause 3, Art. 1370 of the Civil Code of the Russian Federation on business inventions, models, industrial designs; Art. 1430 of the Civil Code of the Russian Federation on selection achievements (all relate to employment).

the results of intellectual activity, or a purely civil contract, does not have any grounds. Therefore, the above provision of clause 3 of this article should be interpreted in line with the general approach of the legislator, expressed in the majority of similar rules.

In other words, in Part 4 of the Civil Code of the Russian Federation, sets two versions of the contractual distribution of exclusive rights to official results of intellectual activity between the author-employee and the employer, namely:

- conclusion of an independent civil contract;
- conclusion of a poly-branch mixed contract, combining, within the framework of the general form, the conditions of both an employment contract and a civil law contract on the distribution of rights to results of intellectual activity. In particular, such a mixed contract can be executed by a document called "employment contract", but should include the corresponding condition (reservation) on the distribution of exclusive rights.

Thus, we can argue that with the adoption of part 4 of the Civil Code of the Russian Federation, the legislator supported the premise that we expressed earlier on the admissibility of concluding mixed poly-branch contracts, at least with respect to one of the variants of such contracts[1].

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[1] See: Ogorodov D.V., Chelyshev M.Yu. Practice, Legislation and economics, 2005, no. 10, p. 50-53; Id. Types of mixed contracts in private law, p. 53-59.

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