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CONCLUSION OF DIRECT CONTRACTS WITH UTILITIES PROVIDERS

Svetlana E. Masley
Dostoevsky Omsk State University, Omsk, Russia

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The subject of the paper is conclusion and execution of direct contracts between consumers and utilities providers.
The main aim of the paper is to confirm or disprove the hypothesis that direct contracts between consumers and utilities providers are more convenient for utilities providers than for consumers.
The methodology of the study includes general scientific methods (analysis, synthesis, comparison, generalization, description) as well as particular academic legal methods (formal-legal analysis of theoretical and regulatory sources, interpretation of legal acts, judicial and arbitration practice).
The main results and scope of their application. The current procedure for the provision and payment of utilities is based on the concept of "performer of utilities", which are the management organizations, homeowners' associations, housing cooperatives. The performer of utilities enters into a contract with utilities provider. These utilities are acquired by the contractor at the border of its operational responsibility (on the border of an apartment building), then this resource is already provided as a utility service to final users – tenants and owners of premises in an apartment building. Consumers pay for utility services to the contractor of utilities, and he, in turn, transfers the received payments to the utilities provider (resource supplying organization). Such a scheme of contractual relations leads to problems, including the following: the performers do not enter into contracts with the utilities providers (resource-supplying organizations), thereby trying to exclude their responsibility for the quality of services; do not pay fully or partially for the supplied utility resource. In this regard, the legislation has been amended to allow direct contracts between consumers of public services and resource organizations and, accordingly, directly pay for utilities.
Conclusions. Direct contracts between consumers and utilities providers are more convenient for utilities providers than for consumers in the scope of responsibility for the poor quality of utilities.

1. Introduction.

Federal law No. 59-FZ of 03.04.2018 supplemented the Housing code of the Russian Federation (hereinafter – the housing code) with article 157.2 "provision of utilities by a resource supplying organization, a regional operator for the treatment of solid municipal waste", which fixed the possibility to conclude direct contracts for the provision of utilities with resource supplying organizations and a regional operator for the treatment of solid municipal waste, and, accordingly, to directly carry out payments for the services provided to these persons. The title of this article and its contents fall outside the context of the articles in Section VII. "Payment for housing and communal services" housing code. In accordance with article 8 of the housing code "to the housing-related relations .....the provision of public services, payment of utility fees, the relevant legislation shall be applied in accordance with the requirements established by this Code". The regulation of such relations especially applicable housing code, and in part not regulated by the Code, such relationship shall apply subsidiary norms of other branches of law [1, p. 50]. First of all, civil legislation. And if the issues of payment for housing and communal services are regulated by the housing code, due to the fact that the main regulatory act, which laid the current approach to payment of housing and communal services became the Law of the Russian Federation "About bases of a Federal housing policy" [2, p. 87], repealed with the adoption of the housing code, the rules of granting of utilities to a greater extent remained outside the scope of legal regulation of the housing code. At the same time in art. 157 of the housing code there is a reference to a subordinate normative legal acts directly regulating the rules of providing communal services and the procedure of conclusion of the relevant treaties and rules, obligatory at the conclusion of the management organization or homeowners Association or housing cooperative or other specialized consumer cooperative agreements with utilities providers, the regional

operator of the municipal solid waste management. V.N. Litovkin notes that the housing legislation has taken over the regulation of household consumption of utilities [3, p. 23].

It seems that the inclusion of such an atypical article is due to the need to solve a number of problems encountered in the reform of relations in the provision and payment of utilities.

A fundamental element in the regulation of relations for the provision and payment of utilities is the use of contractual structures, which are divided into three groups of the contracts, mediating the entrepreneurial activity in the sphere of housing and communal services: agreements in the sector of production and supply of resources, removal and treatment of sewage, agreements in the sector of housing management contracts in the sector of the execution of contract works [4, 18-20]. It should be noted that recently in the sphere of housing and communal services a large number of rules have been adopted, replacing and complementing each other. The aforementioned rules apply both to the characteristics of public services and to the features of the conclusion and execution of contracts for the supplies of resources, concluded between the management companies and resource supplying organizations [5, p. 3]. Despite the rather long-term reform of housing and communal services and improvement of the regulatory framework governing these relations, there are still many problems of both theoretical and practical nature. In particular, this is the problem: determine the specifics of the contractual regulation of relations [6, p. 12]; competition rules of civil and housing legislation, regulating relations in the provision of public services[7, p. 37]; the identification of the entity housing-and-municipal services as object of civil rights[8, p. 446]; structure optimization for contractual relationships prevailing in the wholesale and retail electricity markets[9, p. 44]; identify the person responsible for non-performance or improper performance of the contract of energy supply [10, p. 86].

