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OPPORTUNISTIC CONTRACT AS A FORM OF ECONOMIC BEHAVIOUR IN TODAY'S RUSSIAN BUSINESS

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Abstract

Behavioural uncertainty is an important factor in building contractual relations, which can lead to significant risks in the process of concluding and implementing a contract as the main tool for economic exchange. This article explores the most typical types of opportunistic contracts, based on the personal business experience of the authors and on the practice of interaction between business entities in today's Russian economy. An opportunistic (mined) contract is a written procedure for the interaction of economic agents providing for some contract terms and conditions that can significantly change the economic effect of the contract execution with an unjustified benefit for one of the parties to the detriment of the other party to the contract, which is not obvious at first glance, but can happen in the process of the contract implementation (or under the impact of a certain combination of external factors). The authors give a definition of an opportunistic contract, define its characteristics and consider some practical examples of the contractual opportunism manifestation. They conclude that the fundamental precondition for the widespread institutional practice of opportunistic (mined) contracts is an insufficient effectiveness of the judicial system and the judicial and other mechanisms for protecting the violated rights of business entities. The main negative

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effect of opportunistic contracts on economic processes is a significant increase in transaction costs.

Keywords: opportunistic (mined) contract; opportunistic behaviour; contractual opportunism; contractual behaviour; opportunistic pattern; informal arbitrators; fixers.

INTRODUCTION

Identification of risk factors associated with a contract before its conclusion is one of the most important measures to ensure the economic security, prevent financial or physical damages, reduce the likelihood of bankruptcy and protect the company's business reputation. A special place among the existing contractual risks and the factors determining the possibility of their actualization (changes in legislation, low-quality work of the legal service, force majeure, etc.) is occupied by the risk of deliberate non-fulfilment of contractual obligations by one of the parties to the contract. In the context of insufficient effectiveness of legal mechanisms for protecting the interests of participants in business transactions, the opportunistic behaviour of economic agents becomes not only possible, but also very beneficial for them, which has led to a widespread occurrence of opportunism in contractual relations. Over the past 10–15 years, the opportunistic contract has become one of the most common business models in the Russian economy.

This article explores the most typical types of opportunistic contracts, based on the personal business experience of the authors and on the practice of interaction between business entities in the Russian economy.

Behavioural uncertainty is an important factor in building contractual relations. Opportunism is one of the core assumptions for the existence of transaction costs; opportunism risks are taken into account when making investment decisions (Kundakchyan & Grigoryeva, 2016).

The methodological framework for analysing trends and prospects for the impact of the respective contracts in the context of risk management in Russia is based on the works by such foreign and Russian authors as E.V. Antonenko (2016); D. Benzl, E. Kozlova and E. Silova (2014); R.M. Kundakchyan and N.S. Grigoryeva (2016); F. Lumineau and B. Quelin (2012); H. Morita and M. Servátka (2014); B. Huo, Z. Wang and Y. Tian (2016); S.S. Lui, Y. Wong and W. Liu (2009); C. Cordes, P.J. Richerson, R. McElreath and P. Strimling (2006); W. Lu and L. Zhang (2016); L. Sun and S. Rath

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(2008). However, the causal relationship between the sphere of opportunistic behaviour and the characteristics of the implementing contractual relations requires an additional consideration (Kundakchyan & Grigoryeva, 2016). This article explores the most typical types of opportunistic behaviour in contractual relations and the legal practice of their treatment.

DEFINITION AND ESSENTIAL FEATURES OF OPPORTUNISTIC (MINED) CONTRACTS.

An opportunistic (mined) contract is a written procedure for the interaction of economic agents providing for some contract terms and conditions that can significantly change the economic effect of the contract execution with an unjustified benefit for one of the parties to the detriment of the other party to the contract, which is not obvious at first glance, but can happen in the process of the contract implementation (or under the impact of a certain combination of external factors). In Russian business practice, the term "mined contract" is used quite often, and the non-obvious terms and conditions that distort the economic meaning of the contract and turn it into an opportunistic one are defined as a contract "mine".

In general, the contract "mine" can be considered an opportunistic pattern embedded in the contract.

The typical signs of an opportunistic character (an "embedded mine") of a contract are the following:

1) Misrepresentation of the essential contract terms and the true intentions by one contract party in order to mislead the other one.

2) Provision of incomplete and asymmetric information about the deal terms.

3) Lack of reliable information about the actual behaviour of one of the parties after the contract conclusion (as a rule, such behaviour differs significantly from the expected one).

4) Growing asymmetry of risks in the process of the contract implementation (the risks for one of the parties are constantly growing, while the other party takes an unjustified advantage of this situation to their benefit).

