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Obligations in the Digital Environment: Legal Doctrine



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Abstract

Aspects of cross-sectoral influence on the spheres of private and its public regulation construct of obligation in the digital environment using the example of utility digital rights. Specific obligation relationships in the form of the exercise of rights under utility digital rights and derivative financial instruments, including under an contract between a forex dealer and an individual, and others that involve the exercise of rights using technical and electronic means. Provisions on changing the norms of the Russian Federation Civil Code regarding new objects of civil rights: utility digital rights, derivative financial instruments or their analogues — digital rights and obligations. The criteria for obligation in the digital environment are considered and conclusions are formulated about the possibility of identifying the properties of obligation: reciprocity, conditionality, potestateness. A special element is highlighted in relation to obligations in the digital environment. Obligations in the digital environment are presented as a special category of indefinite obligations, digital rights, as new objects of civil rights based on a contract. The results of the action of the norms of Federal Law No. 34-FZ, as well as legislation in general and practice in terms of determining the legal status of participants in relations are analysed. The legal status of the information intermediary determines that it does not have the right to refer to special conditions for exemption from civil liability for violation of intellectual rights under Article 1253.1 of the Civil Code and will be involved in compensation for damage on the grounds common to entrepreneurs, provided for in its Article 401.



Keywords

stochastic obligations; rights in a distributed registry; potestativity; second right of refusal; virtual obligation; utilitarian digital right; digital financial asset; derivative financial instrument; information intermediary liability; marketplace.

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Introduction

The structure of obligation in the rapidly growing digital environment infrastructure is quite special. This clearly demonstrates that the digital reality of hybrid transactions is different from a regular civil debt or a duty to perform in its usual form, at least as far as the civil law definition of these relations is concerned. The description of legal phenomena related to cross-sectoral aspects and participation of special subjects in such relations also is quite specific in transactions of this kind.

Because of that phenomenon, and due to the period of validity of changes in the Russian Civil Code introduced by Federal Law No. 34-FZ as well as due to Federal Law No. 259-FZ “On Digital Financial Assets”¹, there is no conclusive answer to the question of the legal nature and structure of obligations in the digital environment; nor is there a mature methodology and a conclusive nomenclature that would put the matter to rest in efforts to develop the global regulation of the smart construct of obligation (even if it is considered a superstructure, still unaccepted in most jurisdictions, and not a civil law construct). Likewise, contractual law theory 2.0 has not taken final shape either. The reason is that this approach, that the doctrine partially terms “technological determinism”, is sharply criticized in this area of law. The argument in this case is that it is a technological method that the parties choose to discharge their contractual obligations [Bogdanov D.E., 2023: 35].

Still, the global tasks facing users trying to cope with technology challenges need to be taken into account at least from perspective of gaining competitive advantages of using the technology infrastructure. It creates a cyclic development pattern and calls for a general systemic solution, including legal aspects.

¹ SPS Consultant Plus.

These issues pose a global challenge in the sphere of technological sovereignty policies determine a country's ability to compete in the technology sphere at the global level. Current outlooks for the development of civil law, largely related to the enforcement aspect of digital technology use in property relations, will be determined by the efficiency of regulation model application to the obligations in the digital rights sphere and to the prospects of civil circulation of digital technologies in general. The author believes civil law may regulate all of the above, subject to the following.

Fundamental shifts in technologies affect relations of obligation mediating the relations of exchange and circulation of special objects of civil rights that causes changes in approaches to the regulation of legal categories and institutions that can participate in the circulation. While this phenomenon does not change the idea and purpose of the contractual structure, it adds a special aspect to the way obligations are fulfilled, and, to a some extent, enables to change approaches to the freedom of contract principle. On the whole, the doctrine does not define legal nature of the digital obligation and of the obligation in the digital environment, does not list the attributes characterising this type of obligation, and does not describe limits for application of this legal phenomenon. The question whether general principles of civil law can apply to contractual obligations in their entirety and what is the adequate limit of their application has not been resolved. The fact that there is absolutely no interconnection between legal systems and no synergies between functionality and private interest exacerbates the problems existing in the sphere of high-tech services (sets of platform technological solutions) regulation. E.g., a computer code can influence the shaping of approaches in pricing (anti-competition) of large business structures towards consumers. Also, the information intermediary's legal position can be used dishonestly in this sphere by limiting liability, etc.

The lack of clear-cut rules for regulation of constructs of obligation, the trend to individual regulation without establishing standardised boundaries of these constructs of obligation have given rise to the above-mentioned legal phenomena of a contractual nature. These phenomena tend to obtain a random regime affecting, among other things, correct determination of the list of digital rights. In turn, the development of the civic institution of the object of digital law has led to a cyclical half-result, which gives us reason to believe that it would be premature to ignore the emerging property criteria of such rights; thus, it would be necessary to develop property criteria to involve them properly in the circulation. This state of law and order "naturally" impedes

the technical and infrastructure ability to cope with the global challenges of technological integration and, in effect, obstructs digital sovereignty.

If to look at this as a problem statement and an attempt at an introduction to the theme, we see a clear need for a methodological solution that determines what is the universal (or close to universal) approach for working out ways to develop regulation in this sphere.

1. Descriptive essence of obligation structure in a digital environment

In most cases digital contracts and smart contracts are obligations related one way or another to literal legal contracts; the former ones can be a part of a contract, or a whole contract, or be used to automate the execution of literal transaction.