The practical component of problems is connected with the unsettledness of a number of issues, for example, how and by whom should be provided and to whom utilities are paid in the absence of a resource supply agreement, in a situation when one of the parties sent an application for its conclusion, and the will of the other party is absent [11, p. 30] and a number of other problems.

It is obvious that even these problems cannot be solved by supplementing the LC RF single article. But it seems that these changes are aimed at solving the problems identified in the Strategy of development of housing and communal services in the Russian Federation for the period up to 2020:

1. Improving the system of payments for utilities.

2. Increasing the responsibility of consumers for the timely payment of housing and communal services, as well as the responsibility of resource supply and management organizations for the quality of utilities and resources.

2. Direct payments and direct contracts with resource supply organizations.

The current procedure for the provision and payment of utilities is regulated by Art. 155 and 161 of the LCD of the Russian Federation And the rules for the provision of utilities (hereinafter – Resolution No. 354) and is as follows. The contractor of utilities, which is the management organization, the partnership of homeowners, housing cooperative, housing cooperative or other consumer cooperative, acquires utility resources from the resource supplying organization under the contract for the acquisition of utility resources for the use of such resources in the provision of utilities to consumers on the border of common property in an apartment building, and then provides these utilities (already as a utility) to the owners of premises in an apartment building., tenants and other persons who use the premises in an apartment building for living or other purposes, on the basis of a paid contract concluded in writing or by conclusive action (the terms of contracts concluded with consumers of public services are defined in the contract of management of an apartment house or in the contract for the provision of public services concluded with a partnership or cooperative with the owners of residential premises in an apartment building in which a partnership or cooperative is established).

The contractor receives payment for the provided utilities, which is transferred to the resource supplying organization and is responsible to consumers for the proper quality and volume of provided utilities, and the proper maintenance of engineering equipment in an apartment building necessary for the provision of utilities. Therefore, in relation to the provision of public services between the owners of apartment buildings and energy supply organizations included the mediators, TSZH and management companies, in connection with which completely changed the system of power supply companies for supplied resources that modifierade owners of premises in apartment houses in utilities [12, p. 77].

This scheme of the relationship between the executor of utilities, the supplier and the organization and the consumers of public services is essential and must be applied even in cases when these persons have in fact a different procedure for the payment of utilities, for example, in a situation when between the provider and the supplier and the organization was not concluded the contract of purchase of utilities and consumers directly pay for utility service supplier and the organization.

So, in one case, the defendant - HOA "Goznak-1" without acknowledging the plaintiff - MUP "Vodokanal" of the recovery of debts for the rendered utilities for water supply and sanitation obschedomovye needs, interest on borrowed funds, their objections are motivated by the fact that he refused a contract with the plaintiff, to avoid liability utilities – water supply; between him and the plaintiff signed the contract for the provision of accounting and calculation of payment for public utilities; he never exercised the functions of the Executive utilities for water supply and sanitation in relation to MCD, are included in the HOA, and in fact acted as a single settlement centre for the plaintiff. In addition, the defendant believed that the plaintiff was the perpetrator against the residents of the disputed ICD.

The court, considering the defendant's objections, however, indicated that the defendant, as the executor of utilities is obliged to conclude contracts for supplies of resources with the purpose of providing utility services to owners of residential premises, not the conclusion of such contract with one of the RSO (in this case in terms of water services and sanitation) may not be considered as a circumstance which exempts the contractor's utility services from the provision of appropriate utility services and payment for services rendered to RSO. Therefore, the defendant's references to the fact that he does not associate himself with the contractor of public services (water supply and sanitation), including referring to the contract between the parties (in which the defendant is named as the RCC), are not accepted .

This design of contractual relationships has been repeatedly criticized, including by reason of the substitution of the constituent entities, as executor of utilities actually performs seller of utility resources[13, p. 22], but also because of the failure to transfer payments to implementing resource-supplying organizations. In particular, it was noted that the debt of management companies to resource supply organizations is more than a trillion rubles for 2018.

