

COMMENTS

BUSINESS TRANSACTION INVALIDITY IN THE CONTEXT OF THE PRINCIPLE OF LEGALITY

KONSTANTIN TOTYEV,

National Research University Higher School of Economics
(Moscow, Russia)

DOI: 10.17589/2309-8678-2016-4-4-81-94

This paper explores business transactions in the context of the principle of legality. It will be argued that Article 168 of the Russian Civil Code, as a metarule, contains three types of rule: 1) rules dealing with the priority of special rules and exceptions (exclusive rules); 2) rules dealing with the interpretation of general, special and exclusive rules, as well as with the requirements of statutes or other legal acts violated by a transaction and established outside of Article 168 of the Civil Code; 3) rules dealing with the admissibility of special rules and exceptions, as well as with the conditions of admissibility of these rules.

With regard to the first group of rules, the legislature and commercial courts consider Article 168 of the Civil Code a common base for other grounds in the Civil Code, and in certain other statutes, for declaring transactions invalid. According to the second group of rules, the subject-matter (object) of legal interpretation consists of two elements: a) the text of Article 168 of the Civil Code; and b) the texts of legal acts, described by the generic term "statute or other legal act." Article 168 of the Civil Code provides instructions, not only for rules as objects of application of the article, but also for the methods of interpreting violated requirements. The rules of admissibility for special rules and exceptions, as well as the conditions of admissibility for these standards, are aimed at the numerous cases in which the legislature, in the Civil Code or in other legal acts, expressly establishes nullity (voidness), voidability and other legal consequences for illegal transactions. The paper also answers questions regarding the impact of recent amendments to the Russian Civil Code on the use, by commercial courts, of rules on business transaction invalidity.

Keywords: business transactions; entrepreneurial activities; general, special and exclusive rules; invalidity (nullity or voidness, voidability) and other legal consequences of illegal transactions; the principle of legality; sanctions; statutes or other legal acts.

Recommended citation: Konstantin Totyev, *Business Transaction Invalidity in the Context of the Principle of Legality*, 4(4) Russian Law Journal 81–94 (2016).

1. Introduction

In Russian judicial practice and doctrine, the invalidity of illegal transactions of business entities (entrepreneurs) is usually considered in terms of the application of the grounds of invalidity to particular transactions.

The problems related to the actual grounds for, and the subject and the normative role of the rules governing, the invalidity of transactions in the Russian legal system are not less important, however. These questions take on special significance in connection with recent amendments to Article 168 of the Civil Code adopted in May 2013 (Federal law No. 100-FZ of May 7, 2013 “On Amendments to Subsections 4 and 5 of Section I of Part 1 and Article 1153 of Part 3 of the Civil Code of the Russian Federation”)¹ and with the emergence of instructions from the Supreme Court of the Russian Federation approved in June 2015. What impact do these amendments have on the use of the rules on the invalidity of business transactions in commercial courts? The current paper examines recent Russian judicial practice and relevant foreign legal materials in order to suggest answers to these and other closely-related legal questions.

2. Two Approaches to Invalidity of Transactions and Their Respective Features

Traditionally, Russian and foreign debates about the invalidity (nullity, voidability) of illegal transactions of entrepreneurs boil down to one of two possible approaches. Supporters of the first approach view invalidation of an illegal transaction as a way to protect violated rights or as a sanction for violation of the duties to discourage violations.² Jurisprudence identifies three types of sanction: 1) punitive (focused on a person held responsible); 2) reparative or corrective (taking into account the interests of those for whose benefit responsibility is assigned); 3) preventive (orders prohibiting future illegal conduct).³

Establishing the invalidity (nullity, voidability) of a transaction as a sanction relates to the last two types of legal consequence for violations of legal rules, since these consequences involve the interests of those for whose benefit a transaction

¹ Собрание законодательства РФ, 2013, № 19, ст. 2327 [Legislation Bulletin of the Russian Federation, 2013, No. 19, Art. 2327].

² See Herbert L.A. Hart, *The Concept of Law* 33 (Oxford: Clarendon Press, 1994); Peter Bydliński, *Bürgerliches Recht. Bd. I* 132 (Wien: Springer, 2005); Claus-Wilhelm Canaris, *Gesetzliches Verbot und Rechtsgeschäft* 17 (Heidelberg: C.F. Müller, 1983); Gérard Cornu, *Vocabulaire juridique* 599 (Paris: PUF, 2003); Bertrand Fages, *Droit des obligations* 179 (Paris: LGDJ, 2007); Stéphane Mail-Fouilleul, *Les sanctions de la violation du droit communautaire de la concurrence* 135–158 (Paris: LGDJ, 2002); Hans-Martin Pawlowski, *Zum Umfang der Nichtigkeit bei Verstößen gegen “öffentlich-rechtliche” Verbotsgesetze*, 21 *Juristenzeitung* 696 (1966).