Obligations in futures transactions with derivative financial instruments are vague. It is a “contract” with no price criteria at the time the parties enter the deal: the price depends on the market (e.g., demand and offer), the terms and conditions of the transaction, and the cost of delivery. In short, this contract is stochastic. In the past, the stochastic nature of such obligations brought about the emergence of terminology that was related to financial instruments in this area and had a clear cross-discipline character. However, after the 2008 global financial crisis, new financial “generators” of market concepts outside of centralised regulation emerged. This gave rise to approaches in law that tend to “expand” towards abstractions and towards a virtualised model of obligation and criteria for valuing this obligation as property already in the decentralised sphere. This is how “stochastically tuned” indeterminate “self-executing”, “smart” legal constructs of obligation emerged. However, this fails to address the issue of individual categorisation of the concepts underlying such derivative instruments as digital financial assets (“DFA”), utility digital rights (“UDR”) and others, and, consequently, to establish an acceptable balance between the private and public interests of the parties [Kulakov V.V., 2017: 423]; [Egorova M.A., Kozhevina O.V., 2020: 83]; also, this highlights specific peculiarities of their structure—at least, the peculiarities of applying the freedom of contract principle. Special laws in the sphere of the securities market fail to give answers to the above questions, too. Hence, the issue of what should come first, the code or the contract, will remain on the agenda for a long time to come. In this connection, debates continue, and one would logically ask

the question whether a “pure” civil law model is possible as a basis and whether it can apply in full [Kartskhiya A.A., 2019: 13]. In this connection scholars note that the differences between the concept of “code is law” and *lex mercatoria* are expressed in the contradiction of rigid rules, *ex ante* self-executed by software code, and the relationship between special customs and innovative applications that can be applied *ex post* by specialised arbitration courts [Jünemann M., Milkau U., 2021: 1]. Obviously, contract law is in many ways an *ex-post* instrument for regulating pre-existing contractual relations between counterparties. But as far as smart self-execution is concerned, the transaction that is the basis for the respective obligations is also a private-law regulator that determines the conditions on which the obligations will be formed. Thus, this concept cannot be curtailed: all its parts are important to ensure accurate legal qualification, to categorise concepts for data consolidation and to work out the methodology.

It is still unclear whether law of contract can apply in this case. Is it a controversial issue. The matter is that they were initially developed so as to rely exclusively on technical rules, e.g., the rules embedded in blockchain, and were considered standalone instruments capable of solving various problems that could arise between the parties. However, they failed to stand the real-life test due to the lack of an effective technical legal regulation [Kiviat T., 2015: 608]. Moreover, it is clear that the participants of a distributed ledger not only validate smart obligations but also control their invariability [Bogdanova E.E., 2019: 118].

Therefore, the relevant questions are those that determine the priorities and principled basis at the present moment for the legal regime of such legal concepts and for solving the questions whether synergies are possible when applying general principles of civil law and special principles of digital turnover to solve the problems of law of obligations, corporate law (securities market), and competition law [Inderst R., Thomas S., 2024]. In this connection, it is important to address the point if the institutions and legal remedies of civil law can fully apply to the “laws of the digital market” in general.

2. General description of obligations in the digital environment: the road to conditionality

Participation in a civil obligation means acquiring and executing civil rights and obligations on one’s behalf and at one’s own financial liability before the creditors, including liability in digital format. Theoretical studies

usually consider legal relations in the sphere of “digital” rights as a dynamic system of “legal relations within the subject of civil law” [Belov A.V., 2007: 75]. And from the view of legal technique they are a legal concept, “the constituent elements of which are objects, subjects, and content” [Volynkina M., 2012: 5].

The civil law method allows, for the purposes of the use of digital rights, to substantiate the conceptual assessment of digital civil turnover, which inherently involves the change of carriers of digital rights through the use of digital technologies that provide sequential mathematical operations of computer code in the form of digital records and which serve as a way to express certification and transfer of digital civil rights to digital objects. This means that the material difference in smart obligations that are initiated and automatically executed is that a smart contract is executed on the contract formation principle by means of a software programme that the parties use to express their will at the time when an agreement is reached on the terms and conditions of the contract, and that a smart contract is a kind of a software veil that covers a regular civil law contract [Željka M., 2021: 166].

Categories such as the presence of virtuality, the digital environment, and its infrastructure require a more comprehensive, renewed understanding of the legal regime of obligations with account of the legal system as a whole. Thus, it is a reason to believe a digital civil smart obligation, unlike its analogue in electronic form, is, according to the previously established criteria, more subjected to the influence of the rules governing the creation of digital technologies. To qualify an obligation that primarily binds, e.g., the execution of a smart contract, a significant starting role will have to be played by legal individual regulators together with technical rules and local acts based on the rules of a distributed data ledger (information system) for such crypto-instruments. That is, the very same regulators can be objects of civil transactions realised as utility digital rights by concluding contracts and issuing tokens for various kinds of services to “support” the platform and with generation of independent values on their basis.

E.g., it should be taken into account that crypto-instruments are the results of IT products (programmes) and of calculations performed by means thereof, i.e., the results of certain algorithms. The software programme, on the other hand, is an intellectual product of human activity. It follows that, at first glance, crypto-assets, as a general rule, cannot be the object of an exclusive right, but they can have distinctive features of and intellectual product—e.g., a programme code that can be activated on physical data carrier.

