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Special Aspects of the Civil Rights Acknowledgement in the Russian Legislation and the Foreign Law

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Abstract: The article is devoted to the analysis of the application of special aspects of the right acknowledgement as of the method of the civil rights protection in the Russian Federation. The current list of the civil rights protection methods in the Russian Federation is given in Article 12 of the Russian Federation Civil Code (hereinafter referred as the RF Civil Code). However, the RF CC does not contain the legal definition of such a right protection method as the right acknowledgement. There are no condition regulation for such a protection method in the law and no order described for its application. The work contains the analysis of the legal regulation of this protection method including that in the foreign law, in particular-as referred to the legislation of England, the USA, Germany; the review is given of the court practice for this method application; the correlation of the civil right protection methods and the civil right protection forms was researched; the thesis is formulated that the right acknowledgement is practiced exclusively in the court juridical form of protection; the place of the right acknowledgement among the other civil right protection methods was studied. Based on the results of the research performed, the proposals on the legal defining of the right acknowledgement as the civil right protection method are given.

Key words: Civil right protection methods and forms · Right acknowledgement · Infringement of the right · Infliction

INTRODUCTION

As of today, the list of the civil right protection methods in the Russian Federation is given in Article 12 of the Russian Federation Civil Code (hereinafter referred as the RF CC).

With this, the RF CC does not contain a legal definition of such a protection method as the right acknowledgement. Some of the law regulations are associated with the acknowledgement of definite corporeal rights (for example, the right of property), however there is no exact understanding of which rights are applicable for the protection method in question.

We have to state that there is different practice of the mentioned protection method application, regarding for example the liability rights [1]. And this is reasonable: if the property right acknowledgement regulation is in some ways defined in special legal acts (for example, in Article 222, 234 of the RF CC), regarding the liability rights, the interested person has to be guided practically by the general principles and the fundamentals of the civil legislation and has to analyze a very wide range of the court precedents.

The Place of the Right Acknowledgement among the Civil Rights Protection Methods: Thus, studying the legal nature of such a protection method as the right acknowledgement, we have to first define the protection form.

The civil right protection forms division into jurisdictional and non-jurisdictional is the only widely spread opinion in domestic civil science [2]. It is necessary to mention that such a position fully complies with the modern trends of the civil legislation development (in particular, a similar position is reflected in the concept of the RF CC general provisions improvement) [3]. The non-jurisdictional protection form is performed independently by the private person whose rights are offended or protested. The jurisdictional form can be performed by the state body or other authorized body (the court and the administrative order of the civil rights protection).

Generally, the application of such a protection method as the right acknowledgement means having a dispute between the interested parties regarding their having (or non-having) of the subjective right. It is deemed that it is not possible to solve the dispute by

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using the non-jurisdictional protection form. In other words, the corresponding right cannot acknowledged by the right holder. There should be some third independent party (the arbiter) which is able to objectively solve the dispute. Otherwise, firstly, the right acknowledgement by only one party of the dispute would break such fundamental principles as the equity of the civil relations participants and the inadmissibility for anyone to interfere in private cases [4]; secondly, the right acknowledgement in non-jurisdictional form will not lead to the real subjective right protection, because there is no sense in the right acknowledgement by the person who has originally no doubts in having the corresponding right.

So, having agreed with the given civil right protection forms division, we can make a conclusion that the right acknowledgement refers to the jurisdictional form of the right protection.

Going forward, the right acknowledgement is performed in a situation when the corresponding right is opposed or not recognized by the third parties and this, in its turn, means a dispute about if the interested party actually holds the right. The purpose of the court, in accordance with the provisions of Article 4 of the Russian Federation Arbitration Procedural Code and Article 3 of the Russsian Federation Civil Procedural Code (hereinafter referred as "RF APC" and "RF CPC"), is in solving disputes between the participants of the civil legal relations. In point of fact, sustaining a claim for the right acknowledgement, the court imperiously confirms the existence of the legal relation between the parties and the complainant subjective right resulting from the relation. It appears that it will be reasonable to refer to the opinion of civil scientist of pre-revolutionary period T.M. Yablochkov who insisted that the court task is to solve disputes associated with a right [5]. In this situation, we think that it will not be reasonable to transfer the dispute solution functions to the non-court bodies with the availability of the court system.

The court practice also proves the possibility of the right acknowledgement by the court only. In particular, the following definition of the protection method in question is met: "the right acknowledgement in itself, as the court protection method, is understood as the reflection of the right, legally obtained but not acknowledged by any participant of the legal relations, in the court's act" [6].

Nevertheless the law directly provides for the possibility for protection by acknowledging the right in the administrative (non-judicial) order. In accordance with Article 3 of the RF CC, the property right for the unauthorized construction can be acknowledged by the court and in cases defined in law-in other order defined by the law, as the right of the person who is the owner of the land used for construction, or he has it in the lifetime ownership, or in the constant (termless) rent. Thus, the mentioned legal norm provides for the possibility for the unauthorized construction right acknowledgement not only by the court but also in other order stipulated by the law.