³ Peter Cane, *Responsibility in Law and Morality* 43 (Oxford: Hart Publishing, 2002).

is declared invalid. For example, the function of Paragraph 134 of the German Civil Code (*Bürgerliches Gesetzbuch* or BGB)⁴ is considered a preventive measure against the performance and mutual execution of an illegal transaction by its parties.⁵ The Russian legislature also provides arguments in favor of this approach to invalidating transactions. The term “consequences of violation” used in Article 168 of the Civil Code, for example, shows that the legislature considers invalidation of transactions to be a form of sanction.

Furthermore, on the basis of Paragraph 6 of Article 3 of Federal law “On Amendments to Subsections 4 and 5 of Section I of Part 1 and Article 1153 of Part 3 of the Civil Code of the Russian Federation” more recent provisions of the Civil Code concerning the grounds and the legal consequences of invalidity of transactions (Articles 166–176 and 178–181 of the Civil Code of the Russian Federation) can only be applied to transactions conducted after the date the statute came into effect (Federal law “On Amendments to Subsections 4 and 5 of Section I of Part 1 and Article 1153 of Part 3 of the Civil Code of the Russian Federation” came into effect on September 1, 2013).

Commercial courts have followed this instruction by only applying the new version of Article 168 of the Civil Code to transactions concluded after the date on which it entered into force.⁶ The legislature’s position and judicial practice have both been determined by observation of the general legal principle of the non-retroactivity of statutes that establish or aggravate responsibility: “a statute introducing or aggravating responsibility shall not have a retrospective effect” (Part 1 of Article 54 of the Constitution of the Russian Federation, Paragraph 5 of Resolution of the Constitutional Court of the Russian Federation No. 20-P of July 20, 2011,⁷ Paragraph 1 of Article 4 and Paragraph 1 of Article 422 of the Civil Code). According to this constitutional principle, when enacting new legal rules, the legislature is not allowed “to give retroactive effect to new regulations where doing so would have a negative impact upon the legal status of individuals or restrict their subjective rights that already exist in specific legal relationships” (Paragraph 5 of Resolution of the Constitutional Court of the Russian Federation No. 20-P of July 20, 2011).

Proponents of the second approach argue that invalidating transactions limits the freedom of economic activity (private autonomy, freedom of contract) and

⁴ *Bürgerliches Gesetzbuch* 28 (58th ed., München: DTV, 2006).

⁵ See Canaris 1983, at 17; Thomas Zerres, *Bürgerliches Recht* 63 (Berlin: Springer, 2010).

⁶ See Постановление Федерального арбитражного суда Восточно-Сибирского округа от 12 марта 2015 г. № Ф02-495/2015 [Resolution of the Federal Arbitrazh Court of the East-Siberian District No. F02-495/2015 of March 12, 2015]. Hereinafter, the sources of publications of judicial decisions are the Russian legal database “ConsultantPlus” and the website of commercial courts of the Russian Federation: www.arbitr.ru.

⁷ Собрание законодательства РФ, 2011, № 33, ст. 4948 [Legislation Bulletin of the Russian Federation, 2011, No. 33, Art. 4948].

is a form of control of the terms of transactions.⁸ The basis for this argument in Russian legislation is Article 168 in Chapter 9, “Transactions,” of the Civil Code, which defines the terms of fulfillment of actions by citizens and legal entities directed at the establishment, change, or termination of civil-law rights and duties (Article 153 of the Civil Code). The legal capacity to engage in entrepreneurial activities which are not prohibited by statute and to perform any transactions that are not contrary to statute, mentioned in Article 18 of the Civil Code (in connection with the legal capacity of citizens), complements this argument.

Despite significant differences, these two approaches possess two important common properties. In both approaches, the rule of invalidity (nullity, voidness) of illegal transactions is considered a legal rule for certain regulated behavior, and the invalidity itself and the restitution related to it are legal consequences of application of the rule in a specific instance.

3. An Alternative Approach and Its Advantages

An alternative approach to Article 168 of the Civil Code has its basis in Paragraph 2.1 of Ruling of the Constitutional Court of the Russian Federation No. 948-O-O of July 15, 2010.⁹ In this ruling, Article 168 of the Civil Code was used to develop the rule formulated in Part 2 of Article 15 of the Constitution of the Russian Federation on the duty of citizens and their associations to observe the Constitution and statutes (they “...shall be obliged to observe the Constitution of the Russian Federation and statutes”). Although this conclusion was reached by the Constitutional Court on the basis of the previous version of Article 168 of the Civil Code, it is largely applicable to the article’s current formulation, as will be shown later. Therefore, the Constitutional Court places Article 168 of the Civil Code in the context of the constitutional principle of legality (which states that the bodies of state authority, the bodies of local self-government, officials, private citizens and their associations shall be obliged to observe the Constitution and statutes).

