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# The Contract for Services under the Civil Code of Russia and under the Draft Common Frame of Reference (DCRF)

## I. Comparison in outline

Both the Russian legislator and the authors of the DCFR consider the concept of service in a broad sense, including economic relations concerning the supply of services. It can be testified in particular by the enumeration of works exercised under the contract for work (locatio conductio operis) and of the R&D's execution among services in paragraph 2 article 779 of the Civil Code of the Russia Federation (CC RF). The DCFR included expressis verbis among the contracts of services those contracts which are related to the contract for work model under the Russian legislation: construction, processing, and design.

However, in this point the CC RF and the DCFR differ from each other under the aspect of their juridical technique. In contrast to the DCFR, the CC RF does not contain general provisions which would be applied to all types of services. Quite the contrary, there are separate chapters in the Russian Code reserved for the contract for work (locatio conductio operis) and the contract for services (locatio conductio operarum) as distinctive types of contracts. One of them (chapter 37) is dealing with all the sorts of the contract for work (contract work for a consumer, construction contract, contract for design and survey works, contract for the state needs included), the other (chapter 39) is dedicated to the remunerative services.

| Gratuitous Services | |
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| Article 702. Contract for work<br><br>1. Under the contract for work one party (contractor) undertakes an obligation to exercise a definite work on the instructions of the other party (client) and to hand over its result to the client, and the client undertakes an obligation to accept the result of the work and to pay for it.<br><br>Article 779. Contract of remunerative rendering of services<br><br>1. Under the contract of remunerative rendering of services the supplier undertakes an obligation to render services (to perform definite actions or to realize a definite activity) on the instructions of the client, and the client undertakes an obligation to pay for these services. | IV. C. – 1:101: Scope<br><br>(1) This Part of Book 4 applies:<br><br>(a) to contracts under which one party, the service provider, undertakes to supply a service to the other party, the client, in exchange for a price; and<br>(b) with appropriate adaptations, to contracts under which the service provider undertakes to supply a service to the client otherwise than in exchange for a price |

Commentary: The CC RF provisions are aimed for the regulation of remunerative works and services only. Their application to the gratuitous services is under discussion until now.[1] But the communis opinio doctorum admits their analogical extension in such cases by analogy of lex.[2] On the other hand, the DCFR openly declares that the provisions of its Part C Book IV (Services) should be applied mutatis mutandis to those contracts under which the service provider undertakes to supply a service to the client otherwise than in exchange for a price.

| Obligation to achieve result | |
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| Article 702. Contract for work<br><br>1. Under the contract for work one party (contractor) undertakes an obligation to exercise a definite work on the instructions of the other party (client) and to hand over its result to the client, and the client undertakes an obligation to accept the result of the work and to pay for it.<br><br>Article 779. Contract of remunerative rendering of services<br><br>1. Under the contract of remunerative rendering of services the supplier undertakes an obligation to render services (to perform definite actions or to realize a definite activity) on the instructions of the client, and the client undertakes an obligation to pay for these services. | IV. C. – 2:106: Obligation to achieve result<br><br>(1) The supplier of a service must achieve the specific result stated or envisaged by the client at the time of the conclusion of the contract, provided that in the case of a result envisaged but not stated:<br><br>(a) the result envisaged was one which the client could reasonably be expected to have envisaged; and<br><br>(b) the client had no reason to believe that there was a substantial risk that the result would not be achieved by the service. |

Commentary: Under the Russian doctrine and legislation the differentiation of the contract for work and contract for services has been made traditionally against the presence or the lack of a materialized or any other objective result, which should be separable from the contractor's person and could be guaranteed by him.[3] In the contract for services such an objective result is lacking. Certainly, a useful result of services can take place, but it does not have a material realization, and it cannot be guaranteed by the service's supplier.[4] On the other hand the jurisprudence of courts stands on the position that the contracting parties are not entitled to include in their contract a term providing construction of their obligation for supplying of services according to the model of achievement of an outcome (contract for work), because in the given case it would result in the creation of a new subject of contract which is not provided under statutory law[5].

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1 *Jurij Tolstoj*/Natalia *Rasskazova (ed.)*, Civil Law. Textbook (Гражданское право. Учебник) Vol. II, 5th edn., Moscow, 2012, p. 714.

2 *Aleksandr Sergeev (ed.)*, Civil Law. Textbook (Гражданское право. Учебник), Vol. II, Moscow, 2009, p. 501-503.

