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# THE DUALISTIC LEGAL NATURE OF THE CONTRACT FOR THE PERFORMANCE OF DEVELOPMENT WORK

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The research is conducted in order to develop practical recommendations for the further development and improvement of various forms or sources of law, individual legal acts, norms and institutions. The main objective of the article is to highlight the problems of legal regulation in the theory of legal science and in law enforcement practice, the elaboration of legal mechanisms and recommendations for improving current legislation, overcoming legal gaps.

The subject of the research is the norms of Russian legislation regulating relations in the field of development work, legal positions reflected in judicial practice. The object of research is public relations related to the legal institution of a contract for the performance of development work. These agreements belong to the group of consensual, retaliatory and mutual, that is, bilaterally binding agreements that are considered concluded from the moment the parties reach all essential conditions.

This type of contract has the features characteristic of both contracts for the performance of work and contracts for the provision of services. The practice of using this legal institution shows the dualistic legal nature of contracts of this type and the need to separate it into a separate independent type of contract – a contract of design activities and special legal regulation. Today in Russia, the contract for the implementation of the R&D is considered adjacent to the contract for the performance of work and is regulated by Chapter 38 of the Civil Code of the Russian Federation.

The purpose of this article is to study the main features of the contract for the performance of experimental design work, generalization or isolation of its general and specific features, analysis of various points of view on the issue of its legal nature, review of Russian legislation, as well as Russian judicial practice, their positive and negative aspects.

Methodology. In order to best solve the task, a systematic approach was used in combination with a logical method. This allowed us to study the theoretical, factual and legal foundations of the phenomenon of the contract for the implementation of R&D. The comparative legal method was also used by comparing single legal concepts and processes, contrasting legal norms and identifying similarities and differences between them, using conclusions by analogy, relying on the similarity of the signs of the facts being studied, which will allow transferring the signs from one phenomenon being studied to another.

Main results and scope of application. The article outlines the main features of the contract for the implementation of R&D, different points of view on the definition of the legal nature of this type of contract. The results of the study contribute to the identification of problems of legal regulation in the theory of legal science and in law enforcement practice, the elaboration of legal mechanisms and recommendations for improving current legislation, overcoming legal gaps.

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## 1. Introduction

The study was conducted to elaborate practical recommendations for the further development and improvement of various forms or sources of the law, individual legal acts, norms and institutions.

The main objective of this article is to highlight the problems of legal regulation in the legal theory and the law enforcement practice, to elaborate legal mechanisms and recommendations for improving the current legislation and bridging the legal gaps.

The subject of this study is presented by the Russian legislation norms regulating the relations in the field of R&D and the legal positions reflected in the judicial practice.

The object of this study covers the public relations pertaining to the legal institution of the contract for performance of R&D work. Today, in Russia, an R&D contract is considered as adjacent to a labour contract and regulated by Chapter 38 of the Civil Code of the Russian Federation.

This article is aimed to study the main features of the R&D contract, to specify its common and specific features, to analyze different viewpoints about its legal nature, to review the Russian legislation as well as the Russian judicial practice and their positive and negative aspects.

In order to perform this task in the best way, a systematic approach was used combined with a logical method. This allowed to study the theoretical, factual and legal basis of such phenomenon as the R&D contract. Also, a comparative legal method was used enabling to compare single legal concepts and processes, verify legal norms and identify similarities and differences between them making conclusions by analogy based on the similarity of features of the facts under study that would allow to transfer the features of one phenomenon under study to another.

One of the goals of the state policy stipulated in the Economic Security Strategy of the Russian Federation[1] is to maintain the resource of the military industrial complex of the country at the level required for providing the adequate national defense capability. One of the methods to effectively perform such task and attain the stated objectives is the improvement of the normative legal base providing for the adequate level of legislation that can fully reflect the demands and requirements of legal entities and identify the priorities for development of legal regulation of norms for particular types of contracts.

There are such fields in the present reality of the Russian legislation development that go beyond the regulated law framework and predetermine the moment of formation of a kind of vector giving a direction for a law-maker to develop the contract law. Moving along this way would require the entire analysis of future legal norms – starting from their accurate wording to the estimation of probable consequences that may result from their potential adoption.