This principle is set out in Paragraph 2.2 of Resolution of the Constitutional Court No. 8-P of April 4, 2002¹⁰ and Paragraph 2 of Resolution of the Constitutional Court

⁸ See Karl Larenz, Manfred Wolf, *Allgemeiner Teil des Bürgerlichen Rechts* 630, 723 (München: C.H. Beck, 2004); Dieter Medicus, *Allgemeiner Teil des BGB* 192 (Heidelberg: C.F. Müller, 2006); Hart 1994, at 34–35; Jean-Bernard Blaise, *Droit des affaires: commerçants, concurrence, distribution* 548–551 (4th ed., Paris: LGDJ, 2007); Judit Rochfeld, *Les grandes notions du droit privé* 438–447 (Paris: PUF, 2011); Синайский В.И. Русское гражданское право 167 [Vasily I. Sinaiskii, *Russian Civil Law* 167] (Moscow, 2002).

⁹ An official publication is on the website of the Constitutional Court of the Russian Federation (Nov. 23, 2016), available at <http://doc.ksrf.ru/decision/KSRFDecision41347.pdf>.

¹⁰ Собрание законодательства РФ, 2002, № 15, ст. 1497 [Legislation Bulletin of the Russian Federation, 2002, No. 15, Art. 1497].

No. 6-P of March 31, 2015,¹¹ in which Part 2 of Article 15 of the Constitution is cited in connection with the legal force of rules and the grounds for (and the consequences of) their inclusion in the legal system of the Russian Federation. It is no accident that the Constitutional Court used the abovementioned constitutional provisions (see, for example, Paragraph 6 of Resolution of the Constitutional Court No. 2-P of February 17, 2015)¹² in conjunction with Part 2 of Article 1, Part 1 of Article 11, as well as Articles 2, 10 and 18 of the Constitution, which establish the evaluation criterion, as well as the procedure for promulgation and application of legal norms. A similar approach to the content of Part 2 of Article 15 of the Constitution can be found in decisions of commercial courts. According to one commercial court's decision,¹³ Part 2 of Article 15 of the Constitution should be considered a general legal principle, according to which the duty of economic entities to observe the public law requirements of economic legislation is established.

As a result, Article 168 of the Civil Code serves in the context of the constitutional principle of legality not so much as a standard for assessing entrepreneurial behavior as a rule on other legal norms. What rules are established and applied on the basis of a narrow understanding of Article 168 of the Civil Code? The analysis of the current practice of Russian commercial courts justifying their decisions with reference to Article 168 of the Civil Code corroborates the hypothesis that the three most important groups of such rules include: 1) rules governing the priority of special rules and exceptions (exclusive rules); 2) rules governing the interpretation of general, special and exclusive rules, as well as the requirements of statutes or other legal acts violated by a transaction and established outside of Article 168 of the Civil Code; 3) rules governing the admissibility of special rules and exceptions, as well as the conditions of admissibility of these rules. Let us consider each of these groups in more detail.

With regard to the first group of rules, Russian commercial courts universally recognize the existence of a general rule on the voidability of a transaction (in Paragraph 1 of Article 168 of the Civil Code)¹⁴ that violates the requirements of a statute or other legal act, and often treat Paragraph 2 of Article 168 of the Civil Code as an exception to the general rule on the voidability of such transactions (Paragraph 1 of Article 168 of the Civil Code). Moreover, analysis of the place of Article 168 of the Civil Code in the

¹¹ Собрание законодательства РФ, 2015, № 15, ст. 2301 [Legislation Bulletin of the Russian Federation, 2015, No. 15, Art. 2301].

¹² Собрание законодательства РФ, 2015, № 9, ст. 1389 [Legislation Bulletin of the Russian Federation, 2015, No. 9, Art. 1389].

¹³ Постановление Двенадцатого арбитражного апелляционного суда от 28 мая 2013 г. № А06-27/2013 [Resolution of the Twelfth Arbitrazh Court of Appeal No. A06-27/2013 of May 28, 2013].

¹⁴ See Paragraph 73 of Resolution of the Plenum of the Supreme Court of the Russian Federation No. 25 of June 23, 2015 "On Application by the Courts of Certain Provisions of Section I of Part 1 of the Civil Code of the Russian Federation" (Бюллетень Верховного Суда РФ, 2015, № 8 [Bulletin of the Supreme Court of the Russian Federation, 2015, No. 8]).

structure of Chapter 9 of the Civil Code and Paragraph 1 of Article 431-1 of the Civil Code confirms that the legislature and the commercial courts consider Article 168 of the Civil Code to be a general rule in relation to other articles which establish the invalidity of transactions, especially Articles 170, 173, 173-1 and 174 of the Civil Code, as well as certain statutes.¹⁵ Some of these articles of the Civil Code establish an internal structure of relations between general, special and exclusive rules.

