

# THE PROCEDURAL AND LEGAL CONSEQUENCES OF AN UNAPPROVED SETTLEMENT AGREEMENT IN THE LAWSUIT

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Summary: 1. Introduction. – 2. Settlement Agreements Signed by the Parties, in Respect of Which a Judicial Decision has not yet been made to Approve or to Refuse Approval. – 3. Settlement Agreements Signed by the Parties, the Approval of Which Was Denied by the Court. – 4. Conclusions.

*This article considers the issues of procedural legal consequences of settlement agreements that were not approved by the court. It researches the fundamentally different models of legislative regulation that could be applied to settlement agreements signed but not approved by the court. An attempt is made to identify certain features of the legal force of a judicial decision on the refusal to approve a settlement agreement. Special approaches are justified to resolve some specific issues arising in the distribution of court costs.*

*Keywords: settlement agreement, court's refusal to approve a settlement agreement, legal consequences of a court ruling, prejudice, res judicata, exclusivity as a property of legal force of a court ruling, court costs, reimbursement of legal expenses to a third party, optional substantive dispute.*

## 1. INTRODUCTION

A fairly large amount of scientific research in the Russian legal doctrine is dedicated to the institution of settlement agreements. It is surprising that at the moment there are practically no studies that would substantively research the phenomenon of an unapproved settlement agreement, even despite the fact that the question of the consequences of not approving a settlement agreement is raised quite often. The authors who address this issue usually confine themselves to the prevailing approach, according to which a settlement agreement not approved by the court does not entail any legal consequences at all, and is, in fact, an un concluded

agreement.<sup>1</sup> It is indicative that this approach is directly declared in such an important document as the Concept of the Unified Civil Procedural Code of the Russian Federation of 14 November 2002 N 138-FL (hereinafter – the CPC RF).<sup>2</sup> And although at the moment in the procedural and civil legislation of the Russian Federation there is no norm that would directly determine the consequences of a non-approval of a settlement agreement for lawsuit cases, by and large, law enforcement practice is based on this basic message.<sup>3</sup>

However, in some works other judgments are still possible to find. Thus, for instance, V.V. Yarkov believes that in the event of a non-approval of a settlement agreement, one should speak of a 'completed actual composition' that performs 'right-preventing functions'.<sup>4</sup> S.V. Moiseev, with some reservations, proposes to qualify an unapproved settlement agreement as a 'substantive contract'.<sup>5</sup> A.G. Karapetov, reflecting on the legal nature of the signed, but not yet approved agreement, makes an assumption, which, in essence, makes it possible to qualify such an agreement as a 'special organizational deed'.<sup>6</sup>

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1 For example, L A Gros, reflecting on the significance of a settlement agreement at the stage of execution of a judicial act, emphasizes that 'only if approved by the court does it become a legal fact in civil law (entails termination of an obligation that has become indisputable based on a court decision) and in arbitration procedural law (entails termination of civil legal relations between the bailiff - the executor, on the one hand, and the recoverer and the debtor, on the other hand)' (L Gros, 'Settlement agreement in the enforcement proceedings: disputed situation' (2002)5 Russian justice (LCS 'Consultant Plus')). D L Davydenko, exploring the institute of the settlement agreement in comparative legal terms, expresses the following thought: 'So, since under the law of the Russian Federation the settlement agreement enters into force only after its approval by the court, until the court approves the settlement agreement by its definition, it is considered uncompleted..'. (D L Davydenko, 'The settlement agreement as a means of extrajudicial settlement of private law disputes (on the basis of the law of Russia and some foreign countries' (Candidate of Legal Sciences Dissertation, Moscow 2004).

M A Rozhkova categorically asserts that 'in the absence of a settlement agreement approved by the court, the latter does not meet the requirements for its form, and cannot be considered an accomplished legal fact. In other words, in accordance with Art. 432, 434 of the CPC RF, a settlement agreement not submitted to the court for approval or submitted with the court having refused to approve it, will be an uncompleted agreement' (M A Rozhkova, N G Eliseev, O Y Skvortsov, *Contractual Law: agreements on jurisdiction, international jurisdiction, conciliation procedure, arbitration (tribunal) and settlement agreement* (M A Rozhkova ed, Statute 2008).