Therefore, the legislation provided for the possibility to carry out direct payments for utilities, bypassing the contractor, and to conclude direct contracts for the provision of utilities with resource supply organizations.

The procedure for direct payments for utilities was regulated by parts 6.3 and 7.1 of article 155 of the RF Housing code, which has now become invalid. The rules of implementation of direct payments was as follows. Based on the decision of General meeting of proprietors of premises, members of the homeowners Association, or housing cooperative or other specialized consumer cooperative, the owners and tenants of premises in the apartment building could pay for some or all utilities directly to organizations, and utilities for municipal solid waste management – the regional operator, the municipal solid waste management. Such payment was recognized as proper performance of duties by owners and employers. At the same time, the management organization, the homeowners' Association or the housing cooperative were responsible to the owners and tenants for the provision of public services of appropriate quality. Therefore, transition to direct calculations was not the basis for recognition of the resource supplying organization as the contractor of utilities. This was confirmed in judicial practice, repeatedly in court decisions indicated that in an apartment building can be only one way to manage and one management company, which is obliged to provide a full range of utilities. Therefore , in the presence of the management company, direct calculations of citizens do not change the scheme of relations between the resource supply organization and the management company as a contractor of utilities, this method of calculation means the establishment of a new method of fulfillment of obligations by consumers of utilities to the contractor in the face of the management organization .

Direct contracts with the resource provider and the regional operator for the management of municipal solid waste have been concluded and can now be concluded in the following cases.

1. The absence of the contractor utilities.

- at the conclusion of contracts with the owners of individual houses (part 9 of article 155 of the LCD RF);

- with direct control of an apartment building (part 8 of Art. 155 of the LCD of the Russian Federation). Contracts of cold and hot water supply, water disposal, power supply, gas supply (including supply of domestic gas in cylinders), heating (heat supply) are concluded by each owner of the premises on

his own behalf [14, p.51]. Such model of relations is the best, since the failure to perform duties under such contracts, in particular for payment, the claim shall be presented to the contractor under the contract [15, p. 66]. However, this scheme of contracts does not establish the procedure for the provision of energy and other goods transmitted through the connected network, common areas that are undoubtedly in need of such goods. In particular, we are talking about heating and lighting of entrances, Elevator operation, etc. [16, p. 23];

- in the absence of the contractor for other reasons (e.g., not selected or selected, but implemented method of management of an apartment house) (item 17, Resolution No. 354).

2. Provision of services to owners of non-residential premises (paragraph.4 item 6 of the Resolution No. 354).

3. The conclusion of the contract supplies of resources with the service provider, which expressly provided for the possibility of unilateral refusal of resource providers from the contract if the contractor's debt for the supplied utility resource in excess of the cost of utility resource calculation for three months . The inclusion of this provision in the current legislation served as the basis for filing an application by the limited liability company "management company" housing Fund " of the city of Izhevsk to declare it invalid because of its inconsistency with the art. 155, 161, 162 housing code, paragraph 64 of the Rules of granting of utilities to owners and users of premises in apartment buildings and houses approved by the resolution of the Government of the Russian Federation of may 6, 2011 № 354; violation of rights, freedoms and legitimate interests of companies in the sphere of entrepreneurial and other economic activities for management of apartment houses, including creation of obstacles for implementation of such activities. Confirmation of the declared requirements, the company indicated that the contested norm does not contain the order of refusal of the supplier and the organization from the contract, the terms and procedure for notification of consumers, does not provide for the manner of payment of utilities by consumers or by the managing organization prior to adoption by the owners decision to choose the method of payment of public services or until the owners of the decision on the choice of the method of management of an apartment house or other management organization.

Having considered the application of LLC, the court refused to satisfy the claim, determining that by virtue of the paragraph. 2 item 1 of Art. 546 of the Civil code of the Russian Federation in case when the subscriber under the power supply agreement acts as the legal entity, the power supplying organization has the right to refuse execution of the agreement unilaterally on the bases provided by Art. 523 of the civil code of the Russian Federation except for the cases established by the law or other legal acts. Article 523 of the civil code of the Russian Federation unilateral refusal from execution of the supply agreement (in whole or in part) or its unilateral change is allowed in case of essential violation of the agreement of one of the parties, including at repeated violation of terms of payment of goods. Subparagraph "a" of paragraph 30 of the Rules of the government of the Russian Federation refers to the concept of fundamental breach under the contract on the delivery of communal resource, the presence of a recognized by them in the reconciliation report or confirmed by a judgment of debt to the resource supplying organization for the supplied utility resource in excess of the cost of respective communal resource 3 settlement period (settlement month). Taking into account the powers of the Government of the Russian Federation, this specification of the concept of "material violation" does not contradict the above norms of the civil code and cannot be considered as a violation of the rights and legitimate interests of the administrative plaintiff .