The general rule in Paragraph 1 of Article 168 of the Civil Code describes the conditions of voidability of illegal transactions (“a transaction that violates the requirements of a statute or other legal act is voidable...”). The special rule in Paragraph 2 of Article 168 of the Civil Code establishes the nullity of a transaction which not only violates the requirements of a statute or other legal act, but also encroaches on the public interest or rights and legitimate interests of third parties (“...except in the cases provided for by Paragraph 2 of this Article”). In turn, the exclusive rule allows commercial courts not to exercise the special rule of Article 168 of the Civil Code under certain conditions (“...if it does not follow from a statute that such a transaction is voidable...”).

According to current judicial practice,¹⁶ the legal difference between general and special (and exclusive) rules, regardless of whether they are established in Article 168 of the Civil Code, is the priority of the latter over the former. However, the current practice of both the commercial courts and the legislature unreasonably confuses the distinct legal concepts of special rules and exceptional (exclusive) rules.

4. Rules of Interpretation

According to the second group of rules which govern legal interpretation, the subject of interpretation consists of two elements – the text of Article 168 of the Civil Code, and the texts of other legal acts, described by the generic term “statute or other legal act” (the term “statute” is also used in the special and exclusive rules of Article 168 of the Civil Code). Similar terminology was present in the previous version of Article 168 of the Civil Code, allowing partial use of judicial precedents. Paragraphs 1, 2 of Article 2 and Paragraphs 2–6 of Article 3 of the Civil Code are aimed at establishing a proper understanding of the composition and the text of external (i.e., with respect to Article 168 of the Civil Code) legal acts in the field of entrepreneurship, as well as at establishing their legal force and normativity. According to these articles of the Civil Code: 1) the concept of statute in the interpretation of judicial practice includes, in addition to the Civil Code, federal statutes adopted in accordance with

¹⁵ See Определение Верховного Суда РФ от 10 апреля 2015 г. № 306-ЕС15-998 [Ruling of the Supreme Court of the Russian Federation No. 306-ES15-998 of April 10, 2015].

¹⁶ See Постановление Федерального арбитражного суда Московского округа от 23 июля 2015 г. № Ф05-9286/2015 [Resolution of the Federal Arbitrazh Court of the Moscow District No. F05-9286/2015 of July 23, 2015].

the Civil Code which regulate relations between or involving entrepreneurs; 2) the term “other legal acts” covers decrees of the President of the Russian Federation and regulations of the Government of the Russian Federation.

In view of the above, the role that Paragraph 2 of Article 3 of the Civil Code plays in clarifying the structure of legislative acts can be observed in Paragraph 90 of Resolution of the Plenum of the Supreme Court of the Russian Federation “On Application by the Courts of Certain Provisions of Section I of Part 1 of the Civil Code of the Russian Federation”¹⁷ and in Ruling of the Supreme Court of the Russian Federation No. 33-APG15-13 of July 15, 2015. Therefore, these legislative acts can be identified by direct indications from the legislature that a specific statute is based on the provisions of the Civil Code (for example, according to Part 1 of Article 2 of Federal law No. 44-FZ of April 5, 2013 “On the Contract System in the Procurement of Goods, Works and Services for State and Municipal Needs”).¹⁸

Uncertainty and disagreements over the significance of the term “statute,” as it appears in Paragraph 2 of Article 3 of the Civil Code, in relation to Article 168 of the Civil Code have been resolved by the Supreme Court of the Russian Federation in favor of a broader interpretation of the term (Paragraphs 73 and 75 of Resolution of the Plenum of the Supreme Court of the Russian Federation “On Application by the Courts of Certain Provisions of Section I of Part 1 of the Civil Code of the Russian Federation”). This interpretation considers the term “statute” to include the Civil Code of the Russian Federation. On the other hand, in Paragraph 2 of Article 3 of the Civil Code, the legislature does not mention any general legal principles which differ from the principles of civil law explicitly set out in Article 1 of the Civil Code that would contribute to a broader concept of statute. However, the commercial courts still rely on the general principles of law (for example, the principle of legality) not only in connection with Article 169 of the Civil Code (it establishes the grounds for invalidity of a transaction concluded for a purpose contrary to the principles of public order or morality), but also in connection with Article 168 of the Civil Code.