2 'It is also necessary to determine that the settlement agreement not approved by the court does not give rise to legal consequences' (clause 15.3.8).

3 'The novation agreement between the recoverer and the debtor, made at the stage of enforcement proceedings, but not approved by the court as a settlement agreement, is not concluded' (paragraph 7 of the information letter of the Presidium of the Supreme Court of Arbitration of the Russian Federation of 21 December 2005 N 103 Article 414 of the CPC RF).

'The conclusions of the courts in the present case that the named unapproved settlement agreements do not entail legal consequences for its participants and in this regard, they cannot be subject to independent challenge, should be considered true' (definition of the SAC RF of 2 September 2013 N 11076/13 in case N A64-2504 / 2012).

'The settlement agreement of the parties, not approved by the arbitration court in accordance with Part 4 of Art. 139 and Part 2 of Art. 141 of the Arbitration Procedural Code of the Russian Federation of 24 July 2002 N 95-FL (hereinafter – the APC RF), expresses only the parties' intention to conclude it, which is not implemented in accordance with the procedure established by Chapter 15 of the Code, and therefore does not entail the legal consequences of a settlement agreement (Art. 9 of Memo on the conclusion and approval of settlement agreements, posted on the official website of the Arbitration Court of the Sverdlovsk region <[http://www.ekaterinburg.arbitr.ru/sites/ekaterinburg.arbitr.ru/files/pdf/ZP14042014\\_5.pdf](http://www.ekaterinburg.arbitr.ru/sites/ekaterinburg.arbitr.ru/files/pdf/ZP14042014_5.pdf)> accessed 7 September 2019).

4 V V Yarkov, 'Legal facts in the mechanism of implementation of civil procedural law' (Doctor of Legal Sciences Dissertation, Ekaterinburg 1992).

5 S V Moiseev, 'The principle of dispositive arbitration process' (Candidate of Legal Sciences Dissertation, Moscow 2001).

6 'If we assume that the settlement agreement signed by the parties to the litigation does not enter into full force before the court approves it, and does not give rise to appropriate civil law and procedural legal consequences, it nevertheless binds the parties in such a way that none of them may prevent the court from approving such an agreement (or at least the parties impose obligations on themselves not

For the purposes of this research, we propose to title it as ‘unapproved settlement agreements’ as a term and divide into two relative groups:

(a) those that are signed by the parties, but for which *a judicial decision has not yet been made* to approve or to refuse approval (see please part 2 of the article);<sup>7</sup>

(b) those that are signed by the parties, but which *were denied by the court* (see please part 3 of the article).

The need for such a division is explained by the fact that the moment of judicial verification of a settlement agreement is extremely important from the point of view of possible legal consequences. This is a kind of dividing line, which translates the legal situation into a state of complete certainty about the disputed substantive legal relationship, the dividing line, after which specific legal consequences must occur (or not). In addition, the grounds for issuing a judicial decision of rejecting also, apparently, may have some influence on the composition of possible consequences for a signed but unapproved settlement agreement.

## 2. SETTLEMENT AGREEMENTS SIGNED BY THE PARTIES, IN RESPECT OF WHICH A JUDICIAL DECISION HAS NOT YET BEEN MADE TO APPROVE OR TO REFUSE APPROVAL

Several questions arise concerning the first group of unapproved settlement agreements. Should the signing of a settlement agreement have legal procedural consequences? Is it possible to approve a settlement agreement in a situation where one of the parties does not make a corresponding petition or even directly speak out against its approval? Is it possible to assert that the signing of a settlement agreement is only one of the elements in a complex factual composition, which, besides the signing itself, also implies the independent will of each of the parties in the framework of the judicial procedure?

These questions are, by and large, interrelated. To find the answer to them, let us begin with the fact that, in our opinion, two fundamentally different models that determine the legal significance of agreements (and, in particular, settlement agreements) that are signed by the parties after the initiation of the judicial procedure are hypothetically possible.