3 *Sergeev*, see fn. 2, p. 410-411.

4 *Sergeev*, see fn. 2, p. 499.

5 Resolution of the Constitutional Court of the Russian Federation № 1-П from 23.01.07 "About the constitutional control of the provisions of paragraph 1 art. 779 and of paragraph 1 art. 781 CC RF".

The DCFR does not make a strict delimitation between contracts of work and the contract for services on the basis of the presence or lack of a final result. It provides only that as a rule the supplier must achieve a specific result stated or envisaged by the reasonably acting client at the time of the conclusion of contract. The author's commentary to the DCFR states that a reasonable client normally cannot expect the achievement by the supplier of a specific result in some kinds of services, such as e. g., medical services. But in some concrete circumstances such contracts could also be interpreted as providing precisely such duty.[6] Therefore, one can make a conclusion that the DCFR does not exclude the possibility of the existence of contractual terms providing the supplier's duty to achieve a specific outcome in any contract for services, which are inadmissible under the good law of Russia today.

| Client's right to terminate | |
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| Article 717. Withdrawal from the performance of the contract for work by the client<br><br>Unless otherwise provided by the contract for work, the client is entitled to withdraw from the performance of the contract at any time before the result of the work has been handed over to him, after the payment to the contractor of that part of the agreed price which is proportional to the part of the work already performed before the acquisition of the notice about the withdrawal from the performance of contract by the client. The client is also obliged to compensate to the contractor the damages caused by the termination of the contract for work, within the limits of the disparity between the price agreed for the whole work and the part of the price paid for the work already performed.<br><br>Article 782. Unilateral withdrawal from the performance of the contract of remunerative rendering of services<br><br>1. The client is entitled to withdraw from the performance of contract of remunerative rendering of services under the condition of payment to the performer of the actually incurred expenses. | IV. C. – 2:111: Client's right to terminate<br><br>(1) The client may terminate the contractual relationship at any time by giving notice to the service provider.<br><br>(2) The effects of termination are governed by III.-1:109 (Variation or termination by notice) paragraph (3).<br><br>(3) When the client was justified in terminating the relationship no damages are payable for so doing.<br><br>(4) When the client was not justified in terminating the relationship, the termination is nevertheless effective but, the service provider has a right to damages in accordance with the rules in Book III.<br><br>(5) For the purposes of this Article, the client is justified in terminating the relationship if the client:<br><br>(a) was entitled to terminate the relationship under the express terms of the contract and observed any requirements laid in the contract for doing so;<br><br>(b) was entitled to terminate the relationship under Book III, Chapter 3, Section 5 (Termination); or<br><br>(c) was entitled to terminate the relationship under III.-1:109 (Variation or termination by notice) paragraph (2) and gave a reasonable period of notice as required by that provision |

[6] Commentary, P. 1654.

Commentary: A similarity between the CC RF and the DCFR reveals itself in granting to the client of the right to termination of the contract at any time. But there is also a difference between the two normative systems under the following aspects: the DCFR provides a compensation of damages caused to the supplier by the termination of contract by the client's initiative, with the exception of those cases, when the right to the termination of contract is provided by the contract, or by some other rules of the DCFR. Under the CC RF there exist other criteria of differentiation of the compensation of damages in the given situation – on the basis of the nature of the terminated contract. In case of the termination of a contract for work the contractor is entitled to claim from the client who has terminated their contract all the damages caused to the contractor by the termination (art. 717 CC RF). But if it is a contract for services, the client ought to compensate not all the damages, but only the expenses incurred de facto.

| Construction Contract<br>Scope of the construction contract<br>Non-material object in the construction contract | |
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| Article 702. Contract for work<br><br>1. Under the contract for work one party (contractor) undertakes an obligation to exercise a definite work on the instructions of the other party (client) and to hand over its result to the client, and the client undertakes an obligation to accept the result of the work and to pay for it.<br>2. The provisions of the present section of the Code are applied to the separate types of the contract for work (contract work for a consumer, construction contract, contract for design and survey works, contract for the state needs) unless otherwise provided by the provisions of the present Code related to these types of contracts.<br><br>Article 703. Works performed under the contract for work<br><br>1. Contract for work is to be concluded for the production or processing (machining) of a thing or for the performance of another work with handing over of its result to the client.<br><br>Article 740. Construction contract<br><br>1. Under the construction contract the contractor undertakes an obligation to build a definite object or to operate another construction works in the period provided by the contract and on the instructions of the client, and the client undertakes an obligation to create for the contractor necessary conditions of the performance of the work, to accept their result and to pay agreed price. | IV. C. – 3:101: Scope<br><br>(1) This Chapter applies to contracts under which one party, the constructor, undertakes to construct a building or other immovable structure, or to materially alter an existing building or other immovable structure, following a design provided by the client.<br><br>(2) It applies with appropriate adaptations to contracts under which the constructor undertakes:<br><br>(a) to construct a movable or incorporeal thing, following a design provided by the client; or<br><br>(b) to construct a building or other immovable structure, to materially alter an existing building or other immovable structure, or to construct a movable or incorporeal thing, following a design provided by the constructor. |