Courts sometimes interpret the term “other legal acts” far more broadly than the literal meaning set out in Paragraph 6 of Article 3 of the Civil Code, e.g., to include the acts of ministries and other federal executive bodies.¹⁹ However, there are examples of judicial practice (developed mainly on the basis of the previous version of Article 168 of the Civil Code) that does not interpret “other legal acts” as also meaning acts of various organs of the subjects of the Russian Federation and local self-governing bodies, as well as acts of ministries and other federal executive bodies, since they are

¹⁷ Бюллетень Верховного Суда РФ, 2015, № 8 [Bulletin of the Supreme Court of the Russian Federation, 2015, No. 8].

¹⁸ Собрание законодательства РФ, 2013, № 14, ст. 1652 [Legislation Bulletin of the Russian Federation, 2013, No. 14, Art. 1652].

¹⁹ See Определение Верховного Суда РФ от 13 декабря 2011 г. № 5-Б11-116 [Ruling of the Supreme Court of the Russian Federation No. 5-B11-116 of December 13, 2011].

not covered along with charters of business entities by a strict reading of Paragraph 6 of Article 3 of the Civil Code.

Nevertheless, the commercial courts have highlighted a situation in which the provisions of a charter coincide with the requirements of legislation.²⁰ This can lead to the invalidation of a business transaction due to non-compliance with a statute rather than the charter. The individual legal acts of organs of state authority are, furthermore, not part of other legal acts. In this respect, the Russian legislature and the commercial courts are largely in agreement with foreign practice. For example, in Germany, Paragraph 134 of the German Civil Code does not cover administrative orders directed against procedures for implementing transactions.²¹

The application of Article 168 of the Civil Code of the Russian Federation in interpreting the requirements of statutes or other legal acts, established outside of Article 168 of the Civil Code and violated by an illegal transaction, implies (unlike Article 169 of the Civil Code of the Russian Federation or Paragraph 138 of the German Civil Code) that the content of the violated statute or other legal act should be determined. The requirements of the acts regulated by Article 168 of the Civil Code of the Russian Federation and used by the commercial courts for assessing the legality of transactions depend on the subjects (addressees) of the requirements and the relations regulated by the statutes or other legal acts.

In the field of business transactions assessed by commercial courts in accordance with Articles 1, 2 of the Commercial Procedure Code of the Russian Federation No. 95-FZ of July 24, 2002,²² categories (composition) of addressees may be identified on the basis of Subparagraph 3 of Paragraph 1 of Article 2, Paragraph 1 of Article 23, Paragraph 1 of Article 50 and Article 153 of the Civil Code, and may include commercial organizations and sole traders. In a number of statutes, the addressees of prohibitions and other requirements are determined with the help of special categories which are different from the standard civil-law concepts of “individual” or “legal entity” (for instance, according to Article 14 of Federal law No. 381-FZ of December 28, 2009 “On the Basic Principles of State Regulation of Trading Activities in the Russian Federation”, they include economic entities).²³

In addition, on the basis of specific instructions from the legislature, the scope of persons to whom certain legal requirements are applied can be further expanded. Relying on Paragraph 3 of Article 23 of the Civil Code, the commercial courts have

²⁰ See Постановление Федерального арбитражного суда Московского округа от 28 января 2015 г. № Ф05-14162/2014 [Resolution of the Federal Arbitrazh Court of the Moscow District No. F05-14162/2014 of January 28, 2015].

²¹ Zerres 2010, at 63.

²² Собрание законодательства РФ, 2002, № 30, ст. 3012 [Legislation Bulletin of the Russian Federation, 2002, No. 30, Art. 3012].

²³ Собрание законодательства РФ, 2010, № 1, ст. 2 [Legislation Bulletin of the Russian Federation, 2010, No. 1, Art. 2].

also applied the legal requirements for commercial organizations to sole traders (Subparagraph 4 of Paragraph 1 of Article 575 of the Civil Code of the Russian Federation).

In turn, the subject-matter (object) of violated requirements should be related to the transactions. In other words, a transaction should be mentioned in the text of *statutory* requirements as the basis for a legal relationship. For example, a commercial court has refused to apply a statutory prohibition and Article 168 of the Civil Code to a transaction because a certain requirement was related to the charter of a company, not to its transactions. If the issue of invalidity arises from a sham transaction (Paragraph 2 of Article 170 of the Civil Code), the legal requirement, which the parties of a transaction try to bypass, should concern the transaction that the parties actually have in mind, because the actual transaction can be invalidated on the grounds specified in the relevant statute. It should be emphasized that Article 168 of the Civil Code of the Russian Federation allows the possibility of narrowing the scope of legal requirements on the basis of legal exceptions (provided, for example, in Paragraph 11 of Article 21 of Federal law No. 14-FZ of February 8, 1998 “On Limited Liability Companies”).²⁴ Certainly, the legal exceptions must be taken into account in order to recognize a particular transaction as invalid and in order to apply the legal consequences of its invalidity based on Article 167 of the Civil Code of the Russian Federation.