The *first model* is based on the fact that the party that signed the document has already expressed its will to commit a certain procedural motion (for convenience of further exposition, this model will be referred to as **binding**). The court cannot learn about the signed document and make the appropriate judicial act,<sup>8</sup> but if the agreement itself is submitted to the case by an interested person, then this alone is sufficient. For example, if there is a petition from the defendant to discontinue the proceedings to which the settlement agreement signed by both parties is attached, the court is obliged to consider it. Indeed, in the given situation the claimant has already expressed the will to commit

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to do this), we see a preliminary legal binding effect of the agreement not yet approved by the court. In this case, there is room for the recognition of an unapproved settlement agreement as a special organizational agreement, which is converted into a full settlement agreement with the entire bouquet of legal consequences specific to it after approval by the court’ (V V Baybak, R S Bevzenko, S L Budylin et al, *Deeds, representation, limitation of actions: article-by-article commentary on articles 153 – 208 of the CPC RF* (M-Logos 2018).

7 Further in the text also - the refusal definition.

8 ‘Thus, ... both parties can sign an agreement or declare in front of witnesses that they are finishing the case via settlement ... but if this has not been brought to the notice of the court yet, the proceedings will continue’ (E V Vaskovsky, *The course of the civil process* (Bashmakov Bros Publishing House 1913).

a procedural act, as they signed not an agreement on novation, not any other civil law document, but a settlement agreement. Both from the essence of this legal institution, and from the content of the document itself, it is obvious that the settlement of the conflict covers not only the sphere of private law, but also implies the completion of the already initiated judicial procedure.<sup>9</sup>

The second model is based on a different foundation: the signing of the agreement itself is considered here only as a kind of formal prerequisite for the implementation of the procedural motion, the addressee of which is the court (this model can be called the model of *necessary co-directed expressions of will*). And this motion (since the subject matter is an agreement) can find its manifestation exclusively in the expression of the co-directed wills of both subjects. Accordingly, if at least one of the subjects who participated in the signing of the settlement agreement did not notify the court about its approval (or directly objected to it), then there are no grounds for considering this procedural issue.

Thus, for the first (binding) model, the essential feature is that the right has already been exercised, and if there is an appeal from at least one interested person, the court is obliged to respond in a certain procedure to such an assertion (petition); as for the second model (the model of the necessary co-directed expressions of will), we can only speak about a certain accumulation of elements, but not about a specific legal consequence in the form of the court's duty: such a duty arises only when all interested parties appeal.

What are the advantages and disadvantages of each model?

The first one is more flexible because it does not require duplication of the already expressed will. Such flexibility, perhaps, is not such an obvious advantage for the most frequent dispute with one plaintiff and one defendant, but if we imagine a dispute in which there is a sufficiently large number of subjects on the active or passive side, then apparently the need for the model in question will become more obvious. The advantages of the first model include the greater stability and predictability of opponent's behavior - having signed the document, both parties already know that the next 'procedural step' will entail judicial verification of the settlement agreement, that the procedural opponent will not 'change his/her mind' and will not start negotiating more favorable terms, will not return the procedural situation to the position preceding the conclusion of the settlement agreement. This, of course, in a certain way disciplines the subjects. In addition, the parties, starting from an already concluded settlement agreement,

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9 We emphasize that the analysis of the binding model offered below is limited solely to the procedural law area. Meanwhile, by adopting a binding model as a starting point for thinking about possible legal consequences, if one of the parties avoids going to court to approve a settlement agreement, it is also possible to raise questions on the material and legal level (for example, on the admissibility of a penalty from the evading party for legal losses or on the construction of conditional settlement agreements, providing negative property consequences for the party evading the court to approve the settlement agreement). It is clear that the discussion of such issues goes beyond only the procedural legal consequences.