5) Presence of certain conditions (intentions of one of the parties, external factors) that contribute to the contract transformation into an opportunistic one.

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The role of a number of specific institutional and psychological factors of business behaviour typical for the Russian economy and business culture is extremely important in the actualisation of opportunistic contracts.

The fundamental precondition for the widespread institutional practice of opportunistic contracts is an insufficient effectiveness of the justice system and the judicial and other mechanisms for protecting the violated rights of business entities.

EXAMPLES OF OPPORTUNISTIC CONTRACTS:

1. A fairly common example of an opportunistic contract (pattern) is a contract for the supply of goods (performance of work or provision of services), which allows one of the parties to the contract (the purchaser of goods, works or services) to obtain additional financial benefits through the maximum possible prolongation of the actual fulfilment of the party's contractual obligations (payments for the delivered goods, performed works or rendered services). For this purpose, the party introduces the following condition to the contract text: "In the event of non-fulfilment of contractual obligations by one of the parties, the non-fulfilling party is subject to penalties of 0.01% of the amount of outstanding obligations for each calendar day of delay in their fulfilment." In this case, the opportunistic pattern is based on the slowness and inefficiency of the justice system and the low level of legal culture among Russian businessmen: a simple calculation shows that in case of non-fulfilment of contractual obligations, the guilty party should pay penalty of 3.65% p.a. of the outstanding amount, which is significantly less than even the key interest rate of the Russian Federation Central Bank, which, for example, was 9.5% p.a. on February 21, 2022.

At the same time, after the changes introduced in 2015 to the Civil Code of the Russian Federation (hereinafter referred to as the RF Civil Code), item 4 of Article 395 does not allow the creditor to choose one of two options: a contractual penalty (in our case, 0.01% per day of the outstanding amount) or interest under item 1 of Article 395 of the RF Civil Code (in the amount equal to the key interest rate of the Russian Federation Central Bank). Until the introduction of item 4 into Article 395 of the RF Civil Code in 2015, judicial practice allowed the creditor to choose one of the specified penalties. Today, such choice is possible only if it is stipulated by law or expressly stated in the contract. In addition, unless otherwise provided by law or the contract, the

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creditor has the right to demand the recovery of losses caused by the contract violation in excess of the amount covered by the penalty (item 1 of Article 394 of the RF Civil Code). However, this provision is actually not enforceable due to an extremely complicated algorithm for substantiating the amount of damages in Russian courts.

In this case, the opportunistic strategy for the contract execution is the following: the purchaser of goods, works or services, having received them, informs the other party about impossibility of fulfilling payment obligations due to an unfavourable financial situation or even without any explanations. If the supplier of goods, works or services does not agree with the deferred payment, the only option is to go to court. In litigation, the purchaser's lawyers, using procedural manoeuvres, delay a court decision with the subsequent transfer of a writ of execution to the Federal Bailiff Service for a period of nine months to a year and a half. During this time, the outstanding amount is in the opportunist’s commercial circulations, bringing profits that significantly exceed 3.65% p.a. (Russian businesses usually prefer operations with the minimum profitability of 25% p.a.).

As a rule, the outstanding amount is paid voluntarily the day before or immediately after the initiation of enforcement procedures by the Federal Bailiff Service, which allows the opportunist to avoid paying the enforcement fee. The possible costs of compensating the plaintiff for legal expenses usually do not prevent such defendant from acting in this way. The state duty for commercial litigation is rather low. Moreover, the attorney fees and other legal expenses are recovered from the losing party under court decisions in rather modest amounts.

A thorough analysis of the contract terms and conditions, taking into account possible negative scenarios of its execution, would easily reveal an opportunistic pattern. However, the opportunists demonstrate the skills of subtle psychological manipulation, taking advantage of the weak legal culture among managers of Russian small and medium-sized businesses, who often do not consider it necessary to study the contract terms carefully enough, with a paradoxically high level of trust in their partners in the unstable conditions of fluctuating economy.

2. Another example of an opportunistic contract has a limited scope of application: it is used in major construction projects. This pattern is more difficult to implement than the first example, but it allows the opportunistic entity to get much more significant economic benefit through paying only half or two thirds of the contract value

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for building a large facility and also receiving a "bonus" in the form of multi-million dollar penalties imposed on the contractor or its property complex in case of the contractor's bankruptcy. The main factor that makes it possible to implement this type of opportunistic contracts is the low level of construction culture inherited from the times of the USSR, leading to failure to meet the exact deadlines and to provide proper quality at all stages of major construction projects. The partners to the contract considered below are a large federal developer and a Russian regional construction company acting as a contractor. The developer included a number of major provisions in the construction contract: 1. During the construction process, the contractor can receive from half to two thirds of the contract value, and the rest is paid after the construction completion certified by the customer; 2. The contract execution is strictly scheduled in terms of stages and quality of works. The contract terms provide for significant penalties imposed for failure to complete the construction stages on time and for performance with inadequate quality, which are calculated as a percentage of the price for the corresponding scope of work; 3. The customer carefully records and documents all violations of the contract terms during the construction process, but does not make any claims to the contractor until 95–100% completion of the construction project.