The order of unilateral refusal of the resource supplying organization from the contract of resource supply can be conditionally divided into the following stages. First, the supplier and the organization should inform consumers about the existence of a debt of the executor of utilities. The form of the notification is defined by the resource supplying organization independently. Second, the supplier and the organization is required to provide public services to the conscientious consumers until the conclusion of the contract to another contractor utility services or with the owners directly[17, p.36]. This procedure is confirmed by the materials of judicial practice .

4. The contract supplies of resources provided that the contractor's utility services payment obligations set communal resource by the assignment in favor of resource providers claim rights to consumers in arrears for payment of utility services .

The assignment of rights is the administrative transaction is designed to transmit (transfer) the right of claim from the copyright holder (initial creditor, assignor) to the transferee (new creditor, assignee)[18,

p. 26]. Assignment of claims to consumers in favor of the resource supply organization is possible under the following conditions.

Since the assignment entails the replacement of the creditor in the obligation (in whole or in part), the condition of the assignment contract on the subject matter of the assignable right must be formulated in such a way as to exclude an ambiguous interpretation of the scope of the assignable rights. That is, there should be specified a specific obligation under which the right of claim is assigned, the amount of assigned rights, a reference to documents confirming the debt (for example: specific contracts of rental and maintenance of housing for which the right of claim is assigned, indicating the size of the assigned right for each of them), information on the counter-provision .

Proof of performance of the principal obligation must be provided. When considering a particular case, the court, in denying the recovery of debts for utility services in order to assignment of claims, including pointed out that in the case of documents (invoices) it is also impossible to establish the actual performance of the original creditor of its obligations resulting from the debtor by virtue of paragraph 1 of article 328 of the Civil code of the Russian Federation emerged a counter-charge on their payment. These invoices do not contain authentic signatures of the debtor's authorized persons. Other documents on execution by a creditor of its obligation to the plaintiff because of the burden of proof is not submitted .

The contract on assignment of the right of claim arising from a continuing obligation must contain information (reference) about the period of the debt or about the documents clearly allowing to determine this period .

In addition, the assignment should not lead to substitution of public services by the supplier and the organization without the appropriate vote of the owners and tenants of residential premises and may not apply to the right to claim payment of utilities, the term of payment obligations which has not come as such a concession is not a concession of a debt within the meaning of paragraph 26 of the Rules, obligatory at the conclusion by the managing organization or partnership of owners of housing or housing cooperative or other specialized consumer cooperative of contracts with the resource supplying organizations .

It should be noted that there is another practice associated with the assignment of rights to receive debts for utility payments. JSC "OmskVodokanal" appealed to the court to L. S. N.,L. A. recovery of debt for water supply and sanitation Defendant L. S. N., without disputing the fact of a debt, a claim not recognized, indicating that the contract for the provision of public services by the plaintiff to them was not concluded, therefore JSC "OmskVodokanal" appropriate person on the stated claim, and they are proper defendants, are not.

By the decision of the magistrate of the judicial site No. 48 of the Kirovsky court of Omsk of 04.03.2009 satisfaction of claim requirements of JSC OmskVodokanal is refused. By its appeal ruling of the Kirov district court of Omsk from 15.06.2009. the decision of the world judge is left without change, the appeal complaint of JSC "OmskVodokanal" - without satisfaction. Refusing satisfaction of the declared requirements, the court specified that the obligation of payment for the provided utilities arises at the consumer of utilities before the contractor who is directly providing utilities and responsible for service of intra house engineering systems with which use they are provided. As the law obliges to purchase communal resources in order to provide them to citizens is assigned to the management company, the contractor for the provision of these utilities and the proper plaintiff in the claimed dispute is JSC "left Bank".