However, for those interested in this field of research, we draw attention to the fact that in some countries the conclusion of a settlement agreement under a suspensive condition is expressly prohibited (see, for example, part 3 of article 176 of the CPC of the Republic of Kazakhstan of 31 October 2015 No. 377 -V 3RK; hereinafter - CPC RK). For some of our considerations specifically on the substantive consequences of an unapproved amicable settlement, see: D B Abushenko, 'Civil law consequences of an unapproved settlement agreement: statement of the problem / Conciliation procedures in the civil law and legal proceedings' in V P Ocheredko, A N Kuzbararova, S Y Katukova (eds), *Proceedings of the International Scientific and Practical Conference* (April 26 - 27, 2019, St. Petersburg, Part 2, North-West branch of the Federal State Budgetary Educational Institution of Higher Education 'Russian State University of Justice', Asterion 2019).

can build legal constructions that are based on the future implementation of such a settlement agreement among themselves or with the participation of other subjects. For example, a conscientious participant in turnover who is in dire need of money, to whom an individually-determined object must be transferred by settlement agreement, can immediately conclude an agreement with the prospective purchaser of this object; in the end, both the buyer and the seller will have the confidence that the object will not remain in the procedural opponent's possession, if he suddenly 'changes his mind', but will be transferred under the terms of the settlement agreement, and in the future the obligation from the purchase and sale agreement will be properly executed. Or, the parties themselves, on the basis of the compromise reached in the court case, can simulate the overall economic effect and conclude a settlement agreement in another case that is being considered with their participation, here the obligation of the already signed settlement agreement will also have some stabilizing effect, to serve as the basis for bargaining position.

But the binding model has certain drawbacks. Firstly, it becomes permissible that the court is presented with a document from one of the opposing sides - this, of course, may give rise to distrust of both its content and the reality of the will of the party that is absent at the court hearing.<sup>10</sup> Secondly, in the case when both disputing parties are present at the court hearing, a rather conflict situation arises, in which the will expressed initially by the party (which is fixed in the settlement agreement) conflicts with the actual expression of will (which the court directly observes in court hearing). Thirdly, for judicial procedures that do not require professional judicial representation, an important aspect is that of explaining the consequences of approving a settlement agreement and termination of proceedings. Assuming that the settlement agreement can be approved only on the basis of the petition of one of the disputants of the parties, there will inevitably be cases when the decision of the approval of the settlement agreement will be appealed for the reason that the party believed in the possibility of bringing a new identical claim or returning to the consideration of the case instituted by the original lawsuit in case of non-performance of the terms of the agreement.<sup>11</sup>

Accordingly, the drawbacks and advantages of the necessary co-directed expression of will model are mirrored: less flexibility and, in fact, the absence of some stability, the unpredictable nature of the procedural opponent's behavior, the difficulty or impossibility of using a number of legal structures based on the intended execution of the settlement agreement, but coupled with guarantees that the actual will of all parties was established in the judicial procedure, and the consequences of approving the settlement agreement and termination of proceedings of the case are clear to all signatories.

The comparison of the proposed models involves a discussion of another purely theoretical issue, which is associated with the sign of the ability of cancellation of procedural actions identified in the procedural doctrine. If (as indicated above for the

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10 S V Moiseev quite reasonably admits blunt falsifications of the document in such cases (S V Moiseev (n 5) 125, 126).

11 According to the current Russian procedural legislation, the definition by which the settlement agreement was approved entails termination of the proceedings (part 2 of article 150 of the APC RF, paragraph 5 of article 220 of the CPC RF), which excludes a second appeal with an identical claim (paragraph 2 of 1 article 127.1 of the APC RF, paragraph 2, part 1 article 134 of the CPC RF). At the same time, the refusal of a party (debtor) to voluntarily execute such a definition allows the lender to apply to the procedures of compulsory execution (part 2 of article 142 of the APC RF, part 2 of article 153.5 of the CPC RF). In comparative legal terms, we note that similar norms exist in the legislation of a number of other countries: for example, similar provisions are established in the legislation of Kazakhstan by paragraphs 2, part 1, art. 151, part 2, article 178, p. 5, art. 277 of the CPC of the Republic of Kazakhstan.