Commentary: In the CC RF the construction contract is specified on the basis of its subject – under the given contract the building contractor creates an object of construction or operates another construction works and it is this criterion which substantiates the special regulation of construction in the part 3 chapter 37 CC RF. But if the subject of contract consists in the creation of chattels, the general provisions on the contracts of work, included in the part 1 chapter 37 CC RF, should be applied to the correspondent relations. Another legal technique is used in the DCFR: the rules related to the construction contract are playing a part of general provisions for the contracts of work aimed to the creation of movables. In IV. C. – 3:101 (Scope) the DCFR admits the possibility to conclude a contract for the creation of a non-material object, which results in the regulation of the correspondent relations by the rules included in the chapter related to the construction contract. But the article 703 CC RF dedicated to the detailed elaboration of the contract's of work subject, is speaking first of all about the materialized result of the work, and eventually about another result of the work, the substance of which is not disclosed in the statutory provision. Therefore the problem of this "another" (non-materialized) result of the work is under discussion in the Russian doctrine until now. In particular the consensus of opinion is lacking with regard to the question, if the non-material object's creation (particularly of a definite information block existing on a material object) can be the subject of the contract for work or such relations should be understood as information services. Depending on the answer to this question a corresponding chapter of the CC RF should be applied, i. e. the one about the contract for work or, vice versa, about the contract for services.

| Processing<br>Correlation of the contract for work and the contract of processing | |
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| Article 702. Contract for work<br><br>1. Under the contract for work one party (contractor) undertakes an obligation to exercise a definite work on the instructions of the other party (client) and to hand over its result to the client, and the client undertakes an obligation to accept the result of the work and to pay for it.<br><br>2. The provisions of the present section of the Code are applied to the separate types of the contract for work (contract work for a consumer, construction contract, contract for design and survey works, contract for the state needs) unless otherwise provided by the provisions of the present Code related to these types of contracts.<br><br>Article 703. Works performed under the contract for work<br><br>1. The contract for work is to be concluded for the production or processing (machining) of a thing or for the performance of another work with handing over of its result to the client. | IV. C. – 4:101: Scope<br><br>(1) This Chapter applies to contracts under which one party, the processor, undertakes to perform a service on an existing movable or incorporeal thing or to an immovable structure for another party, the client. It does not, however, apply to construction work on an existing building or other immovable structure.<br><br>(2) This Chapter applies in particular to contracts under which the processor undertakes to repair, maintain or clean an existing movable or incorporeal thing or immovable structure. |

Commentary: In comparison of these articles of the CC RF and DCFR a specific difference in the legal technique attracts attention: In the DCFR the "processing" is specified in the framework of services as a special contract aimed to supply services of "processing" of the already existing chattels, non-material objects or immovables. In particular, such contract includes repairs, services of exploitation and cleaning (tidying up) of the existing chattels, non-material objects or immovables. But in the CC RF all such works are covered by the contract for work, which can be concluded as for the achievement of a definite result, as for its processing. At the same time any differentiation of the legal regulation is not especially provided. There exist only few rules which by their nature cannot be applied to processing (e. g. paragraph 6 article 720 CC RF: Unless otherwise provided by the contract for work, if the client shirks the acceptance of the work performed, the contractor is entitled after the expiration of one month from the day when under the contract the result of the work should be handed over to the client, provided that afterwards he gave notice twice to the client, to sell the result of the work, and to contribute the gain, with the deduction of all payments owed to the contractor, for the client on the deposit account). Hence unlike the DCFR which reserved a special chapter with a definite content for the processing, the application of the provisions of the chapter 37 CC RF every time requires a teleological interpretation of any concrete provision in order to find an answer to the question of its applicability to the processing.