Hence, the disputed opinion that a crypto-instrument, being an object of digital right, could become an object of absolute right (just as the right of claim was once declared an object of the “absolute” right of obligation [Sazhenov A.V., 2018: 119], has somewhat similar “property features.” E.g., the thesis of “thing absolutization” notes: “records in blockchain, limited technologically, represent absolute rights and are similar to natural things: their number is known; they pass from owner to owner in a strictly defined order; they do not contain any *in personam* claims” [Jankowski R.M., 2017: 36]. At the same time, for a possible substantiation of “virtual property”, it would be worth mentioning the theory of legal correlates and legal opposites, which deconstructs legal relations into four pairs: claim-rights/duty, privileges/no right, powers/liability, and immunities/disabilities [Hohfeld W.H., 2017: 710].

So, there is a counter-thesis: the idea “digital property” is a new object of civil law follows from the absence of a tangible form; it is an algorithmic code and the result of computer calculations that exists as a virtualised object of law with a value criteria. This code can be used and can circulate outside the IT system whose owner interacts with information intermediaries, and the material value of this virtualised object depends on the number of transactions in the wide sense. While this counter-thesis doesn’t enjoy overwhelming support, it still exists as an antithesis to the rejection of the virtual nature of such property. The smart contract proper can also be considered from different perspectives: as a software code, and as an obligation [Efimova L.G., Sizemova O.B., 2019: 30].

So the ideas a close-end joint-stock company may issue the equivalent of stock value in the form of UDRs underscoring its virtual status quo are significant but not critical for the legislator (despite the fact doctrine rejects such transactions, and regulations use them to a limited extent). At the same time, it is impossible to forget the prohibitive background of crypto-asset-for-commodity exchange transactions stipulated in law. Furthermore, some scholars believe that it would be incorrect to introduce the concept in the rules of an individual information system which stipulates that transactions with digital currencies can be performed as with “miscellaneous property”: if digital currency is proposed to general public, then it is not related to a particular obligation, either as a means of payment or as an investment. It is an array of electronic data that is generated within a particular information system, has a material value within this system, and there is no particular person obliged to each holder/owner of the electronic data. The exception

is system operators as a special class of information intermediaries according to the rules of the system: normative boundaries/rules have so far only just begun to emerge for them in individual regulation. All these positions and counterarguments give rise to debate and more research.

3. Conditionality and potestativity

Probably it would be mostly correct to discard the smart contract as an independent regulator. Indeed, basically, the smart contract as a software programme has no substantive legal meaning. At the same time, there are no reasons to claim that, broadly speaking, there is no obligation relationship in a transaction when an obligation is executed by means of a smart contract. A smart contract actually pervades the conventional legal relations that are presented in a “digital skin” and are executed by means of the respective digital technologies. And the software decides to execute or terminate an obligation. Therefore, in its essence, the smart contract mediates a concrete obligation relationship that follows from a purchase and sale transaction, a lease, a loan, or a settlement that is tied with the expectation of the proper performance of an obligation by, at least, one party to the transaction. In other words, new types of contractual relations, which are not regulated in the Civil Code, can’t be the legal foundation of a smart contract. The novelties in question are as follows: the way of implementing such legal relations, namely by means of crypto-instruments and a blockchain platform; the way of recording such legal relations, namely by means of a programme code or a statement in programming language, the digital object of such legal relations, namely a crypto-asset, crypto-instrument, artificial intelligence, big data, and others. Conditional determinants take a special shape, too. Namely, the obligations are performed by the program in the overall framework of a conditional transaction, and conditional obligations where performance by one party is linked to performance by the counterparty. The priority of performance of a mutual obligation is inherent in the conditional nature itself.

Hence, it is obvious that such action or inaction (the code takes decisions on behalf of both parties, or at least one party) determines the time when the “commanding” nature of such action / inaction manifests itself. This will determine when the condition under the obligation occurs, i.e., when its potestative nature manifests itself. Most probably, it will be necessary to outline this nature in law with respect to such constructs of obliga-

tion despite the fact that potestativity remains at the discretion of the court and is not applied in positive law. Thus, the digital reality, which is impersonal, abstract, and takes programme code as reference points, is a favourable place for a conditional obligation “to exist in.”

If to look at the specificity of the binding nature of a legal relationship implemented through a smart contract, it is worth noting automation inherent in the use of blockchain technology requires that all these types of contractual relationships be conditional, i.e., that they are performed upon the occurrence of certain circumstances set forth by the parties in their written literal agreement. Academic literature has mentioned in numerous papers: performance conditionality is specifically inherent in the execution of an obligation through a smart contract. Scholars point to the conditional nature of a smart contract as one of its characteristics pointing out that the performance of one party’s obligation under that sort of a contract is conditional on the occurrence of certain circumstances. Thus, from the point of view of Russian law, this type of relationship may be characterised either as a conditional transaction (Article 157 of the Civil Code) or as a contract in that the performance of one party is conditional on the performance of an obligation by the other party (Article 327.1) [Savelyev A.I., 2016: 123]. In opinion of the author of paper presented, a smart contract has a similar nature: it introduces a conditional aspect to contractual relationships (Art. 327.1) and thus complicates the application of such construct [Kotsar Y.A., 2024: 46].

A party to a smart contract performs its obligations upon the occurrence of certain conditions that can both depend on and be independent of the will of the party as regulated by the provisions of Article 327.1 on the conditional performance of obligations [Grin O.S., Grin E.S., Soloviev A.V., 2019: 55]. The legal fact inherent in a conditional transaction and an obligation with conditional performance leads to a certain legal effect. However, in a conditional transaction, the legal effect manifests itself at the stage when rights and obligations arise or terminate, while in an obligation with conditional performance it appears at the stage when rights are exercised and obligations performed. I.e., obligations with conditional performance may be the legal substance for a legal relationship performed by means of a smart contract.