3. New rules for the conclusion of direct contracts with resource organizations and the regional operator for the treatment of solid municipal waste

New rules of direct contracts are provided by article 157.2 of the RF LCD. The essence of the rules is as follows. At preservation of the former order of management of the apartment house - at management of the apartment house by the managing organization, partnership of owners of housing or housing cooperative or other specialized consumer cooperative utilities to owners and employers of rooms in the apartment house can be provided by the resource supplying organization, the regional operator on the treatment of solid municipal waste (further – RSO) according to the contract signed with each owner of the room.

The basis for the conclusion of such agreements is:

1) the Decision of the General meeting of owners of premises in an apartment building on the conclusion of contracts with RSO. The contract is considered to be concluded from the date specified in the decision of the General meeting of owners of premises in an apartment building, by the decision of RSO,

determined by the General meeting of owners of premises term may be postponed, but not more than three calendar months, as notified to the owners.

2) the Contract between the owners and the RSO (here we are talking about a situation where the owners of premises in an apartment building did not choose or chose, but did not implement a method of management of an apartment house or when the house was implemented management method - direct control and, accordingly, there is a contract in which payments for utility services is carried out directly RSO) which contains provisions on the preservation of housing and communal services and payments for utility services with the RSO if you change the method of management of an apartment house, or when you select the administering organization. The contract is considered to be concluded from the date of conclusion of contracts, valid until the owners of premises in an apartment building decision to change the method of management of an apartment house or the choice of the management organization.

3) Termination of the concluded agreements between RSO and the contractor of services (the managing organization, partnership of owners of housing or housing cooperative or other specialized consumer cooperative) owing to unilateral refusal of RSO from execution of the agreement in the presence at the contractor of the services recognized by it or confirmed by the judgment, debt to RSO for two months and more, except for the case of full repayment of this debt by the contractor of services before the entry into force of the judicial act on collecting this debt. Unilateral refusal of the contract is realized by sending to the contractor of services and to body of the state housing supervision of the subject of the Russian Federation of the notification on refusal of the contract. After 30 days from the date of notification, the contract is considered terminated, and contracts for the provision of utilities and services for the treatment of solid municipal waste with all owners and other users of residential premises, notified of such refusal, are considered concluded, except for the provisions of previously concluded contracts regarding the acquisition of communal resources consumed in the use and maintenance of common property in an apartment building.

Direct contracts with RIS are also concluded:

- in the direct management of the apartment building;
- if the owners of the premises in an apartment building did not choose the method of management of such a house or the chosen method of management is not implemented;
- in the absence of the contract of resource supply between RSO and the contractor of utilities.

Contracts with RSO are recognized concluded with all owners at the same time for an indefinite period in accordance with the model contracts approved by the Government of the Russian Federation, do not require writing.

Whether direct contracts will solve the problem of non – payment and whether the introduced rules will increase the responsibility for the quality of public services-apparently not. The problem of non-payment will be solved only in respect of the" former" contractor of utilities, as consumers will directly pay RSO. But at the same time, the RSO will have to conduct claims and judicial work to recover the debt for the supplied utilities. It should be noted that RSO is easier to collect debts from the service provider than from each consumer.

While maintaining the same procedure for the provision and payment of utilities for the quality of public services is made by a person engaged in the management of an apartment house. Under the new rules, the person managing the apartment building is responsible only for ensuring the readiness of engineering systems (part 2.3 of article 161 of the LCD of the Russian Federation). The Ministry of construction of Russia in the letter No. 20073-AH/04 defined questions of responsibility as follows. By virtue of part 15 art. 161 LCD RF organization engaged in the supply of resources necessary for the provision of utility services is responsible for supplying these resources of adequate quality to the boundaries of the common property in an apartment house and the boundaries of the external networks of engineering support this at home, unless otherwise provided by Treaty with such an organization. A person who manages an apartment building acts as a" single window " for receiving complaints from consumers about the violation of the quality of provided utilities and is obliged to be responsible for the quality of provided utilities within the apartment building in terms of the proper maintenance of internal engineering communications . And who will check what quality resources have reached the border of an apartment building, because the quality can be determined only by using these resources in a particular room. It seems that in this situation, RSO is the executor of public services and that RSO should be responsible for the poor quality of the resource that has reached the consumer. This thesis is confirmed by the law