Article 168 of the Civil Code indicates both rules that are the objects of its application, as well as methods of legal interpretation for violated requirements. These methods can be identified by comparing Paragraphs 1, 2 of Article 15 of the Constitution of the Russian Federation and Article 168 of the Civil Code, which expands on the constitutional principle of legality. Therefore, although constitutional provisions require correspondence not only to statutes, but also to the Constitution of the Russian Federation (the constitutional principles), Article 168 of the Civil Code only refers to statutes and other legal acts (Paragraphs 2–6 of Article 3 of the Civil Code). In this way, it gives priority to the legislative intent with respect to the relative normative provision and assumes that it is possible to identify legislative intent on the basis of the literal interpretation of the text of a statute. In turn, jurisprudence argues that the question of legislative intent hinges on “the meaning of words used in a particular context.”²⁵

²⁴ Собрание законодательства РФ, 1998, № 7, ст. 785 [Legislation Bulletin of the Russian Federation, 1998, No. 7, Art. 785].

²⁵ Rupert Cross, *Statutory Interpretation* 26 (Oxford: Oxford University Press, 2006). See also Aharon Barak, *Purposive Interpretation in Law* 97 (Princeton: Princeton University Press, 2005); Ronald Dworkin, *A Matter of Principle* 14, 19 (Harvard: Harvard University Press, 1985); Scott J. Shapiro, *Legality* 304 (Cambridge, MA: Harvard University Press, 2011); Stefan Vogenauer, *Statutory interpretation in Elgar Encyclopedia of Comparative Law* 833–835 (J.M. Smits, ed., Cheltenham, UK: Edward Elgar, 2012).

5. The Role of Judicial Practice

For the purposes of interpretation of legal requirements, Russian judicial practice allows use of rules of interpretation contained not only in Article 168 of the Civil Code, but also in decisions of the higher courts (despite the fact that many of these decisions were issued before September 1, 2013, the courts often apply these decisions to the new version of Article 168 of the Civil Code). The rules governing responses to violated requirements are established in two ways. One such way is to indicate the specific paradigmatic cases (examples) related to the relevant concept (composition). Using this method, the scope of the violated requirements may be expanded or reduced. For example, in its Ruling No. 1600-O-O of November 17, 2011, the Constitutional Court of the Russian Federation concluded that it is impossible to apply the prohibition provided in Article 956 of the Civil Code “to cases in which the beneficiary replacement occurs voluntarily by virtue of the norms of Chapter 24 of the Civil Code.”²⁶ Given this restrictive interpretation, the court may reject a petition to recognize a contract as invalid.²⁷

Moreover, in Paragraph 9 of Information Letter No. 120 of October 30, 2007 regarding the prohibition on donations from commercial organizations (Subparagraph 4 of Paragraph 1 of Article 575 of the Civil Code), the Presidium of the Higher Commercial Court of the Russian Federation agreed with the court of cassation that the absence of conditions concerning the price of transferred rights (claims) in an agreement regarding assignment of rights “[...] is not itself evidence of the donation of the right.”²⁸ Therefore, the Presidium of the Higher Commercial Court of the Russian Federation defined the external limits of the term “donation” by reference to a situation which is not covered by the legal concept of donation.

An attempt to systematize similar situations, which are important for the interpretation of violated requirements, has been undertaken in Paragraphs 73–76 of Resolution of the Plenum of the Supreme Court of the Russian Federation “On Application by the Courts of Certain Provisions of Section I of Part 1 of the Civil Code of the Russian Federation”, as well as in previously adopted decisions of higher courts (for example, in Paragraph 9 of Resolution of the Plenum of the Supreme Court of the Russian Federation No. 10 and Resolution of the Plenum of the Higher Commercial Court of the Russian Federation No. 22 of April 29, 2010 “On Some Issues Arising in Judicial Practice while Litigating the Controversies Relating to the Protection of Property Rights”).

²⁶ Official publication is on the website of the Constitutional Court of the Russian Federation (Nov. 23, 2016), available at <http://doc.ksrf.ru/decision/KSRFDecision82434.pdf>.

²⁷ Постановление Федерального арбитражного суда Московского округа от 25 февраля 2015 г. № Ф05-16038/2015 [Resolution of the Federal Arbitrazh Court of the Moscow District No. F05-16038/2015 of February 25, 2015]

²⁸ Вестник ВАС РФ, 2008, № 1 [Bulletin of the Higher Commercial Court of the Russian Federation, 2008, No. 1].