The mechanism for implementing this opportunistic pattern is described below. Immediately before the acceptance procedures for a nearly or completely constructed site, the customer's lawyers file claims against the contractor for shortcomings and violations of the terms of the construction contract, based on which the customer representatives refuse to sign the final acceptance certificate and to pay the rest of the contract value. In addition, they demand to pay the penalties stipulated in the contract. The contractor loses the lawsuit and either pays the penalties or goes bankrupt, after which its property may be transferred to the customer as a compensation for the unpaid penalties. In the legal context, the contractor can be actually blamed for all the problems arising in the construction project implementation.

3. One more example of the opportunistic pattern is the use of the so-called *pledge security*. In this scheme, a pledgor (a physical person or a legal entity) that has pledged a certain object (e.g., real estate) as collateral for a loan seeks to recognize the right of the pledgee to this object as absent, referring to some legal reasons. As a

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result, the lender may lose the opportunity to get back the loan amount, not to mention the accumulated interests.

It is possible based on the following provision of paragraph 2 of item 2 of Article 335 of the RF Civil Code: "If an object has been put in pledge of a pledgee by a person that was not its owner or that was not properly empowered to dispose of the property, about which the pledgee did not know and could not know (bona fide pledgee), the owner of the pledged property has the rights and duties of the pledgor envisaged by the present Code, other laws and the contract of pledge." At the same time, paragraph 3 of item 2 of Article 335 of the RF Civil Code stipulates: "The rules envisaged by paragraph 2 of the present item are not applicable if the object that was put in pledge had been earlier lost by the owner or by the person to which the object had been handed over by the owner for possession, or had been stolen from either of these persons, or had ceased to be in their possession otherwise against their will."

Thus, a claim for recognising the right (encumbrance) of the pledgee on the pledged object to be absent can be satisfied by the court even without proving that the *pledgee was acting in bad faith*, if the claimant proves that "the object that was put in pledge had been earlier lost by the owner or by the person to which the object had been handed over by the owner for possession, or had been stolen from either of these persons, or had ceased to be in their possession otherwise against their will." In such situation both the *owner of the pledged property* and the *pledgee* may be acting *in good faith*, but the legislators, "weighing" their rights and legitimate interests, give priority to the protection of the rights of the owner and place the risk of such an event (theft of property from the owner, etc.) on the *pledgee*. In general, this approach is recognized as fair and consistent with the legal practice of other countries.

We would like to consider a typical example of such pattern from the Russian law enforcement practice: Resolution of the Arbitration Court of the Northwestern Federal District no. F07-6074/2017 of June 30, 2017, on case no. A26-8858/2016 (Arbitration Court of the Northwestern Federal District, 2017).

Company 1 applied to the arbitration court with a claim against companies 2, 3 and 4 for enforcing the consequences of invalidity of the deal (sale and purchase agreement for non-residential premises) between companies 1 and 2 through returning the specified property to the plaintiff, recovering the disputed non-residential premises from the illegal possession of company 3 and recognising the encumbrance (mortgage

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pledge) on the property in favour of company 4 as absent. As a result, the resolution of the arbitration court of the first instance, left unchanged by the arbitration courts of the appellate and cassation instances, partially satisfied the claim: the consequences of the invalidity of the sale and purchase agreement for non-residential premises were applied in the form of returning the property to the plaintiff, with its withdrawal from the illegal possession by company 3, but the rest of the claim was denied.

The court identified the following facts of the case. Under the disputed agreement, the non-residential premises were sold by company 1, represented by director A., to company 2, represented by director B. Company 2 later sold the premises to company 3. The new owner (company 3) entered into an agreement with company 4 on the pledge (mortgage) of the disputed property as collateral for a loan issued to Mrs. C. (Director of company 3).

Later, director B of company 2 was found guilty of a tax crime by a criminal case judgement of a court of general jurisdiction, which came into legal force, During the criminal case consideration, it was established that B. prepared the above-mentioned contract for the sale of non-residential premises and other necessary documents, on which the signatures of A. (director of company 1) were forged. For the embezzlement of public funds, B. used both company 2, in which he was the managing director and the sole participant, and company 1 controlled by him, in which, according to the testimony of witness A., the latter was only the nominal founder and managing director. There were no actual money transfers for the property sale between companies 2 and 1.