binding model) we are to assume that the party that signed the document has already expressed its will to commit a certain procedural action, then can it be restricted in principle in the right to withdraw such a will? One of the most authoritative experts in the field of civil process prof. E.V. Vaskovsky pointed out that 'the parties have the right to withdraw their claims, testimonies and approvals. This contains a characteristic feature of procedural actions as unilateral acts which is their cancellation. However, such a cancellation should have certain limits, since otherwise the normal course of the process would be impossible and violations of the rights of the opposing party could occur... Since any procedural action is directed towards achieving a certain goal, therefore, the general limit of cancellation should be the achievement of the goal for which the action was undertaken.'<sup>12</sup> At the same time, the specified author has at least one reservation, which makes it possible to state that the procedural treaties were appointed in a certain special (from the point of view of analysis of the annulment feature) group: thus, E.V. Vaskovsky believed that if 'the litigant has tied himself with an agreement with a counterpart then he is obliged to abide by it and is responsible for non-fulfillment or violation, whereas in unilateral actions he is free and can cancel them at his discretion but within the general limits of their cancellation.'<sup>13</sup> However, the views of one specialist, even one of the most authoritative in the field of civil procedure, can hardly be a serious argument; a more detailed analysis of the features of cancellation of procedural actions and agreements is clearly needed here.

To begin with, it is really difficult to find any serious counter arguments against the general idea that a unilateral expression of will, which has not yet entailed the adoption of the relevant judicial act, can be withdrawn. For example, if a party has filed a motion for an examination, but for some reason has changed its mind before it was resolved by the court, should this party be deprived of the right to disavow this petition? The answer is obviously negative: what is the point of considering a petition, the motive for which has already been lost? Dispositive beginning, coupled with the principle of procedural economy push for a negative answer. Equally, this approach should apply to more important regulatory actions. For example, if the claimant stated that he had rejected the claim, but before making a court decision on the termination of the proceedings, he nevertheless decided that it was in his interest to consider the dispute on the merits, it would be extremely unfair to deprive him of such an opportunity. However, should the ability to cancel procedural actions, including procedural agreements, be extended? Some modern Russian researchers give an affirmative answer to this question.<sup>14</sup> Such an approach seems absolutely wrong to us.

If the procedural agreement is concluded before the initiation of the judicial procedure, the possibility of unilateral refusal seems completely unwise, since the procedural agreement itself is one of the conditions of a civil contract or other agreement. The fact is that all the conditions that the parties considered necessary to include in the agreement are based on a certain balance of interests, and procedural agreements are

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12 E V Vaskovsky, 'Recognition of the parties in civil proceedings' in *Selected works of the Polish period* (Reprinted version of the 1913 year's book, Statute 2016).

13 Vaskovsky (n 8) 661.

14 For example, D L Davydenko, reflecting on the signed, but not yet approved settlement agreement, directly indicates that 'because according to the law of the Russian Federation, a settlement agreement enters into force only after it is approved by the court ... each party can refuse it even despite its signature in the text...' (Davydenko (n 1)).

A similar judgment is expressed by O N Shemeneva, arguing that 'either of the parties ... has the right to "change its mind" and not appeal to the court claiming to apply the consequences of the agreements reached, or express its will to reject these agreements or indicate that it has no intention to demand that their consequences be applied in another form' (O N Shemeneva, *The role of the parties' agreements in civil proceedings* (Infotropik Media, 2017).

no exception. For example, at the negotiation stage the seller reduced the price of the object to be sold and, in return, set the condition of a geographically convenient court in the event of a dispute. It is clear that a unilateral refusal of the condition of contractual jurisdiction distorts the general agreement reached by the parties, and allows one of them to play a kind of double game when a certain advantageous contractual condition is negotiated first, and then whatever caused the compromise is removed from the content of the relationship.

But here you can reasonably argue that the settlement agreement is concluded after a dispute arose, so maybe the extension of the rule of cancellation of procedural actions for such an agreement would still be entirely appropriate? And indeed, a settlement agreement is a completely autonomous, independent agreement, which, although it has a connection with a disputed legal relationship, is not incorporated into it as a kind of special condition. Most often, the settlement agreement in general 'dissects' the substantive legal relationship that has already arisen between the parties, in essence, acting as a new civil law agreement. Consequently, a refusal of a signed but unapproved settlement agreement in itself does not affect a general agreement, does not introduce a certain disproportion in the balance of rights and obligations (as was the case with the unilateral refusal of the condition on contractual jurisdiction described above). And yet we believe that a simple, linear solution, consisting in the admissibility of an unmotivated refusal from the settlement agreement signed by the party, would be wrong, and there are several reasons for this.