## II. Case study

Some disputable aspects of the contract for services under the Russian law could be illustrated by a case which has recently taken place in Saint Petersburg and will be described hereinafter. A limited liability company negotiated a contract with a public enterprise, under which the company undertook an obligation to liquidate gratis an illegal spontaneous rubbish dump, and to realize land reclamation on its place, allocated for the use of the same public enterprise. The company's interest in rendering of these gratuitous services consisted in the possibility of the excavation's removal to use the borrow soil for the purposes of a pit's covering, which the company had been obliged to accomplish under a contract with another client.

Some time after the beginning of the work the client notified the company about the contract's termination on the grounds of non-performance by the company of the contractual term under which before the contractor had started working it should submit the project of the land reclamation to the approval of the public agency which is in charge of the nature management's supervision in the Russian Federation. The contractor contested the termination of the contract in the court, because the client's statement that the public agency's approval of the project should be obtained by the same contractor was in fact false. In the proceedings the company managed to prove this fact, but nevertheless its claim finally failed, because the state arbitration court decided that despite the absence of any contractor's breach of the contract the client was entitled to terminate their contract by his unilateral will without any objective grounds. The articles 717 and 782 CC RF had been mentioned in the court's decision as its legal grounds. The logic of the court was that if unilateral withdrawal from the performance of the contract of remunerative rendering of services and also of the contract for work was admissible under the good law of Russia, it was possible also in this case of a gratuitous contract, regardless of the fact if it was qualified as a contract for services or a contract for work. The solution of the case was evidently determined by the application of the analogy of lex, which identified gratuitous contracts of services (or of work) with those which provide services of works in exchange of a payment. On the other hand, the contractual term which in this concrete

contract provided that the contractor was acting gratis and on its own expenses had blocked for him the possibility to claim the compensation for the work already done and for its expenses already incurred before the termination of contract by the client. Besides, the unexpected termination of the contract by the client resulted in the breach by the contractor of the second contract with another person for the pit's covering, which was impossible to perform in time without the borrow soil which the contractor hoped to obtain in course of the first contract's performance. Damages caused to the contractor by the non-performance of this second contract should remain uncompensated, because they were allocated to the contractor's own business risk. Such was evidently the point of view of the appellate judge and of the cassation, which both had confirmed the decision without taking into consideration those above-mentioned circumstances.

The contractor had to apply to the last instance – the Supreme Court of the State Arbitration, which has supervisory jurisdiction over the lower courts of the so-called "state arbitration" in the Russian Federation.[7] One of the authors of the present text proposed for this application such "innovative" argumentation, partly based on the novels of the Russian legislation, and partly inspired by the DCFR.

Under paragraph 3 article 1 CC RF "participants of the civil law legal relations ought to act in good faith in the civil rights' establishment, exercise and protection, and in performance of civil law duties," and according to paragraph 4 of the same article "nobody is entitled to benefit from its illegal or unfair dealing". Both paragraphs are in force from 2013. Therefore, the actual statutory law provides a duty of all persons participating in the civil law legal relations to act in good faith in the exercise of their rights and in performance of their duties. The concretization of the requirements of good faith in the law of contracts could be reveled in those parts of the Draft of the modifications of the Civil Code of Russian Federation, which from spring 2012 have been under discussion in the Federal Parliament, and are dealing with the different aspects of the liability for culpa in contrahendo. In particular, in negotiations for conclusion of contract or in their break-off, it is considered unfair dealing: to enter into or continue negotiations with no real intention of reaching an agreement with the other party, to mislead the other party about the nature or the terms of the supposed contract, in particular, to provide false information or to omit those facts which the other party should be informed about because of the nature of the contract, as well as to break off the contract negotiations unexpectedly and causelessly without a preliminary notice to the other party.

But after the contract's conclusion, the party which under the statute or the contract is entitled to the contract's unilateral termination ought to act also reasonably and in good faith. That means that it is not to negotiate the contract having in mind already at this moment to use its right to the unilateral termination of it, but without a preliminary notice about such own intention to the other party. Besides, an unexpected and causeless exercise of the right to the unilateral termination of the contract, in the absence of any legally protected interest in such termination of the party entitled to the termination, which being fully aware that the termination results in damages to the counterparty, would be the exercise of the civil right contrary to the principle of good faith, that is the abuse of the right.