## 2. Interpretation of legal relations in the juridical doctrine

There are scientific discussions about R&D contracts and their reference to either independent contracts or labour contracts or service contracts [1]. It is necessary to note that the discussions on the legal nature of R&D contracts are not limited by the above-mentioned types. In the judicial practice there are such acts that formulate criteria for differentiation between the R&D contract and the delivery contract[2] which stipulates the transfer of goods produced or purchased by the vendor, i.e. the items which do not in fact have any individual features, whereas the R&D contract provides for development of a principally new product based on the Customer's demand which is the key factor for this development.

[1] Decree of President of RF dated 13.05.2017 N 208 «About the Economic Security Strategy of the Russian Federation for the period until 2030». Collection of legislative acts of RF», 15.05.2017, N 20, Cl. 2902.

[2] Resolution of the Presidium of the Supreme Arbitration Court of RF dated 17.07.2012 № 2296/12 w.r.t. case № A40-86304/10, Resolution of the Arbitration Court of the North-West District w.r.t. case №A56- 33281/2015, Resolution of the Arbitration Court of the Ural District dated 15.07.2019 № Ф09-3244/2014 w.r.t. case №A60-28796/2018. ConsultantPlus.

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The term “type” (derived from the Greek word “typos” that means “print”) is determined as a form making the basis for a number of different or related individuums, a sample which best determines a class or a sort [2]. It is possible to identify specific features of a contract type when considering its essential conditions, in particular, a subject matter and unique purpose of the contract, and also in case of untypical legal relations between the Parties.

M.I. Braginskiy and V.V. Vitryanskiy [3] propose a model for grouping the contractual relations oriented to the transfer of goods, performance of work, rendering services, establishment of various institutions. The authors point out the particular differences from the other groups of activities stipulated by a contract for performance of work producing the result which is separable from this work and which in fact represents a subject matter of the contract. They suppose that subdivision inside a group is possible based on the risks to fail in achieving the result. The risk assumed by the Contractor is typical to a labour contract, whereas the risk assumed by the Customer is specific to an R&D contract.

According to S.A. Sinitsyn, some contractual constructions derived from service obligations for performance of research and development work need thorough regulation. «The expanded regulation of the service contract is in special demand and of social importance, and such contract should not be considered as similar to or derived from a labour contract» [4].

One of the civil lawyers who considered necessary to separate the notions of a labour contract and a service contract was G.F. Shershenevich who stated that the labour contract means «performance of work as a product of labour utilization», and the work outcome should be definitely presented as the «work product» [5].

Presently, the legal relations arising from the R&D contract are primarily regulated by Chapter 38 of the Civil Code of the Russian Federation. The research and development work acquires independence as a sort of a labour contract in the only clause dedicated to this notion – Clause 97 of the «Fundamentals of civil legislation of the Union of Soviet Socialist Republics»[3] – which stipulates the Contractor’s obligation to perform some particular work by order of the Customer (i.e. scientific research, development of a new product prototype, design documentation, a new manufacturing procedure or other production innovation), and the Customer is finally obliged to accept the work and make payment. Such a contract concluded between the Customer and the Contractor can comprise both the entire process of research, development and manufacture of production innovations and selected types of studies. These types of contracts, by analogy with construction contracts (Clause 95 of Fundamentals) and contracts for design and survey work (Clause 96 of Fundamentals), were non-alternatively referred to as a sort of labour contracts.

Referring the R&D contract to the type of labour contracts cannot be absolutely categorical and correct, since considering the special nature of legal relations it is still required that they should be more clearly separated from the labour contract [6,7]. There is a viewpoint that the reference of R&D contracts to labour contracts is not possible in principle.

Thus, M.P. Ring points out that «both contracts have a number of common group features such as: legal relations established because of work, performance of work by one party by order of another, delivery of work products to the Customer. At the same time, each contract has specific features making it independent. It means that the norms of one contract, for instance, a labour contract, are not common and applicable for the other contracts. Thus, it makes a hierarchy of norms based on common features that simplifies law enforcement and integrity of the contract law. It can be concluded that the requirement to separate a group of contracts making a contract type is based on the specific character of exercising the rights, achieving the purpose and execution of the contract» [8].