enforcement officer, in particular, the Supreme Court of the Russian Federation, considering the case on the administrative claim of LLC "management company "housing Fund" to challenge the ABZ. 4 item 2 letters of the Ministry of construction and housing and communal services of the Russian Federation of December 30, 2016 No. 45097-AH/04, "ON the application of certain provisions of the legislation of the Russian Federation concerning the conclusion of agreements on the provision of public services", stated: "within the meaning of paragraphs 8, 9, 10 of regulation No. 354, performers of public services can be management company, homeowners, housing, housing-construction or another specialised consumer cooperative, as well as RSO. Thus according to the subparagraph " e " of point 17 of Rules No. 354 of RSO for which according to the legislation of the Russian Federation about water supply, water disposal, power supply, heat supply, gas supply the conclusion of the contract with the consumer is obligatory, starts providing utilities of the corresponding type to owners and users of rooms in the apartment house concerning which the agreement on acquisition by the managing organization, partnership or cooperative of a municipal resource for the purpose of providing utilities is terminated., - prior to the conclusion of a new agreement for the purchase of communal resource in relation to the apartment building. From the above provisions of regulation No. 354, it follows that in the case of termination of the contract on the acquisition management organization, a partnership, or a cooperative communal resource in order to provide utilities that were its performers, to the conclusion of a new agreement for the purchase of communal resource in relation to the apartment building contractor utilities is a RSO .

It would be advisable to fix in the LCD of the Russian Federation the rule that in the case of direct contracts with RSO, it is RSO is the contractor of utilities.

The order of decision-making by the General meeting of owners of rooms on transition to direct contracts with RSO needs improvement also. The General meeting of owners of premises in an apartment house held for the purposes of management of an apartment house by discussing agenda issues and taking decisions on issues put to vote)[19, p. 29].

Decisions on transition to direct contracts with RSO are made at the General meeting of owners of rooms by the majority of votes from the total number of votes of the owners who took part in meeting (PP. 4.4 part 2. 44 and part 1 of Art. 46 of the LCD of the Russian Federation), that is the minimum number of votes for decision – making-26%. Is it possible to force owners who did not take part in the meeting, or who voted against, to conclude relevant agreements with the RSO? Provisions of part 7 of art. 157.2 housing code reinforce the rule that contracts are concluded on the date specified in the decision of the meeting, i.e. automatically with all owners. This provision is contrary to the norms of civil law. The obligation to conclude contracts that mediate the provision of resources through an attached network is established only in respect of resource-supplying organizations. After all, with this construction of contracts, energy supply contracts will be concluded with consumers, which were previously concluded by the contractor of utilities (paragraph 1 of article 539 of the Civil code of the Russian Federation). It seems that in order to resolve this issue, it is necessary that the owners with the majority of votes of the total number of votes of the owners of premises in an apartment building vote for the conclusion of the contract with the RSO, then the principle laid down in the housing legislation concerning decision-making by the owners of premises in an apartment building would be justified: "the minority is subject to the majority". In fact, the majority principle is the only way, following which it is possible to make the necessary decisions, if we start from the thesis that co-owners should be forced as little as possible to activities with which they do not agree)[20, p.70].

4. Conclusions

Thus, it can be concluded that direct contracts with resource supply organizations are introduced in order to legislate a direct order of payments for utilities, which actually has developed in many regions of the Russian Federation and to establish a simpler procedure for the termination of resource supply contracts with persons managing apartment buildings, if these persons have debts to resource supply organizations.

For owners the rules are less convenient in terms of determining the person responsible for the quality of public services, the responsibility for the quality of public services under new rules imposed on organization (for the supplied resources to the border of an apartment house) and the person managing the apartment building (for proper maintenance of engineering networks inside apartment buildings). The legislator does not determine who is responsible for the final result. Moreover, it is not entirely clear is the

purpose of the decision of the General meeting of owners of premises in an apartment building on the transition to direct settlements with the supplier and the organization, if the person managing the apartment building, faithfully performs the obligations on transfer of payment for communal resources. In addition, the number of votes required to make such a decision clearly indicates that the decision of the General meeting is a formal reason for the transition to direct calculations.

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INFORMATION ABOUT AUTHOR
Svetlana E. Masley – PhD in Law, Associate Professor, Department of Civil Law
Dostoevsky Omsk State University
55a, Mira pr., Omsk, 644077, Russia
e-mail: svetlana.masley@mail.ru
SPIN-code: 7273-8504; AuthorID: 595987

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