At the same time, it is not quite correct to consider a smart contract as a purely external form, as a “technological method” of performing obligation. We should agree with the opinion that it is inadmissible to equate

the smart contract only to a specific form of contract, as its use affects the rights and obligations of the parties to the agreement [Akhmedov A.Ya., Volos A.A., Volos E.P., 2021: 20, 79].

Scholars see this influence in the fact that, unlike a contract executed in a regular way, execution through smart technologies is planned for the future, and no outside intervention is possible. Conversely, the execution of an obligation in the “general” version may be subject to modification throughout the life of the contract, again subject to the will of the parties to the contract; this includes circumstances, the occurrence of which determines the fulfilment of a duty.

In light of these issues scholars rightly draw attention to the definition of a smart contract as an “obligation in a digital environment” and to the possibility of applying to such an obligation the principles of general contract law or purely technical principles of platform functioning on the basis of conditionality and reciprocity.

The opinion that the virtuality, the digital environment and its infrastructure require a more complete and new comprehension of the legal regulation of the obligation, taking into account the choice legal remedies in case of non-delivery of the conditional obligation in law as a whole, arises from a certain break-up of relations of obligation (performance by the programme-platform) and from the subsequent choice of the legal remedies, taking into account the definition of Article 328 of the Civil Code. Thus, we believe it is evident that a digital civil smart obligation, unlike its analogue in electronic form, is more subjected to the influence of the rules governing the creation of digital technologies.

Thus, the performance of an obligation in the digital environment will indeed affect the specific nature of this obligation, but will not replace it in its essence. In this regard, if we distinguish between form and content in the smart contract category, it is necessary to should speak exclusively of digital technologies with attention to form. And the content will be the “civil obligation”, that is the essence of the legal relations that are performed by means of a smart contract upon the occurrence of the circumstances programmed in the code. Exercise of rights and performance of obligations upon the occurrence of a condition (both an external circumstance and one that depends on the actions of the parties to the obligation) is characteristic of an obligation with conditional performance (Article 327.1). Hence, we can consider a smart contract a form of external expression of this type of obligation.

It would be appropriate to criticize the opinion the smart contract is a conditional transaction. The reason is that it mediates not merely legally significant actions, but precisely the qualitative component of the contract: its performance, and the transition (change of record behind the holder) of the digital asset from one account to another and to its new holder [Efimova L.G., Sizemova O.B., 2019: 30].

These aspects of a smart contract as a conditional transaction imply their separate study in setting the limits and development of approaches to understanding the fundamental basis of freedom of contract in the digital environment in such transactions, which enable understanding the freedom of contract in each part of the transaction responsible for delivery, since the parties regard such performance as an indication in a conditionally separable understanding of the counter-performance of the obligation in one part of the transaction from the other. At the same time, such separable understanding of reciprocity performance may provide an independent qualification criterion.

Programming a smart contract one can use any kind of condition: a contingent condition, a dissolving condition, or a potestative condition. This is determined by the essence of the legal relations form the legal basis of the programme code.

Also relevant is the issue of methods to protect the right in case the programmed condition does not occur. It is impossible to apply here the fictitious occurrence of condition, which is applied in case of violation of an obligation with conditional performance, because this method of protecting the rights is based on evaluations, and any evaluations are totally out of place in the programme code. That said, we believe it is possible to apply the classical remedies, such as damages, in the general course of a lawsuit.

To summarise, it is possible to distinguish the opinions a smart contract is a form of external expression of the rights and obligations arising from “traditional” forms of contractual relations, but implemented and executed on a digital platform using digital tools. A civil law conditional obligation can be the subject matter of a smart contract. This obligation can be performed by computer code programmed for specific circumstances, and it is what the parties have in mind to resolve their issues when they enter into such transactions by joining the platform. Thus, the application of the provisions of the Article 327.1 to relations performed by means of a smart contract establishes a separate type of obligation: the obligation with con-

ditional performance. It is important to note that the conditional relation implemented by means of a smart obligation should be reflected in the law system as a whole rather than only within a regulatory control framework and on a case-by-case basis.

4. Cross-sector linkages and functional approach

The task of correlating private and public principles for the development of methods invariably arises in applying cross-discipline approach for legal regulation of the obligation relationships. This gave rise to the need to study, e.g., the utility component of digital rights.

In view of the above, it would be relevant to study the cross-discipline impact on the legal relationship in the digital circulation of various legal phenomena associated with heterogeneous sector affiliation. This manifests itself in the necessity to divide information law into three conventional groups for the purposes of modernisation: law on information itself; law in the field of modern information technologies; and telecommunications law.

The request for utility reinforces the need to thoroughly analyse the concepts of information and civil law with respect to the regulation of digital relations. In this regard, we find interesting the functional cross-discipline approach. It is synthesis, which partly has a basis of mathematical origin [Efimov A.V., 2022: 95], and partly includes an instrumental approach [Fillipova S.Y., 2013: 350] for a transaction arrangement by means of setting up the digital environment infrastructure (preparing a platform solution) and meeting the public guidelines of the regulators.

It is evident that the mutual definition of the substance of the private element of UDR is predetermined by the public element in the form of a corresponding permission and obligation formalised by a transaction in the field of SaaS, IaaS, and PaaS services. Special attention should be paid when selecting a legal regulatory regime for such intra-functional service UDR as a bridge between private and public legal component through a functional and instrumental approach. In the former case, this will define a basis for the preparation of a correct circulation of such private UDRs, and the latter one will provide a basis for the circulation of investment-grade digital assets (e.g., digital financial assets, hereinafter referred to as DFAs).