As a result, the arbitration courts ruled that there were no grounds for applying the provisions of paragraph 3 of item 2 of Article 335 of the RF Civil Code. However, the disputed agreement was declared invalid as a sham deal. Moreover, the courts established that there was no evidence of compensation for the acquisition of the disputed premises paid by company 3.

The analysed Resolution of the Northwestern Federal District, referring to the *presumption of good faith*, states that company 4, when issuing a loan secured by real estate to the director of company 3, "relied on the record on the pledgor's ownership of the disputed premises in the state register, which, by virtue of law, is the only proof of a registered right, unless otherwise determined in court." At the same time, materials of the case did not contain any evidence that company 4, when accepting the premises

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as a loan collateral, knew that company 3 did not have the right to dispose of this property due to the lack of authority of its previous owner (company 2). Consequently, company 4, in compliance with the provision of paragraph 2 of item 2 of Article 335 of the RF Civil Code, was recognised as the *bona fide pledgee*, and the claim for recognizing the mortgage of the disputed premises as absent was denied.

In this case, the opportunistic pattern did not work, but the reason was mainly the existence of a related criminal case rather than a through consideration of all circumstances of the dispute by court, as it is usually a purely formal procedure. The analysed case demonstrates that a *pledgee*, even exercising the degree of care and diligence required by the nature of the obligation and the deal conditions and checking property rights of the pledger, may have to prove *good faith*. There is a risk of getting into a situation in which the owner of the pledged property wants to get rid of the pledge, using some dependent persons for this purpose according to a plan prepared in advance. Accordingly, the pledgee may have trouble in proving that the pledged object had not previously left the possession of the owner or the person to which it had been transferred by the owner "against their will".

4. One more example from the Russian law enforcement practice, in which the contract *mine* can be its legal deficiency (flawed will), which can lead to its recognition as *not concluded* (it should not be mixed with a *void* contract).

From the theory of law, we remember that in civil-law transactions it is important to assess whether the true intentions of the parties are realized during the transaction implementation, otherwise there is a case of the flawed will.

Item 1 of Article 432 of the RF Civil Code "Basic Provisions on the Conclusion of a Contract" stipulates as follows: "A contract shall be considered concluded if an agreement has been reached on all the essential terms of the contract among the parties in the form required in appropriate cases". At the same time, paragraph 2 of the same item clarifies: "The essential terms are those on the subject of the contract, terms that are named in a statute or are necessary for contracts of the given type, and also all those terms with respect to which an agreement must be reached by declaration of one of the parties".

Item 708 of the RF Civil Code stipulates the following requirements for all types of work and labour contracts: "The work and labour contract shall indicate the initial and the deadline expiry dates for the performance of work. By agreement between the

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parties, the contract may also provide for the dates of completing particular stages of the work (interim dates)". However, the legislators have not included any reference to the *work performance period* in the general definition of a *work and labour contract* in item 1 of Article 702 of the RF Civil Code, while it was included in the definition of a *construction contract.*/

As a result, item 1 of Article 740 of the RF Civil Code stipulates: "Under a contract for construction work, the contractor undertakes to perform a construction project or some other construction works by the assignment of the customer within the period stipulated by the contract, and the customer has the duty to create the necessary conditions for the contractor to perform the works, to accept the result and to pay the agreed price".

So, according to the letter of the law, if the parties to a *work and labour contract*, in particular a *construction contract*, did not agree on such essential condition as the *initial and the deadline expiry dates for the performance of work*, this contract will be considered not concluded, i.e. not generating legal consequences for the parties. Unscrupulous customers began to use this literal interpretation of the law, referring in courts to the contract non-conclusion only in order to evade the fulfilment of their contractual obligations to pay for the work performed by contractors or at least to avoid paying a contractual penalty for delay in such payment.

The legal position that a construction contract is considered not concluded if it does not contain an indication of the deadline for the completion of works and that, accordingly, it is unlawful to collect a penalty from the customer under such contract was officially formulated in item 4 of the Information Letter of Presidium of the Supreme Arbitration Court of the Russian Federation no. 51 of January 24, 2000 "Review of Judicial Practice on Disputes in Construction Contracts" (Presidium of the Supreme Arbitration Court of the Russian Federation, 2000).

This legal position was directly expressed in relation to the customer's failure to fulfil the contractual obligation to transfer the technical documentation for the performance of work to the general contractor. The supreme judicial authority ruled that in the considered dispute "the customer did not have an obligation to transfer the documentation. Therefore, the penalties stipulated by the contact are not subject to recovery".