Firstly, the signing of a settlement agreement not only represents a possible compromise between the disputing parties, but also reveals, in fact, the concessions that each of them is ready to make. Spreading a feature of cancellation of procedural actions to settlement agreements, the legislator would encourage the dishonest party to enter into the negotiation procedure in order to 'test' the weak points, and then, after receiving the relevant information and even possibly fixing it in a settlement agreement, refuse its approval, and demand consideration of the dispute on merits.<sup>15</sup>

Secondly, the feature of revocability of procedural actions when it comes to a procedural agreement completely ignores the interest of the procedural opponent in obtaining the legal result that the parties pursued when signing such an agreement. Why does the interest of one side to unmotivated disavowal of legal consequences prevail over the interest of the other side to achieve them? Of how much value is the right, in essence, to ignore the agreement reached with the opponent? In our opinion, there are no reasonable grounds for resolving the dilemma in favor of the side behaving inconsistently.

Thirdly, it is possible to look at the settlement agreement from the point of view of a civil law agreement (namely, it is such from the content side with the rare exceptions, when the compromise is, for example, in mutual refusal of the initial claim and counterclaims). If this is an agreement, then it is possible to draw an analogy with cases when the legislator establishes requirements for state registration to achieve the desired legal effect. The approval of the settlement agreement is, of course, not identical to the state registration, as making judicial decision does not entail mandatory effect of publicity in the sense that it occurs when making an entry in the public register (moreover, judicial acts in a number of categories of court cases are not subject to

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15 Note: the thesis that the non-motivated cancellation of legal proceedings, including those associated with the institute of the settlement agreement, creates a ground for abuse, has already been expressed by some researchers (see, for example, A V Yudin , 'Abuse of procedural rights in civil proceedings' (Doctor of Law Dissertation, St. Petersburg 2009).

publication or the information contained in them shall be impersonal).<sup>16</sup> But there is something in common between the state registration of an agreement and the approval of a settlement agreement, which still merits a comparison: in both cases, the competent state authorities (the registrar in the first case and the court in the second) in some way 'dissect' the agreement, conducting a kind of test for the absence of defects in content and expression of will, suppressing possible violations of the rights of persons who are not parties to the agreement, and so on. And since this goal is by and large the same, the logic of defense mechanisms in the event when one party evades this 'test' should be at least similar. The Russian civil law is based on the idea that, in cases of evasion from the state registration of an agreement, it is admissible to file a special claim, the satisfaction of which entails a court decision on the registration of the agreement.<sup>17</sup> At the same time, the law not only does not allow any unmotivated refusal of an already signed agreement, but more than that: it imposes on the party unreasonably evading state registration of the agreement the obligation to compensate the other party for losses caused by the delay in registration of the agreement.<sup>18</sup> Why, then, for a generally similar procedure of approving an arrangement that is within the settlement agreement, should we deviate from these general approaches and allow the rule of annulment of procedural actions to be disseminated? We emphasize that, of course, we are well aware of the significant difference that exists in the activities of an 'ordinary' state body, such as the registrar, and the court itself as the body administering justice. But it is precisely for this case that it is not the presence (or absence) of the procedural form that matters, but the general logic of 'legitimizing' a certain substantive relationship: in both cases the parties bind themselves to an obligation, and then in a public procedure they appeal to the state body, which ultimately entails the latter to resolve the issue of such a 'legitimization'.

So, in our opinion, there are serious reasons for recognizing the legal effect of a signed, but still unapproved settlement agreement, postulating the bind of the parties by the will expressed in such a settlement agreement and the impossibility of a unilateral unmotivated refusal.

It is easy to see that the reasons that exclude the admissibility of an unmotivated refusal from the settlement agreement signed by the party, lead us to the answer to the question which of the two models described above should be preferred. By and large, for the stability of the turnover, for the parties to be able to use flexible legal tools, to develop a respectful attitude towards the agreements reached, of course, it is more important that the binding effect arose at the time of the signing of the settlement agreement and so that no party could 'withdraw' from the obligation, which the court must further approve as a condition for the termination of a judicial dispute.