The definition of Article 141.1 of the Civil Code does not provide clear criteria for resolving questions about the form of a right in the private sphere

in relation to digital rights. Therefore, upon analysing the scope of its application, we see that we can also apply here the general principles of civil law to contractual obligations to a reasonable extent. Thus, the following questions arise: whether the close concept of the legal regulation model is universal, taking into account the intersectoral relations in the private law of the digital environment, whether it is necessary to specify the content of the norm, and within what limits this should be done.

Scholars note law should be divided into individual areas by the subject of legal regulation, i.e. depending on the differences in the contents of the public relations that law regulates [Venediktov A.V., 1954: 29]. Also, scholars note “interbranch relations in law, including private law, are defined as relations of mutual dependence, conditionality and commonality between legal branches”.

Moreover, they clearly state “being inside private law, civil law is interconnected not only with branches of private law, but also with branches of public law—administrative law, criminal law, various branches of procedural law and others, which leads to the possibility of subdividing systemic links of civil law not only into intra-branch and inter-branch ones, but also into interconnections with branches of public law and branches of private law” [Chelyshev M.Y., 2009: 5, 197]. And this is precisely what characterises the primary public component of the UDR.

The conclusion that, in the civil law mode of the digital rights, intersectoral relations play a systemic role facilitating relations of dependence and conditionality between international, administrative, criminal, and civil law requires a multifactor analysis and a functional approach.

The decision on how the foundation can be laid and whether the private model is fully applicable as an established model of digital rights regulation is currently going through the so-called “acceptance stage” [Kartskhia A.A., 2019: 13]. Therefore, answers are required to the questions whether synergies are possible when applying general principles of civil law and special principles of digital circulation to solve the issues of law of obligations and, e.g., financial law and/or corporate law.

And the utility digital rights offer a case of fine-tuned applicability of the qualification of such rights serving as a basis for the principles of “common-public digital law.” Here, the question should be answered to what extent there is cross-discipline influence, and to what extent the principles of digital law are identical to special principles of digital circulation and to

what extent they are taken into account: e.g., in particular, the principle of technological neutrality, the principle of identified anonymisation, the principle of personal data security, the principle of crypto-encryption (encrypted) mode of data transmission, and the principle of cyber security. As well as sector principles with mixed affiliation: the principle of credibility of the data ledger, the insertion principle, and various principles of access rights by sector.

Regulation of property and non-property relations in market and commodity circulation is not limited to the norms of civil (private) law only. It also includes the norms of public law (antimonopoly law, law on technical regulation, on cyber security, on intellectual property, on personal data, etc.), which are not without a utilitarian civil law component.

E.g., it has a sense to believe the Law on Personal Data is directly linked to intangible goods, and it is this link that allows to find the reference areas between the law on personal data and civil law, and also, as mentioned above, is the basis for the utilitarian component, which allows to build effective cross-discipline links for their correct introduction in the form of the UDR.

In doctrine, legal relations in the sphere of “digital” rights are usually considered as a system of “legal relations existing within the subject matter of the branch of civil law, and from the point of view of legal technique they are a legal concept, the constituent elements of which are objects, subjects and content” [Volynkina M., 2012: 5]. Civil transactions are dynamic civil-law relations, hence they are “a totality of cases of change of bearers of subjective civil rights” [Belov V.A., 2012: 75]. Utility digital rights bound by appropriate obligation arrangements to users and holders are no exception.

The general approach equates property and civil circulation, viewing it as a “legal expression of commodity-money and market economic relations”, that comprises “numerous specific acts of alienation and appropriation of property (goods) committed by owners or other legal owners” [Sukhanov E.A., 2011: 1216].

The norms of civil law, with a private law method of regulating relations, should become the starting point for the qualification of the obligation ensuring the digital civil circulation. In other words, we are talking about mixing legal and individual regulators with technical norms (standards, regulations, etc.), local acts, including within the framework of technological platforms based on the rules (agreements) of a distributed ledger or other

technologies, and with account of the special legal personality of information and technological intermediaries).

General innovative developments in civil circulation of property rights to intellectual property objects promote the method of cross-sectoral and intra-industry regulation. According to Joseph Schumpeter, innovative development is “destructive creativity” [Schumpeter J.A., 1995: 57] that constantly creates the new while ceaselessly destroying the old and is the hallmark of the capitalist formation.

The Utility Digital Right token is an example of UDR realisation by means of a transaction, i.e. a smart contract. It is recognised as a fully automated obligation existing through and in the form of software code, which cannot be modified, cannot be unilaterally terminated, cannot be unilaterally repudiated, cannot be waived, and cannot be materially altered. The public part rules on the issuance of UDR serve as an example of this. I.e., we are dealing with a problem of determining the moment for such a “self-executing” obligation, and into how this relates to other areas. This again raises the question of whether it is a contract at all and whether it needs a precise legal qualification or whether a mathematical algorithm will decide everything.

5. Derivatives market “digitalisation” tools and secondary rights

Even before passing of Federal Law No. 34-FZ on amendments to the RF Civil Code, the automated exercise of several rights and fulfilment of obligations under smart transactions already applied to securities market participants. E.g., Federal Law No. 460-FZ of 29 December 2014 “On Amendments to Certain Legislative Acts of the Russian Federation”² provided judicial protection for claims under contracts concluded between a forex dealer and an individual.