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Such resolution would have looked much more unfair in case of non-payment or incomplete payment by the customer for the works already completed, and even more so — for the works accepted by the customer. Recognizing a construction contract in which the parties did not agree such essential condition as the deadline for the performance of works as *not concluded*, the courts still had to recognize the right of the contractor to receive payment for the works performed, though not on the basis of the contractual law, but in compliance with the legal provisions on *unjust enrichment* (RF Civil Code, Chapter 60 "Obligations Due to Unjust Enrichment", items 1102–1109). In this case, the creditor has the right to apply civil liability to the debtor in the form of interest on the outstanding amount in accordance with Article 395 of the RF Civil Code. The latter is stipulated in item 2 of Article 1107 of the RF Civil Code. However, as discussed above, the possible compensation is rather low.

This legal position was officially recorded in item 6 of the Information Letter of Presidium of the Supreme Arbitration Court of the Russian Federation no. 127 of November 25, 2008 (Presidium of the Supreme Arbitration Court of the Russian Federation, 2009). The conclusion was made based on the following facts of the case.

An individual entrepreneur filed a lawsuit against a limited liability company in an arbitration court for the reimbursement of the cost of the work performed, as well as interest for the use of pecuniary means of other people due to delay in payment in compliance with Article 395 of the RF Civil Code. Justifying the claim, the plaintiff referred to the work contract concluded with the defendant and to the act of acceptance of the work performed, which had been signed by the latter without comments. The defendant, in objection to the claim, argued that this contract should be considered not concluded, because the initial and the deadline expiry dates for the performance of work were not agreed. As a result, the arbitration court of first instance dismissed the claim.

The court of appeal reversed the decision of the lower court and satisfied plaintiff's claim. Though the court of appeal agreed with the decision of the court of first instance on the existence of formal grounds for recognizing the work contract as not concluded (under Articles 432 and 708 of the RF Civil Code), it also indicated that, while the plaintiff had duly performed the contractual obligations, the defendant, stating that the contract was not concluded, acted solely with the aim of obtaining release from the obligation to pay for the work performed and from the application of penalties due

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to late fulfilment of the obligation to pay. According to Article 10 of the RF Civil Code, this is an *abuse of rights*.

The court of cassation upheld the ruling of the court of appeal, but changed the grounds for satisfying the claim as follows. As the parties did not agree on the conditions for the initial and the deadline expiry dates for the performance of work, the work contract should be considered not concluded (Articles 432, 708 of the RF Civil Code). At the same time, the defendant, having accepted the work performed by the plaintiff in the absence of a contractual relationship between them, unjustifiably saved money at the plaintiff's expense in the amount of the cost of the work performed. Though the court of cassation recognized the application of Article 10 of the RF Civil Code on the *abuse of rights* by the court of appeal to be unfounded, it ruled that the demands for the recovery of the cost of the work performed in the amount provided for in the contract (as no other cost of the work had been proven) and interest for the use of pecuniary means of other people were subject to satisfaction on the basis of item 1 of Article 1102 and item 2 of Article 1107 of the RF Civil Code.

Thus, in the quoted Information Letter of 2008, Presidium of the Supreme Arbitration Court of the Russian Federation recommends that lower-level courts, when considering similar disputes, should be guided by more specific legal norms on *unjust enrichment* to protect contractors rather than overly abstract provisions of Article 10 "Limits of Exercising Civil Rights" of the RF Civil Code on *abuse of rights* (which, by the way, were somewhat clarified by legislators later, in 2013, which will be discussed below). However, this legal position, despite the convenience of its application to *consideration* for the work performed by the *contractor*, still is not applicable to all cases. In particular, a formal recognition of the work contract as *not concluded* in such situation could also leave the rights of the *customer* without protection, which can be illustrated by the example of the following legal position.

Some years later, Presidium of the Supreme Arbitration Court of the Russian Federation nevertheless decided to move away from formalism in this issue and discarded, like unnecessary crutches, the references to Articles 432 and 708 of the RF Civil Code and to Article 1102 of the RF Civil Code. We mean item 7 of the Information Letter of Presidium of the Supreme Arbitration Court of the Russian Federation no. 165 of February 25, 2014 (Presidium of the Supreme Arbitration Court of the Russian Federation, 2014): "If the work was completed before all the essential terms of the work

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contract were agreed, but its results were subsequently handed over by the contractor and accepted by the customer, then the relations between the parties should be subject to legal regulations on work and labour contracts."

The facts of the case were as follows. The parties were negotiating an agreement on the scope and cost of construction works. At the same time, the plaintiff granted the defendant access to the plaintiff's land plot for construction. In fact, the construction works had been completed before an agreement was reached on the disputed terms. The plaintiff accepted the works and paid for them at the price offered by the defendant. Subsequently, it turned out that the works were performed with low quality. The plaintiff filed a claim with the arbitration court for the gratuitous elimination of defects in the works performed by the defendant on the plaintiff's land plot within a reasonable period of time (in compliance with item 1 of Article 723 of the RF Civil Code).