In the case under discussion the termination of contract was unexpected. The client had not informed the contractor that the causeless unilateral termination by its initiative was possible – neither at the moment of the conclusion of the contract, nor later on. Therefore it did not perform the duty produced by the principle of good faith, that is the

[7] "The courts of the state arbitration" are a special branch of state courts, which is in charge of economic litigation.

duty of the positive informing of the counterparty about its own intention to exercise the right, which, while being unexpected, could result in economic loss to it.

Besides, the unilateral termination of contract was evidently unexpected and causeless. In the sense of paragraph 1 article 782 CC RF, which had been applied by the court in the given case, such termination should be impossible, because the provisions of this article are aimed to make it possible for the client to terminate the contract in the situation when it had already lost its interest in the further rendering of service to it, and has the will to avoid the necessity of its acceptance and payment. In the meantime, the contract negotiated by the parties in the given situation was gratuitous and it did not provide any terms, burdening the client by the duties of the services' acceptance. The client was conscious about that, and therefore it had referred to the non-existent non-performance of the contractual duty as to the legal base for the termination, instead of referring to article 782 CC RF which entitled it to the unilateral arbitrary termination. Due to the same reasons one should say that the client had no lawful interest in the termination of the contract. At the same time the client was fully aware that the termination inevitably resulted in economic loss to the contractor. Consequently, the unilateral termination of contract by the client was an unfair dealing in the given situation.

In virtue of paragraph 1 article 10 CC RF "the acts of exercise of civil rights exclusively aimed to harm another person, the acts to evade the law for an unlawful purpose, and also another exercise of civil rights deliberately in bad faith (abuse of right) are inadmissible". Therefore, according to the given provision, a transaction which can be qualified as the abuse of right is contrary to the statute law, and as such should be invalid under article 168 CC RF dedicated to the legal consequences of the transactions which are contrary to the provisions of the positive law.[8] Unilateral termination of contract in those cases when under the law or under the contract a party is entitled to such termination is a legal act aimed at the determination of a legal relation. That is, it is a legal transaction. An unfair exercise of the right to terminate the contract is the abuse of the right, resulting in the transaction contrary to the requirements of the statutory law, which as such should be qualified as invalid in virtue of article 168 CC RF.

The fact that the plaintiff did not refer to this argumentation as legal grounds for the claim does not have an influence upon the possibility of the declaration of this transaction's invalidity. By paragraph 3 of the Ordinance of the Plenum of the Supreme Court of the Russian Federation and of the Plenum of the Supreme Court of the State Arbitration of the Russian Federation of 29 April 2010 N 10/22 "About some problems emerging in judicial practice on the adjudication of suits concerning the protection of the right of ownership and other real rights" it says:

> Under article 148 of the Civil Procedure Code of the Russian Federation or under article 133 of the Arbitration Procedure Code of the Russian Federation at the preparatory stage of the trial the court should determine, from what legal relation the litigation has originated, and what rules of law should be applied in the adjudication. Under item 1 article 196 of the Civil Procedure Code of the Russian Federation or item 1 article 168 of the Arbitration Procedure Code of the Russian Federation the court should determine what rules should be applied for adjudication in the established facts. Under clause 3 item 4 article 170 of the Arbitration Procedure Code of the Russian Federation the court of state arbitration indicates in the justification of the court decision its motives for non-applicability of those provisions which the litigants have referred to. Therefore the reference of the plaintiff in his writ to the legal provisions which were non-applicable in the given case in the judgment of the court is not in itself the legal ground for the judgment of dismissal.

[8] Paragraph 9 and 10 of the Circular Letter of the Presidium of the Supreme Court of the State Arbitration of the Russian Federation of 25 November 2008 N 127 "Survey of practice of application by the courts of state arbitration of article 10 of the Civil Code of the Russian Federation."

> Under the paragraph 3 of the Circular Letter of the Presidium of the Supreme Court of the State Arbitration of the Russian Federation of 25 November 2008 N 127 "Survey of practice of application by the courts of state arbitration of article 10 of the Civil Code of the Russian Federation" [it says]: "Taking into consideration the peremptory statutory rule of inadmissibility of the abuse of right the possibility of the qualification by the court of the act of the litigant as the abuse of right does not depend on the fact if the other party has referred to the abuse of right from the side of this litigant. The court is entitled to dismiss the legal defence of the right of the abusing person that is following exactly from the content of paragraph 2 article 10 CC RF."

The contractor finally failed with his application to the higher judicial authority, but despite of that, the case as such well illustrates the problems of the contracts of services in Russia.