By virtue of Para 1, Article 4.1 of the Law “On the Securities Market”, a forex dealer on its own behalf and at its own expense concludes with an individual, e.g., a contract on derivative financial instruments, and the obligations of the parties under such contracts depends on the changes in the exchange rate of the relevant currency; the individual in this case may assume obligations that exceed the amount of collateral provided to the forex

² Consultant Plus.

dealer. The forex dealer can also conclude so-called contracts for difference (CFD) with a foreign currency or currency pair (Para 3, Clause 1, Article 4.1 of the Law “On the Securities Market”).

Such contracts are concluded, executed and terminated using automated systems. The obligation of a forex dealer to use software and hardware tools when carrying out operations in fulfilment of the contract and to use technical tools when concluding individual contracts is directly stipulated by law (clauses 6, 18, 23, 24 of Article 4.1 of the Law “On the Securities Market”).

As we continue discussing conditionality and potestateness raised in this article, we turn to the study of secondary application. Here it is of use to mention and briefly analyse the application of the reciprocity rules under the above-mentioned Article 328 of the Civil Code; in doing so, we should take into account the possibility of comparing “digital format” of performance of an obligation and general secondary performance.

Thus, the classical secondary right to refuse to fulfil an obligation related to the performance of commercial activities by its parties or to unilaterally change the terms of such an obligation may be conditioned, according to the contract of the parties, by the need to pay a certain sum of money/perform an obligation to the other party (Clause 3, Article 310 of the Civil Code)³. It, in case of an optional obligation, is pretty much the case in smart execution.

When considering secondary rights incidental to obligations (which may well be the case in a “digital” obligation), their autonomy and the absence of any duty corresponding to the secondary right must be clearly underlined. The presence of a secondary right is predominantly a criterion of optional obligations [Zakharkina A.V., 2013: 172].

Analysing more the right to object as stated in Article 328 concerning reciprocal performance of obligations, it is possible to find here the secondary right consists in suspending performance and setting a time limit for payment of consideration to the debtor under the reciprocal obligation. So, we see a possible overlap with the provisions in the technology obligation when the programme executes a “smart” arrangement, e.g., a specification.

In fact, consideration not only implies but also precedes delivery [Sarbash S.V., 2005: 501]. The priority is inherent in the conditionality.

³ Ruling of the RF Supreme Court of 20 June 2017. No. 5-KG17-71.

The general basis for the application of Article 328 will be such predictability of non-performance that is related to the actions or inactions of the debtor. An accidental possibility of non-performance may be a ground for suspension of performance only in relations, in which at least one debtor is an entrepreneur. Only in this case this secondary right becomes a protective right, as described above in relations with a forex dealer [Karnushin V.E., 2016: 112], and a unilateral right of refusal arises. It is necessary to keep in mind secondary relations may also arise in situations where a third party (e.g., an information intermediary) is involved in the delivery of a smart instrument under Article 430 of the RF Civil Code.

The contract may provide for the following method of execution. An individual (investor) gives the forex dealer (trader) a login and password to manage a nominal account for the purpose of buying and selling foreign currency on the forex market. In doing so, the parties confirm their will by pressing certain keys. So, the terms of the contract with a forex dealer may stipulate the secondary right of the investor [Karapetov A.G., 2018: 215] to unilaterally withdraw from the contract. The period for exercising this right is limited to the term of the contract. This right can be exercised, among other things, by pressing the corresponding key in one's personal cabinet.

It is worth noting that the refusal to perform the contract implies a waiver of all rights and obligations thereunder, and entails the termination of such rights and obligations [Sukhanova Y.V., 2009: 114]. However, in such disputes the withdrawal from the contract with the forex dealer implies the right of the individual investor to withdraw the funds available in the special account, except for the forex dealer's (trader's) consideration. In this case, in accordance with Clause 11, Article 4.1 of the law "On the Securities Market", if the funds in the nominal account of an individual are not sufficient to satisfy the claims of a forex dealer, the forex dealer's claims that are not satisfied with these funds shall be considered discharged. That is, in this case, an individual is exempt from paying the consideration (or part thereof) to the forex dealer. It should be taken into account that, firstly, in pursuance of Article 421 of the Civil Code, the parties shall be entitled to conclude a contract, both stipulated and not stipulated by the Law or other laws and regulations. The conclusion of a contract between a forex dealer and an individual is stipulated in Article 4.1 of the law "On the Securities Market." Secondly, according to Article 310 of the Code, the contract may grant the right to refuse to fulfil an obligation only to a person who is not an entrepreneur, unless the law allows to include in the contract a condition

on granting such a right to the other party. In fact, by refusing the investor's claim for the return of funds, the court allows the forex dealer in their capacity of a person engaged in the relevant entrepreneurial activity, to unilaterally withdraw from the contract with an individual. This is a violation of Article 310 of the Civil Code and Clause 17, Article 4.1 of the Law "On the Securities Market." The peculiarities of exercising the secondary right under a contract between a forex dealer and an individual are:

in case of unilateral withdrawal from the contract, the individual assumes the risks of the transaction made by the dealer, but is entitled to demand from the latter to pay the amount exceeding the amount of the "risk capital";

in case of unilateral withdrawal from the contract, if there are not enough funds in the nominal account of the individual to satisfy the dealer's claims, the dealer's claims not satisfied with these funds shall be considered discharged;

the right to unilaterally withdraw from the contract may be exercised by changing the login and (or) password, and through the investor's member area, i.e. it is recorded in the programme by pressing the relevant keys;

the right to unilaterally withdraw from the contract may also be exercised by withdrawal of funds from the special account.