The court of first instance dismissed the claim, referring the fact that there was no work contract between the parties and, therefore, the claim cannot be satisfied based on item 1 of Article 723 of the RF Civil Code. The acceptance of the performed works and payment for them testify only to compensation by the plaintiff to the defendant for the *unjust enrichment* according to Chapter 60 of the RF Civil Code, which does not provide for such a requirement as the gratuitous elimination of the work deficiencies.

The court of appeal reversed the decision of the court of first instance and satisfied the plaintiff's claim based on the following. If there is a dispute on whether a contract should be considered concluded, the court must assess all facts of the case in their relationship in favour of maintaining rather than cancelling obligations, based on the presumption of *the wisdom of actions and the honesty of the participants in the civil legal relations* according to Article 10 of the RF Civil Code. Delivery of the work result by the person that has performed the works in the absence of a work contract and its acceptance by the person for which these works have been performed signifies the conclusion of an agreement by the parties. The obligations under such agreement are equivalent to obligations under a work contract performed by the contractor. In this case, completion of the works results in obligations for the parties to pay for the works performed and to guarantee quality of the works, just as if the contract had been concluded between the parties.

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The latter legal position has become another progressive step towards improving the practice of applying the relevant legal norms. However, the application of legal provisions on a certain type of relationship to actually established contractual relations instead of the provisions of a specific agreement (since it was not concluded by the parties) deprives the interested party of the opportunity to apply such measure of civil liability as *contractual penalty*, which is in high demand in commercial circulation.

Therefore, it is not surprising that the saga of the continuous improvement of the general regulations on the contact conclusion in the civil legislation of Russia did not end with that circular. In 2015, Article 432 of the RF Civil Code was supplemented with a new item 3: "The party that has accepted the full or partial execution under a contract from the other party or has confirmed the validity of the contract in some other way is not entitled to demand that this contract should be recognised as not concluded, if making such a claim, subject to the specific circumstances, contradicts the principle of fairness (item 3 of Article 1)." We are going to explore the *principle of fairness* in the Russian civil law below. So far, we just want to note here that, guided by this principle, the Russian legislators finally enshrine in law the possibility of derogating from the general norms on the need for the parties to agree on all essential contractual conditions for concluding an agreement. This is a particular case of the applying the *concepts of legitimate expectations and estoppel* as a special manifestation of the *principle of fairness*.

This comparatively new legal provision (item 3 of Article 432 of the RF Civil Code) is often applied in the judicial practice, which is confirmed by the additional information on this item published in the on-line Reference Legal System "Consultant Plus", where as of May 7, 2020, 2,898 acts of various courts of the Russian Federation, each of which contains at least one reference to the specified item, are recorded in the "Judicial Practice" section (Civil Code of the Russian Federation, 1994).

IMPACT OF OPPORTUNISTIC CONTRACTS ON ECONOMIC RISKS.

The processes of economic exchange and interaction are impossible outside the sphere of contractual relations, therefore, the high occurrence of opportunistic contracts leads to a drastic increase in the risks of non-fulfilment of contractual

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obligations and, as a result, to an increase in transaction costs to ensure the execution of the contract by the parties to economic relations.

The widespread use of opportunistic contracts generates a high level of mutual distrust in the economy and negatively affects the level of transaction costs that the parties to economic relations must bear to fulfil their obligations under the contract. Some reasons for the increased costs are the mandatory requirement of 100% prepayment for the supply of goods, performance of works or provision of service and the need for a labour-intensive legal support of transactions by both parties. A kind of palliative measure is a complete or partial refusal of concluding contracts with new persons who have not been verified in advance with the use of complex and costly procedures.

The reaction of business structures to contract opportunism is also increasingly expressed in the involvement of certain third-party systems for ensuring obligations under the contract, where some influential people with administrative or power resources act as such third parties. They are so-called "fixers" — informal arbitrators or intermediaries who benefit from their social contacts by providing non-legal mechanisms to support the process of contract implementation; some of them also specialize in minimizing tripartite transaction costs. Such fixers are often retired or active law enforcement officers.

In such business environment, the main problem of a conscientious economic subject of contractual relations is how to achieve the proper performance of obligations by the opportunistic counterparty. In this case, there are two alternatives for the risk management systems:

1) establishment of costly economic security departments in holdings or individual companies, or

2) transfer of risk management functions to deal with opportunistic contracts to an external intermediary (informal arbiter), activities of which often are not properly institutionalized and are paid for in cash withdrawn from the official money circulation.