Another way to establish the rules of interpretation of the violated requirements used in decisions of higher courts is connected with the elaboration of the common features of the interpreted concept contained in the text of the legal rule. For example, the commercial courts,²⁹ taking into account Paragraph 75 of Resolution of the Plenum of the Supreme Court of the Russian Federation “On Application by the Courts of Certain Provisions of Section I of Part 1 of the Civil Code of the Russian Federation,” ascertained the nullity of a transaction (for example, in connection with infringement of the public interest) which violates a clearly expressed legal prohibition (explicit prohibition).

As indicated in Paragraph 2 of Resolution of the Plenum of the Higher Commercial Court of the Russian Federation No. 16 of March 14, 2014 “On Freedom of Contract and Its Limits”³⁰ the clearly expressed legal prohibition (explicit prohibition) on parties to an agreement establishing terms which differ from those envisaged by the law has force if the explicit prohibition is unequivocally expressed in the text of the rule (for instance, if there is a direct reference to the nullity, illegality or inadmissibility of an agreement, as in Article 928 of the Civil Code). But this prohibition allows teleologically restrictive interpretations of a statute. Therefore, a discrepancy between a transaction and (i) the requirements of legislation or (ii) the rights of a public entity bound to serve the public interest does not automatically void such transaction (Paragraph 75 of Resolution of the Plenum of Supreme Court of the Russian Federation “On Application by the Courts of Certain Provisions of Section I of Part 1 of the Civil Code of the Russian Federation” and Paragraph 4 of Resolution of the Plenum of the Higher Commercial Court of the Russian Federation “On Freedom of Contract and Its Limits”).

Finally, rules governing the admissibility of special rules and exceptions, as well as the conditions of admissibility of these standards, constitute the third group of rules in Article 168 of the Civil Code. This group is aimed not only at the numerous cases in which the legislature, by means of the Civil Code or in other legal acts, expressly establishes nullity (for example, Paragraph 3 of Article 1007, Paragraph 1 of Article 1028, Paragraph 2 of Article 1033 of the Civil Code and Article 122 of the Inland Water Transport Code of the Russian Federation No. 24-FZ of March 7, 2001),³¹ voidability (especially the rules established in Paragraphs 1, 2 of Article 449 of the Civil Code and Paragraph 4 of Article 17 of Federal law No. 135-FZ of July 26, 2006 “On Protection of Competition,” and considered by the commercial courts as special

²⁹ See Постановление Федерального арбитражного суда Северо-Западного округа от 9 сентября 2015 г. № Ф05-16038/2015 [Resolution of the Federal Arbitrazh Court of the Northwestern District No. F05-16038/2015 of September 9, 2015].

³⁰ Вестник ВАС РФ, 2014, № 5 [Bulletin of the Higher Commercial Court of the Russian Federation, 2014, No. 5].

³¹ Собрание законодательства РФ, 2001, № 11, ст. 1001 [Legislation Bulletin of the Russian Federation, 2001, No. 11, Art. 1001].

rules with respect to Paragraph 2 of Article 168 of the Civil Code)³² or other legal consequences (for example, Paragraph 4 of Article 23 or Paragraph 2 of Article 431-1 of the Civil Code) for illegal transactions in general or for particular terms which arise in these transactions. The fact is that Article 168 of the Civil Code and Paragraphs 2–4 of Resolution of the Plenum of the Higher Commercial Court of the Russian Federation “On Freedom of Contract and Its Limits” require that the commercial courts determining the legal consequences of illegal transactions take into account and assess the legislature’s position regarding the intent (*purpose*) of the rule that protects certain categories of legal entity.

The purpose of the protection of violated rules is also taken into account in German and Austrian law,³³ in which the absence of direct legislative establishment of nullity leads to a need to determine whether nullification complies with the sense (purpose) of extant statutes. The purpose of extant statutes can be formulated with the help of the clearly expressed legal prohibition (explicit prohibition) that, according to Paragraph 75 of Resolution of the Plenum of Supreme Court of the Russian Federation “On Application by the Courts of Certain Provisions of Section I of Part 1 of the Civil Code of the Russian Federation”, allows the courts to apply Paragraph 2 of Article 168 of the Civil Code of the Russian Federation even if there is no direct indication of nullity (as appears in Article 383 of the Civil Code of the Russian Federation). However, the commercial courts often pay attention only to the legislator’s silence concerning the consequences of an illegal transaction, and do not sufficiently analyze violated requirements and their purposes (in these cases, applying the general rule of voidability of a transaction).