Other derivative contracts that are traded in a centralised regulatory environment have similar ways of exercising rights, too. And in turn, the instrument that includes an obligation in a digital environment located in a decentralised data registry, will have almost any combination of the legal tools described in this article.

A smart contract is a fully self-executing contract that exists through and in the form of software code that cannot be changed and cannot be unilaterally cancelled; nor can the exercise of rights under a smart contract be refused. Arguably, this is the most fundamental difference between a contract under which the parties express their through electronic and technical means, and a smart contract. I.e., we are dealing with a problem of determining the time before such a "self-executing" contract is implemented, its implementation, and after its implementation: the sequence of steps needed to end and/or terminate such "hi-tech" contractual relations and the obvious legal implications have to be defined.

Presumably, relations between the parties to a smart contract will fall under the provisions of Articles 157 and 327.1 of the Civil Code regulating stochastic obligations in the decentralised sphere without the regulator's direct involvement. In this case, under Article 327.1 of the Civil Code, the smart contract and individual rights and obligations thereunder shall terminate when certain circumstances occur.

6. Problematic aspects of the parties involved

Information intermediaries are persons working with information (content) created by others on the Internet, act on their own behalf, perform their activities for a fee and have specific requirements for different types of operations with information. The norm on agency in Article 1005 of the Civil Code does not give a deterministic answer to this question either. Due to this uncertainty, scholars believe it is necessary to distinguish between two separate and distinct types of information intermediaries. Firstly, these are persons providing the opportunity to post a piece of information on an information and telecommunications network, including the Internet, and secondly, these are persons providing the opportunity to post a piece of information necessary to obtain the content using an information and telecommunications network, including the Internet.

The concept of an information intermediary first appeared in Russian law in 2013. It was introduced by Federal Law of 02 July 2013 No. 187-FZ "On the Amendments to Legislative Acts of the Russian Federation Concerning Protection of Intellectual Rights in Information and Telecommunications Networks"⁴, that complemented Part 4 of the Russian Civil Code with a new Article No. 1253.1. The article establishes a certain range of persons who can act as information intermediaries, regulates their rights, and determines the specifics of liability for infringement of intellectual rights in the information and communication network [Fomina O.N., 2019: 178]. However, the concept of an "information intermediary" needs correction.

Article 1253.1 "Peculiarities of Liability of an Information Intermediary" of the Civil Code offers the following classification:

⁴ Federal Law of 02 July 2013 No. 187-FZ "On the Introduction of Amendments to Certain Legislative Acts of the Russian Federation Concerning the Protection of Intellectual Rights in Information and Telecommunications Networks" // Collection of Laws of the Russian Federation. 2013. No. 27. P. 3479.

a person transmitting materials in an information and telecommunication network, including the Internet;

a person providing the opportunity to post materials or information necessary to obtain them using an information and telecommunications network;

a person providing the ability to access materials on that network.

Types of services can be used for classification according to the type of obligation and characteristics of the party to the contractual relationship.

It is particularly evident in the field of obligations involving intermediaries in the cloud format of legal relations and in the sphere of specific features of hosting. The types of cloud storage services include:

infrastructure as a service-IaaS;

platform as a service-PaaS;

software as a service-SaaS.

All types of cloud storage allow one to use a particular software without installing the application itself on the user's computer. In other words, the item that we can see does not exist in real life. Instead, there is only something virtual; hence, the user can own only such software. The computer programme itself is installed and the information is stored and processed on the server of the right holder (or partner).

In Para 77 of the Russian Supreme Court Plenum Ruling No. 10 of 23 April 2019 the court independently determines whether a particular person is an information intermediary, taking into account the nature of the person's activities. If a person carries out the activities specified in Article 1253.1 of the Civil Code, it is recognised as an information intermediary with respect to performance of these activities. If a person carries out different activities at the same time, the question of this person's classification as an information intermediary should be decided for each type of activity⁵.

In line with the above, and in the light of the doctrine, the following can be classified as an information intermediary of the first type:

telecom operators providing telematic communication services for Internet access [Tereshchenko L.K., Tiunov O.I., 2016: 47].

⁵ The Russian Federation Supreme Court Plenum Ruling of 23 April 2019 No. 10 "On the Application of Part Four of the RF Civil Code"// Bulletin of the RF Supreme Court. 2019. No. 7.

information system operators, in cases where they work with information and telecommunication networks in course of their activities [Tereshchenko L.K., Starodubova O.E., 2017: 60].

The said persons shall not be liable for any infringement of the IP rights resulting from this transfer, provided that the following conditions are satisfied at the same time, if they:

do not initiate data transmission and do not determine the recipient of the data;

do not alter the said data as they provide communication services, except for technical changes made to ensure the process of content transfer;

did not know and were not supposed to know that the use of the relevant result of intellectual activity or means of individualisation was unlawful.⁶

The second type of information intermediaries include:

owners of Internet sites, because they determine at their discretion how information is used and posted on the site;

file hosting services that provide the users with space for their files and a 24/7 access to them through the Internet;

torrent trackers users can use to exchange information by downloading it from each other, not from a common server.

search services in case they do not store content or information [Tereshchenko L.K., Tiunov O.I., 2016: 47].

Internet sites in case they represent an information and reference system used to store reference information on goods and/or services, advertising materials, users' information on goods/shops (reviews)⁷.

The said persons shall not be liable for any infringement of the IP rights, provided that the following conditions are satisfied at the same time:

the person did not know and was not supposed to know that the use of the results of intellectual activity or means of individualisation contained in the materials or posted information is unlawful;

⁶ Russian Federation Civil Code. Part Four. Federal Law of 18 December 2006 No. 230-FZ. Revised 11 June 2021; with amendments and additions in force from 01 August 2021 // Collection of Laws of the Russian Federation. 2006. No. 52 (Part One). P. 5496.