It is important to mention the opinion of O.S. Ioffe [9] who states that the legal relations

[3] Approved by the Decree of USSR Supreme Soviet dated 31.05.1991 № 2211-1. «Vedomosti SND i VS SSSR (Bulletin of SND and USSR Supreme Soviet)». 26.06.1991 №26, Cl. 733.

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arising from the R&D contract, even having some key cross-points with the labour-contract legal relations, are of the dualistic legal nature taking the form of independent contracts and thereby holding a specific position among the work performance obligations. This viewpoint is shared by the civil lawyers [10] who emphasize that R&D contracts can be treated as independent contracts in the civil law, even considering some particular features related to labour contracts.

At the same time, if we consider the legal relations arising from the fee-based service contract, then in the opinion of some jurisconsults [11], they essentially mean the advantages granted in the form of the Contractor's activity executed in favour of the Customer, and the results of that activity would be a useful effect with no tangible medium [12]. Moreover, the standpoint of the other authors [13-15] is built on the reasoning that a service is determined through demarcation from work based on the criterion which characterizes the action or activity result, its inseparability or separability from the work. The result coming from the service contract obligation may be material but non-embodied result which has no impact on the legal relationship as such, it does not transform it into something fundamentally different, for instance, into the work, since in this case it would only take the form of its objective implementation such as a flash-disc, booklet, etc., which confirms the nonmaterial essence of the activity result.

That is to say, if the result does not suppose its separation from the work, then it is most likely a service obligation. If the separation is possible, then it is a work performance obligation. Therefore, the service obligations differ from the work performance obligations by absence of the embodied result.

One cannot disagree with the viewpoint [16,17] that the result of work performance obligations (a labour contract) is expected to be concrete and tangible, so it should be a created material object or a thing, but the result of service rendering obligations can be abstract. Regardless the fact that the R&D contract is supposed to have a material end result [18], but the work outcome is in fact a nonmaterial benefit – namely, scientific knowledge and technical solutions which are not consumable and not subject to alienation, as the Contractor who handles over the tangible medium to the Customer does not alienate the result itself, its scientific value is not lost by the fact of its disposal of the Contractor's possession, so it does not stop existing in the process of usage. Thus, the "activity result" parameter cannot be only used to identify a concrete typology of the legal relations arising from the R&D contract.

**3. Legal nature of the R&D contract**

R&D contracts are referred to as consensual, fee-based and mutual, i.e. bilaterally binding contracts considered as concluded from the moment when all essential conditions are agreed by the Parties [19]. The law-maker[4] identifies the following contract conditions as essential: its subject as well as such conditions which are indicated in the corresponding law or other regulatory acts as essential or necessary for the contracts of this type as well as all those conditions in respect of which the agreement must be reached on the motion of the Parties.

Let us try to make parallels in terms of the legal relations arising from a work performance contract (a labour contract) and those of a fee-based service contract with respect to the "essential conditions" parameter.

Thus, the law-maker identifies[5] the subject of the labour contract as the obligation to perform the work which one of the Parties (the Contractor) is committed to execute by order of the other Party (the Customer) and provide the result. The Customer, in turn, is obliged to accept the work result and pay for the same. Whereas the fee-based service contract provides for the obligation to undertake certain actions or carry out certain activities by the Contractor.

There is a viewpoint that the labour contract has a double subject: i.e. the work and work result

[4] Civil Code of RF (part 1) dtd 30.11.1994 N 51-ФЗ (ed.dtd 16.04.2022). «Collection of legislative acts of RF», 05.12.1994, N 32, Cl. 3301.

[5] See Cl. 706 of Civil Code of RF (part 2) dtd 26.01.1996 N 14-ФЗ (ed.dtd 01.07.2021, with amendment dtd 08.07.2021) (with amendment and supplement effective from 01.01.2022). « Collection of legislative acts of RF», 29.01.1996, N 5, Cl. 410

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[20].

The disposition of Chapter (38) of the Civil Code of RF which regulates the legal relations arising from an R&D contract – between Chapter (37) devoted to a labour contract and Chapter (39) containing the norms of a fee-based service contract – allows us to suggest an idea about the dualistic nature of the R&D contract and to feel doubts about categorical reference of the norms pertaining to R&D contracts to one (work) or the other (services) type of contracts. At the same time, any legal ambiguity is absolutely delicately overcome by providing the norms required for the adequate legal regulation in the independent Chapter (38) of the Civil Code of RF.