The negative economic consequences of the widespread opportunistic behaviour in the sphere of Russian contractual relations, especially when big money and big businesses are involved, can often be effectively neutralized for the normal fulfilment of contractual obligations only with the participation of informal arbitrators.

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As a result, a kind of "fixer economy" can be formed in the long run, which is characterized by two key features:

a) a high level of shadow money turnover with the capital migration into shadow cash flows, which are not officially reflected in tax accounting and official statistics;

b) huge concentration of funds in cash on hand, and most of this cash funds are in the possession of a special social group of informal arbitrators — intermediaries. For example, there is a well-known case: the amount of money in cash found during a search in the apartment of an active law enforcement officer was equal to the annual budget of a Russian town with the population of 600,000 people (8 billion RUB) ("Colonel Zakharchenko ...", 2018).

In turn, the concentration of capital in the shadow cash flows of the fixers leads to a massive withdrawal of investment resources from the real sector of the economy. The withdrawn money is spent on personal consumption and is used for the development of shadow businesses instead of being reinvested in the real sector of the economy. In fact, we are talking about an illegal mechanism for sterilization of money supply, which is one of the causes of the current economic crisis in the Russian Federation (however, this issue should be the subject of a separate study).

In this regard, the improvement of economic efficiency of the Russian contractual relations is impossible without a number of institutional reforms, primarily in the law enforcement and judicial systems.

OPPORTUNISTIC CONTRACTS: PROBLEMS OF LEGAL INTERPRETATION.

We should emphasize that the concepts of "opportunistic behaviour", "contractual opportunism" or "opportunistic contract" are not reflected in the Civil Code or in any other legislative act of the Russian Federation. Moreover, such terms rarely occur in the Russian legal literature. However, it does not mean that the problem of opportunism is completely unknown to the local jurists. Different aspects of this issue are considered in the context of the research on *principle of fairness* and *abuse of civil rights*.

Some foreign economists (Friedman, 2000; Gelderman et al., 2020; Khantimirov et al., 2020; Bag, 2018) and jurists (White, 2009; Cimino, 2015; Kelly, 2011; de los Reyes Jr. & Martin, 2019) specialising in the economic analysis of the contractual law

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treat *contractual opportunism* as *unfair practices*, including various forms of misleading business partners, gaining benefits in bad faith at the expense of the other party to the contract and a conscious decision to violate the contract if the possible benefit exceeds the benefit from its further proper execution (theory of *efficient breach*).

Thus, the *opportunistic behaviour* in legal terms is not just an *unfair* action (inaction) of one of the parties to the contract, formally violating contractual obligations, but also the behaviour by which this party consciously, perhaps even intentionally, causes damage to the other party (or parties in a multilateral agreement). However, there is no clear understanding of what should be considered opportunistic behaviour. Moreover, there is certain lack of clarity about the essence of such legal categories as *fairness (good faith)* or *unfairness (bad faith)* and *abuse of rights*. However, Russia is not the only country facing this problem.

The opportunistic (mined) contract, which is in the focus of our study, is even more complicated and difficult for legal and economic analysis. Due to certain provisions of such contract and the corresponding terms of the deal, one of the parties receives unreasonable benefits in the process of fulfilling contractual obligations, while the other party, on the contrary, incurs significant losses. At the same time, the party that unjustifiably enriches itself acts legally from the point of view of the letter of the law and the contract. They can go to court to recognize their rights under the contract and, most probably, get satisfaction of their claims from the court.

This issue is insufficiently studied by the scholars in the field of economic analysis and management, and not only in Russia. We do not mean here the cases of obvious opportunism, based on some kind of manipulation of information, deceit or even outright fraud by the party that openly violates the contract, — this type of opportunistic behaviour has been actively studied throughout the world over the past decades. In our study we consider a phenomenon, which, unlike ***"blatant"*** or *guileful* opportunism, can be called lawful opportunism, which was first described in 1991 by *Nobel Laureate Oliver Williamson* in his work "Comparative Economic Organization: The Analysis of Discrete Structural Alternatives" (de los Reyes Jr. & Martin, 2019). Such *lawful opportunism*, as well as the *unlawful* or *blatant* opportunism, from a purely legal point of view can be placed in the broad framework of the concept of *unfair practices*.

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In the course of a major civil law reform, which has been ongoing in Russia for more than 10 years, there has been some improvement in the general provisions of the RF Civil Code on the *principle of fairness*. First of all, the requirement of *fairness (good faith)* was directly enshrined as the *main principle of civil law.* Prior to that, there was no unity in theory and practice on whether it should be considered as one of such principles. In 2013, Article 1 of the RF Civil Code "Main Principles of Civil Legislation" was supplemented with two new items: "When establishing, exercising and protecting civil rights and when discharging civil duties, participants in civil law relations shall act in good faith" (item 3); "No one is entitled to gain an advantage as the result of their unlawful or unfair behaviour" (item 4).