⁷ Appeal determination of the Moscow City Court of 10 July 2015 in case N 33-24183/2015 // SPS Consultant Plus.

the person in case of receiving a written claim from the right holder about infringement of intellectual rights with indication of the page of the site and (or) network address on the Internet on that such material is placed, has timely taken necessary and sufficient measures to stop the infringement of such IP rights, which includes deleting this information.⁸

The third type of information intermediaries include hosting providers providing computing capacity power for placing information in an IT system permanently connected to the Internet.

The conditions for exemption from liability for these persons are the same as for the second type of information intermediaries [Tereshchenko L.K., Tiunov O.I., 2016: 49].

These norms, too vague ones, allow endless interpretations of the definition of an information intermediary. Under such circumstances, this includes any person who provides access to contents or information, but also as browser producers, computer manufacturers, and other civil law entities that provide access to Internet sites containing certain materials.⁹ This is crucial and relevant because the list of persons in this category is open-ended. In this connection, law enforcement is difficult because it is difficult to categorise a person as an information intermediary, and to identify this person's type so as to determine the grounds for exemption from liability.

It would be interesting to look at the experience of China as a best practice in regulating relations on marketplaces. It is a country of the first order with a fairly advanced system for the provision of access to, transmission, storage of information on the Internet, which often needs licensing. Also, information intermediaries operating in China are obliged to participate in the censorship of information disseminated on the Internet [Van Boom D., 2017: 3].

From the Chinese experience and available practice: the cases are described in: [Huang Y., Lu X., 2019: 220], some recommendations should be considered when such market participants work out the rules.

Marketplaces should actively cooperate with content rights holders and enter into partnership agreements with companies and organisations that

⁸ RF Civil Code. Part Four // Collection of Laws of the Russian Federation. 2006. No. 52 (Part One). P. 5496.

⁹ Minutes No. 16 of the Meeting of the Scholar Advisory Board of the Intellectual Property Rights Court on 28 April 2017.

have intellectual property rights. The aim is to distribute content legally and hedge the risks of copyright infringement.

Maintain transparency and authenticity: introduce tools to validate the authenticity of goods and content before they are placed on the platform.

Strengthen measures to deal with infringers: this may include removing illegal content, blocking access to the platform, or to banned sellers.

Raise awareness: marketplaces must inform users about the rules of using content and selling goods, and about the negative consequences of copyright infringement.

Promote technological solutions: machine learning and artificial intelligence can be used to automatically detect and remove illegal content [Pokrovskaya A.V. 2024: P. 14].

Approaches to adaptation and ways to incorporate the experiences of such platforms in relation to digital obligation will be explored in future research.

Conclusions

The obligation structure in the information environment and the rapidly growing digital environment infrastructure is quite special. It demonstrates convincingly that the digital reality of hybrid transactions is different from a regular civil duty to perform in its classical manifestation, is subject to cross-disciplinary influence, and is implemented with the participation of marketplaces.

The stochastic nature of such obligations once used to precede the emergence of terminology associated with financial instruments in this area, which had a strong cross-discipline nature.

There is no conclusive answer to the question of the legal nature and structure of obligations in the digital environment; nor is there a developed methodology and a conclusive nomenclature would put the matter to rest in efforts to develop the global regulation of the smart arrangement in the global environment.

The fact there is absolutely no interaction between legal systems and no synergies between functionality and private interest exacerbates problems existing in the sphere of regulating the operation of high-tech services.

Contract law is in many ways an ex-post instrument for regulating pre-existing contractual relations between counterparties. But as far as smart self-execution is concerned, the transaction that is the basis for the respective obligations is also a private-law regulator that determines the conditions under which the obligations will be formed.

To qualify an obligation that primarily binds, e.g., the execution of a smart contract, a significant starting role will have to be played by mixed legal individual regulators with technical rules and local acts based on the rules of a distributed data ledger (information system) for such crypto-instruments. The reason is that these same regulators can themselves be the objects of civil transactions.

Conditional determinants are special ones. They are performed by the program within framework of a conditional transaction and conditioned obligations; performance by one party is linked to performance by the counterparty. The priority of performance of a mutual obligation is inherent in the conditionality itself.

Exercise of rights and performance of obligations under a smart obligation upon the occurrence of a condition (both an external circumstance and one that depends on the actions of the parties to the obligation) is characteristic of the construct of an obligation with conditional performance (Article 327.1 of the Civil Code).

The question should be answered to what extent there is cross-sector influence and to what extent the special principles of digital circulation are identical to the principle of digital law and are taken into account.

In the “smart” version of the optional performance of the obligation, the general secondary right to refuse to fulfil an obligation related to the performance of commercial activities by its parties or to unilaterally change the terms of such an obligation may be conditioned, according to the contract of the parties, by the need to pay a certain amount of money to/perform an obligation before the other party (Clause 3, Article 310).

The general basis for the application of Article 3 will be predictability of non-performance that is related to the actions or inactions of the debtor. An accidental possibility of non-performance may be a ground for suspension of performance only in relations in which at least one debtor is an entrepreneur. Only in this case this secondary right acquires, in fact, the nature of a protective right, as described above in relations with a forex dealer (Section 6 of the Article).

The legal position of information intermediaries at the present time complicates law enforcement in classifying a person as such, as well as in identifying their type as a cause for exemption from liability.



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