In turn, the researchers indicate [21-23] several approaches for identification of an R&D contract subject. Firstly, the subject is a result of creative work realized as a sample, document, technical solution, i.e. exhibited as something absolutely fresh and undefinable in advance, the information «objectivated on a tangible medium» [24,25]. Secondly, that is the activity as such [26], thirdly, the activity and its result [27]. Herewith it is noted [28,29] that the subject of the R&D contract suggests a certain creative approach of the Contractor to achievement of the contract purpose which is hardly predictable, almost random, featured by high probability of creative failure. That is to say, the subject of the R&D contract can include elements related to both labour contract and fee-based service contract.

The law-maker does not envisage any imperative requirements to have a set of essential conditions for a contract except for its subject, therefore the law does not actually impose any restriction on legal entities in terms of identification of essential conditions for the R&D contract. For example, as per the existing judicial practice, one of such essential conditions is the period of obligation fulfillment[6]. It is confirmed by Clause 708 of the Civil Code of RF which regulates the work performance period. Reference to the same is also made by Clause 778 of the Civil Code of RF. Thus, for the labour contract the law provides for several types of terms: initial and final as well as intermediate terms. In this respect, the R&D contract is undoubtedly inclined to a labour contract type.

In turn, the legal relations arising from the fee-based service contract are considered as valid up to the moment of fulfilling the obligations by the Parties that is mentioned in the contract itself (Point 3 Cl. 425 of the Civil Code of RF). The moment of the obligation fulfillment is identified by both the fact of the service rendering and the fact of its complete payment by the Customer[7]. As per the general rules stated in Clauses 190, 191 of the Civil Code of RF the contract validity period is estimated by the calendar date or expiry period[8] which is calculated by years, months, weeks, days or hours (Clause 190 of the Civil Code of RF), or the expiry period after some event or action[9] specified by the Parties as well as by indication of the event which will inevitably come (Point 2 of Clause 190 of the Civil Code of RF).

In view of the above mentioned, the general norms are applied to the service contract regarding the terms which can be fully or partially applied to the legal relations arising from the R&D contract.

Therefore, the “essential conditions” parameter cannot be also considered as sufficient to arrive at the categorical conclusion on referring the R&D contract to the type of a labour or service contract.

To sum up, it is impossible to disagree with

[6] Decree of the Federal Arbitration Court of Moscow Region dtd 27.02.2014 N Ф05-29/2014 w.r.t. case N A40-40884/13-97-239, Resolution of the Arbitration Court of Moscow Region dtd 30.07.2015 N Ф05-8712/2015 w.r.t. case N A40-409/14, Resolution of the 9-th Arbitration Appellate Court dtd 03.07.2015 N 09АП-22977/2015-ГК w.r.t. case N A40-89200/14

[7] Resolution of the Federal Arbitration Court of North-Caucasian Region dtd 07.10.2009 w.r.t. case N A32-19378/2008, Resolution of the Federal Arbitration Court of East-Siberian Region dtd 06.05.2010 N A33-10545/2009”.

[8] [8]Decision of the Supreme Arbitration Court of RF dtd 30.10.2009 N BAC-13415/09, Resolution of the Federal Arbitration Court of the Ural District dtd 06.07.2009 N Ф09-4665/09-С5, Resolution of the Federal Arbitration Court of the Volga District dtd 11.01.2010 N A12-14566/2009, Resolution of the Federal Arbitration Court of the Volga-Vyatka District dtd 15.02.2010 N A43-11809/2009)”.

[9] Decision of the Supreme Arbitration Court of RF dtd 10.03.2010 N BAC-2262/10.

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the opinion that «the work performed by one of the Parties for its Counterparty eventually, by its nature, means a service in its usual sense. And otherwise, any service having the features of the labour contract indicated in the Civil Code of RF means work» [30].

**4. Conclusions**

Thus, in our opinion, it is reasonable to conclude about the dualistic legal nature of the R&D contract comprising both elements of work (a labour contract) and a service, so the R&D contract deserves to be separated into an independent type of contract – i.e. the contract for performance of development work with further legal regulation by the law-maker considering a specific character of the above legal relations.

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