6. Conclusion

Considered in the context of the constitutional principle of legality, the new version of Article 168 of the Civil Code of the Russian Federation not only regulates the behavior of entrepreneurs and other private legal entities, but also acts as a rule for legal rules (in other words, as a metarule). In this sense, Article 168 of the Civil Code corresponds to its foreign equivalents. The general, special and exclusive rules, as well as the violated requirements of economic legislation, are the object of the Civil Code standards established in Article 168. In turn, the content of the metarule includes rules of priority, interpretation and admissibility, which are formed not only by the legislature, but also, to a large extent, by the courts.

³² Собрание законодательства РФ, 2006, № 31 (ч. 1), ст. 3434 [Legislation Bulletin of the Russian Federation, 2006, No. 31 (part 1), Art. 3434].

³³ See Werner Flume, *Allgemeiner Teil des Bürgerlichen Rechts* 341 (Berlin; Heidelberg: Springer, 1979); Burkhard Boemke, Bernhard Ulrici, *BGB Allgemeiner Teil* 184 (Heidelberg: Springer, 2009); Bydlinski 2005, at 119, 132.

Judicial practice is only beginning to take the new version of Article 168 of the Civil Code of the Russian Federation into account. However, it is already clear that Article 168 contains contradictions which open up new horizons in the field of modernization of the legal content of Article 168 of the Civil Code and the legal rules related to the article as a means of implementing the constitutional principle of legality.

References

- Adomeit K. *Rechtstheorie für Studenten: Normlogik, Methodenlehre, Rechtspolitologie* (Heidelberg: R. v. Decker, 1979).
- Altman A. *Arguing about Law: An Introduction to Legal Philosophy* (Belmont, CA: Wadsworth/Thomson Learning, 2001).
- Barak A. *Purposive Interpretation in Law* (Princeton: Princeton University Press, 2005).
- Bingham T. *The Rule of Law* (London: Allen Lane, Penguin Press, 2010).
- Blaise J.-B. *Droit des affaires: commerçants, concurrence, distribution* (4th ed., Paris: LGDJ, 2007).
- Boemke B., Ulrici B. *BGB Allgemeiner Teil* (Heidelberg: Springer, 2009).
- Bydlinski P. *Bürgerliches Recht. Bd. I* (Wien: Springer, 2005).
- Canaris C.-W. *Gesetzliches Verbot und Rechtsgeschäft* (Heidelberg: C.F. Müller, 1983).
- Cane P. *Responsibility in Law and Morality* (Oxford: Hart Publishing, 2002).
- Cross R. *Statutory Interpretation* (Oxford: Oxford University Press, 2006).
- Dworkin R. *A Matter of Principle* (Harvard: Harvard University Press, 1985).
- Dworkin R. *Taking Rights Seriously* (Harvard: Harvard University Press, 1978).
- Fages B. *Droit des obligations* (Paris: LGDJ, 2007).
- Gordley J. *Foundations of Private Law* (Oxford: Oxford University Press, 2007).
- Graziano T.K. *Comparative Contract Law* (Basingstoke: Palgrave MacMillan, 2009).
- Hart H.L.A. *The Concept of Law* (Oxford: Clarendon Press, 1994).
- Mail-Fouilleul S. *Les sanctions de la violation du droit communautaire de la concurrence* (Paris: LGDJ, 2002).
- Mazeaud H. et al. *Leçons de droit civil. T. II: Obligations: théorie générale* (9th ed., Paris: Montchrestien, 1998).
- Medicus D. *Allgemeiner Teil des BGB* (Heidelberg: C.F. Müller, 2006).
- Methods of Comparative Law* (P.G. Monateri, ed., Cheltenham: Edward Elgar, 2012).
- Molfessis N. *Le Conseil constitutionnel et le droit privé* (Paris: LGDJ, 1997).
- Morgan J. *Contract Law* (Houndmills: Palgrave Macmillan, 2012).
- Riesenhuber K. *Europäisches Vertragsrecht* (Berlin: De Gruyter, 2004).
- Rochfeld J. *Les grandes notions du droit privé* (Paris: PUF, 2011).
- Shapiro S.J. *Legality* (Cambridge, MA: Harvard University Press, 2011).
- The Theory of Contract Law* (P. Benson, ed., New York: Cambridge University Press, 2001).
- Weinberger O. *Rechtslogik* (Berlin: Duncker & Humblot, 1989).

Acknowledgments

The article was drafted under the Academic Fund Program at National Research University Higher School of Economics (HSE) in 2015–2016 (Grant No. 15-01-0034) and supported by a subsidy granted to the HSE by the Government of the Russian Federation for the implementation of the Global Competitiveness Program.

Information about the author

Konstantin Totyev (Moscow, Russia) – Associate Professor at the Department of Civil and Business Law, National Research University Higher School of Economics (8 Pokrovsky boulevard, Moscow, 109028, Russia; e-mail: tku71@mail.ru).