It is deemed that the mentioned civil right protection method application in the administrative order contradicts the very essence of the right acknowledgement.

It is necessary to mention that the present revision of Article 3 of the RF CC, which actually fixes the possibility to acknowledge the right in the administrative order, is also called into question in the modern legal doctrine. I particular, D.I. Kovtkov thinks that up to now there is no clear understanding on who is authorized for the other order (administrative order) property right acknowledgement application and who should perform it [7].

It appears that it will be reasonable to view a similar situation with the property right for the newly erected building. In accordance with Article 219 of the RF CC, the property right for buildings, erections and other newly created immovable property, which is subject to the state registration, appears from the moment when such a registration is done. Thus, the status of the immovable property object erected in accordance with the mandatory requirements and the one erected with no authorization is identical in principle. There is no property right for both the objects held by the party in interest. Nevertheless, Article 219 of the RF CC does not give any dependence between the property right creation and the application of such a protection method as the right acknowledgement.

With these circumstances we deem it reasonable to settle similar legal regulations for the special order of the property right creation for the unauthorized constructions (Item 3 of Article 222 of the RF CC), excluding the provisions on the possibility to acknowledge the right in other non-judicial order.

Summarizing the facts mentioned above, we can make a conclusion that the right acknowledgement is a method of the civil rights protection, which is realized solely in the judiciary court form of protection. The court practice shares the similar position [8].

Right Acknowledgement Application in the Foreign Law: For the purpose of the analysis of the foreign experience in the legal settlement of such a right protection method as the right acknowledgement, we deem it necessary to study the most meaningful and prominent legal sources of the states included into the civil law and common law systems.

In civil procedural law of Germany the claims of settling, or the acknowledgement claims (die Feststellungsklage), are a special procedural protection form, a peculiar complaint, for eliminating uncertainties in legal relations between the parties. The settling claims (the acknowledgement claims) are not based on the legal claim of the complainant against the defendant. Apart from the adjudgement claims these claims are not an order, not a requirement to force the defendant to perform definite actions; they are only aimed at discovering the existence or the absence of the corresponding legal relations and in exceptional cases-at defining the genuineness or the falsified nature of the document.

Thus, the German legislator actually fixed the absence of the compulsory force of the right acknowledgement court order. To develop the research of the mentioned characteristic feature of the right acknowledgement, we deem it reasonable to mention the following views of the German civil scientists in the corporeal relations right sphere:

"The legal nature of the claim is in the extra-contractual claim of the owner aimed solely at establishing the existence or the absence of the property legal relation between him and the defendant and not connected with the claim to transfer the disputable thing to the complainant or to eliminate any inconvenience for the complainant associated with the thing that does not lead to his loosing the ownership. This peculiar feature of the acknowledgement claim was clearly stated by famous German scientist Bernhard Windscheid who noted that the complainant with such a claim declares that something exists but he does not tell that his opponent was supposed to perform anything" [9].

So, as the German civil science states, the claims of settling differ from the adjudgement claims by the fact that the complainant asks not for the satisfaction of the demand justified by him, but he asks to define or not to define the legal relation or to discover the genuineness or the falsified nature of the document. For example, § 256 (1) of the Civil Procedural Code of the Federal Republic of Germany contains the notion of the settling claim, saying that to settle the existence or the absence of the definite legal relations and for defining the genuineness or the falsified nature of a document, a claim may be made in case the complainant has an interest in defining the legal relation, the genuineness or the falsified nature of a document in a legal procedure.

Based on that, then the court define the existence of the legal relation one can distinguish positive settling claims (die positive Feststellungsklage) and when the court defines the absence of the legal relations, the claims are called negative settling claims (die negative Feststellungsklage) [10].

Concerning the topic in question, it is necessary to mention that the right acknowledgement will refer to the positive settling claims.

The subject of the settling claims can be only the legal relation or the fact of the document genuineness or its falsified nature.

The settling claims are based not on the material legal requirement but on the special procedural protection form which serves to eliminate the uncertainties in legal relations. Here, the legal interest of the complainant is that his present legal position constitutes a threat for him and the decision taken by the court removes that threat [11].

The court decisions on the settling claims are called the settling decisions (das Feststellungsurteil). It is also necessary to mention that one of the settling claims forms are the intermediate adjudgement claims (die Zwischenfeststellungsklage). These are the claims that can be additionally initiated in the court when the settling claims are being solved in the court. The intermediate claims can be initiated during the civil case procedure at any time with no limitations used in case the claim is changed. For example, § 256 (2) the Civil procedural Code of the Federal Republic of Germany declares that till the end of the oral hearing aimed at the court decision, both the complainant (in the order of the claim extension) and the defendant (in the order of the counter-claim) can demand to legally define the relation that turned to be disputable during the process.

Going further we need to note that the right acknowledgement in accordance with the legislation of Germany is performed for the purpose of defining the presence of the legal relation. With this an important fact is that the right acknowledgement application is possible only for the restoration of the infringed right of the interested person. Leaping ahead, we note herewith that the modern views of the Russian civil science fully comply with the position described.