However, the Russian civil legislation still does not define the meaning of the concepts of *fairness (good faith)* or *unfairness (bad faith)*.

In an attempt to compensate for the lack of clarity on this issue, Plenum of Supreme Court of the Russian Federation expressed the following opinion in its Resolution no. 25 of June 23, 2015 "On Application of Some Provisions of Section I of Part One of the Civil Code of the Russian Federation by Courts": "Assessing the actions of the parties as fair or unfair, one should proceed from the behaviour expected from any participant in civil transactions, taking into account the rights and legitimate interests of the other party and assisting it, including assistance in obtaining the necessary information" (Plenum of Supreme Court of the Russian Federation, 2015). The same document also states, "according to the general rule of item 5 of article 10 of the Civil Code of the Russian Federation, the good faith of participants in civil legal relations and the wisdom of their actions are assumed until proven otherwise". Accordingly, the burden of proving the lack of good faith and wisdom in the actions of a contract party rests with the accusing party.

Item 1 of Article 10 of the RF Civil Code stipulates, "Not admissible shall be the exercise of civil rights solely for the purpose of inflicting harm upon another person, actions in circumvention of the law for attaining an unlawful aim, as well as any other wittingly unfair exercise of civil rights (the abuse of rights)."

We would like to emphasize that the necessity to refer to unfairness *(bad faith)* or to the *abuse of civil rights* by a contract party arises when the violation of the law or contract is not obvious, but the other side considers such behaviour unfair, inconsistent with the spirit of the law and the agreement between them. In the Russian Federation,

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there have been a considerable number of litigations in which one or another party justifies its claims or objections referring to Article 10 of the RF Civil Code. This is confirmed by the additional information on this Article published in the on-line Reference Legal System "Consultant Plus", where as of May 7, 2020, 190,587 acts of various courts of the Russian Federation, each of which contains at least one reference to the specified Article, are recorded in the "Judicial Practice" section (Civil Code of the Russian Federation, 1994).

However, contractual opportunism is by no means always associated with some kind of exceptionally cunning and treacherous actions by one of the parties. Opportunism often manifests itself in a trivial breach of the contract, for example, when the debtor quite rationally chooses non-performance or improper performance of the contract, considering that this will be more beneficial than good faith behaviour loyal to the creditor. In this case, the ways of protecting violated civil rights may be the recovery of *penalties* or *damages* from the offender. Therefore, the stipulations related to such type of business behaviour are included not only in the general provisions of the RF Civil Code (e.g., on the *principle of fairness* and inadmissible *abuse of civil rights*) but also in more specific regulations of the Code and other legislative acts on obligations and contracts in general, as well as on particular types of contracts. However, we cannot see an integral institution formed as a certain coherent set of civil law norms dedicated specifically to the *contractual opportunism* in the Russian legislation. This is not a mere coincidence. This reflects the complexity of the relevant relations and the lack of a developed consistent theory of their legal regulation.

CONCLUSION

In the context of high occurrence of opportunistic practices in contractual relations, economic agents are facing the need to develop some strategies for the contract risk mitigation. The possible strategies for an economic entity can be divided into two groups: 1. Some palliative measures, including a complete or partial refusal of concluding contracts with new persons who have not been verified in advance with the use of complex and costly procedures or a requirement of 100% prepayment for the delivered goods, performed works or rendered services; 2. Investments in the development of economic security systems both through the establishment of

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economic security departments inside business structures and the transfer of risk management functions to deal with opportunistic contracts to external intermediaries (informal arbiters, or fixers), who are often retired or active law enforcement officers. The negative economic consequences of the widespread opportunistic behaviour in the sphere of Russian contractual relations, especially when big money and big businesses are involved, can often be effectively neutralized for the normal fulfilment of contractual obligations only with the participation of informal arbitrators (fixers). As a result, the widespread use of opportunistic contracts in the Russian economy caused a reaction from the management of Russian companies in the form of an active use of such fixers as a mechanism for the contract risks mitigation. Such considerable impact of intermediaries on economic processes has led to a significant increase in transaction costs and has become a separate economic problem. The long-term macroeconomic consequences of the spread of the described opportunistic behaviour in contractual relations can be expressed in the growth of the shadow sector of the economy, increase in the transaction costs for ensuring implementation of contracts and the withdrawal of significant cash flows from the real sector of the economy. In this regard, the improvement of economic efficiency of the Russian contractual relations is impossible without a number of institutional reforms, primarily in the law enforcement and judicial systems, and without further development of the civil legislation and the practice of its application.

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