The legal regulation on the "special procedural form" of the acknowledgement claim are especially interesting. We need to assume that fixing of such peculiar features is also the result of such a right acknowledgement characteristic as the absence of the adjudgement requirement. The mentioned circumstance allows to make a conclusion that the procedural issues of the right acknowledgement application were studies also by the foreign civil science. Nevertheless, there was no significant research in the German legal science discovered by the author.

Let us refer to the legislation of France. The civil law here is a part of the positive law which supposes the right protection by the public authority. If the rights acknowledged by somebody are infringed by other person, the "right bearer will force to respect his rights by appealing to the state bodies. But usually the right is being disputed and so the forced application of it will be prescribed by the judge who will decide which of the private parties in dispute is legally right" [12].

Practically, the legislator gas settled two forms of the civil rights protection: the judicial one and the administrative one. Further analysis of the legislation system of France allows to make a conclusion that the right acknowledgement is realized as a court protection form by making the correspondent claim.

In their turn, all the court decisions are divided by the French civil science into the settling ones and the transforming ones. The settling court decisions (they are most numerous) solve the disputed about what in particular the legal regulation is, to which the disputing parties subdue or subdued earlier. Opposite to that, the transforming decisions do not settle the legal regulation that existed before, but create a new one. Logically, it is deemed that the right acknowledgement application is possible through only making a settling court decision.

When studying the types of the claims used in France, it is necessary to mention that the right acknowledgement claim will be a position claim, i.e. a position confirming claim-making this, a definite person demands to confirm the position which is used by him.

With this, referring to the corporeal rights, the right acknowledgement is viewed as a petitory way of protection (insisting on the right existance) [13].

Thus, in the result of the analysis of the legal sources of France on the issue in question, we can make a conclusion that the right acknowledgement is applicable in the court (judicial) form of the right protection. Besides, for the right acknowledgement it is necessary to prove that the interested person possessed the disputable right at the moment he made the correspondent claim and this proves the right confirming character of the researched protection method.

Now let us study the details of this protection method interpretation in the civil science of the legal system of the Anglo-Saxon states.

During the analysis of the law sources of England there was no detailed regulation found of the right acknowledgement as a protection method. Concerning the researched issue, we think it necessary to mention that the English procedural legislation provides for making the so-called intermediate decisions. Such court orders are limited to confirming the obligation of the defendant but does not specificate it. For example, confirming the fact of defendant making such actions which infringe the complainant interests, the judge can leave the question of loss compensation to be solved in another case in the future [14].

As we see, in the English legal system the necessity is pointed out to the right acknowledgement application prior to the adjudgement claim study. Moreover, in this case, sustaining the right acknowledgement claim has a primary and fundamental meaning for solving the dispute between the parties in essence, because in the future, when the adjudgement claim is contested, only the issues of the size and the order of the compensation are to be discussed [15].

Similar legal provisions can be found in the legal system of the USA and Canada. The civil procedure here also fixes the possibility of the intermediate decision (the so-called "interlocutory judgment"). The intermediate decisions are the decisions that fix the infringement of the complainant's interests by the defendant and that agree to the declared claim in principle, i.e. not defining of the compensation precise amount. The amount in this case is to be defined in further procedures which are exclusively dedicated to defining of such an amount [16].

Thus, in accordance with the peculiar features of the legal systems of England and the USA, the acknowledgement is a component (intermediate) part of the adjudgement. As a fact, the right acknowledgement is a separate element subject to establishing by the court prior to making a verdict on the dispute solution. We think that this circumstance in particular provides for the absence of any prominent research of the protection method in question by the civil scientists of these countries.

Summarizing the research of the foreign experience in application of the right acknowledgement as a protection method, we cannot but admit that the right acknowledgement was categorically separated from the adjudgement claim (with the exception for Anglo-Saxon legal system countries according to the presence or absence of the duties for the defendant. The legal systems of the mentioned states fix the necessity of the independent right acknowledgement application. With this the possibility of this application in some intermediate form is actually fixed. It is necessary to emphasize that there is no detailed legal fixing for the studied protection method in the legal system of the

foreign countries. This is why there is no possibility to use the foreign law-making experience within the framework of the present study. Nevertheless we need to state that the existing legal regulations do not fundamentally contradict the domestic legal doctrine, but on the contrary-fairly comply with it.

CONCLUSION

Summarizing the results of the research performed, we deem it reasonable to formulate the following conclusions.

As of today, there is no any clear legal definition of such a way of the civil rights protection method as the right acknowledgement in the Russian legislation. There are no precise and definite criteria and conditions for this method application, there is no exact understanding of the method application independence.

The analysis of the foreign legislation allows to think that the right acknowledgement is only some phase in adjudgement. The method is not used on its own.

All the mentioned above means that it is necessary to give the legal definition of the described protection method, its application conditions and the form used (judicial or non-judicial) in the current legislation of the Russian Federation. With this, the legislator should finally define the independence of this method (or to agree with referring the right acknowledgement to the phase of the adjudgement).

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