But the priority of the binding model gives rise to three blocks of related questions.

1) How to eliminate or minimize previously identified negative aspects inherent in this particular model?

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16 See Art. 15 of the Federal Law of 22 December 2008 N 262-FL 'On ensuring access to information on the activities of the courts in the Russian Federation', sec. 2, 3 of the ruling of the Presidium of the Armed Forces of the Russian Federation of 27 September 2017 'On approval of the Regulations on the procedure for placing texts of judicial acts on the official websites of the Supreme Court of the Russian Federation, courts of general jurisdiction and arbitration courts in the Internet information and telecommunications network'

17 In accordance with paragraph 2 of Art. 165 of the CPC RF 'if the agreement requiring state registration is made in the proper form, but one of the parties evades its registration, the court, at the request of the other party, has the right to decide on the registration of the agreement. In this case, the agreement is registered in accordance with the decision of the court'

18 See paragraph 3 of Art. 165 of the CPC.



2) Should there be any peculiarities in the procedural mechanism for exercising the right of a person who insists on the approval of a settlement agreement?

3) Can certain special grounds be identified, in the presence of which the party could still disavow its will expressed in the settlement agreement before the question of its approval is resolved?

We have pointed out some of the drawbacks that may appear in the implementation of the binding model above. One of the drawbacks is related to the possible distrust on the part of the court to the content of the settlement agreement, as well as to the validity of the will of that party, which is absent in the court hearing. When all interested subjects appear in court, the court can always hear objections and, if necessary, undertake the necessary verifications (for example, assign handwriting expertise), but what should be done if the party is absent?

The simplest approach, which is to prohibit approval of a settlement agreement if one of the parties fails to appear, of course, would essentially discredit the model itself and a rather strange situation would occur when a party cannot withdraw its will, but its failure to appear will de facto lead to the same legal effect.<sup>19</sup> Consequently, the general idea requires that the question of approving a settlement agreement to be considered regardless of the appearance of the procedural opponent. Should we then use some kind of legal mechanisms that would protect against possible abuses?

Of course, the notarization of the settlement agreement or the notarization of the signature would significantly simplify the situation. However, it is completely unnecessary to introduce such certification (notarization) into the law as mandatory. And the justification for this, in our opinion, is obvious. First, such an appeal to a notarial procedure would entail additional financial and time costs for numerous subjects, who most often agree on some banal monetary refunds and have no goal to mislead the court regarding the will of the procedural opponent. Secondly, it can be assumed that possible cases of abuse as such will not be quite frequent, given that the opposing party in the judicial procedure may subsequently raise the question of cancellation of the judicial act approving the settlement agreement. Thirdly, the 'ordinary' falsification of a document may lead to comparable or even more substantial property losses, however, for this reason, the legislator does not establish a rule on mandatory notarization of documents submitted to the court.

Apparently, the simplest insurance mechanism would be a one-time postponement of the trial with a separate court ruling, in which the court would offer the absent party to present their opinion on the approval of the settlement agreement. If the duly notified person who received a copy of such a definition does not exercise such a right, the court could proceed from the uncontested presumption of validity of the will and consider the approval of the settlement agreement in the next court hearing.<sup>20</sup>

In addition, for cases when the decision to approve a settlement agreement, entered into legal force or subject to immediate enforcement, is appealed in the court of

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19 The court cannot oblige the party to appear in session on the basis of general rule in the Russian civil process.

20 In comparative legal terms, we draw attention to a rather simple mechanism that is implemented in the Republic of Kazakhstan: the consideration of a petition for approval of a settlement agreement is allowed if the parties fail to appear, but if there is an application to consider the petition without their participation (part 1 of article 177 of the CPC of the Republic of Kazakhstan). It is clear that such a mechanism cannot be applied when the party 'changed its mind' and decided against turning to the court for approval of a settlement agreement. However, for most cases of absenteeism, apparently, it will solve the problem of possible distrust on the part of the court in the content of the settlement agreement and in the validity of the will of the party that is absent in the hearing.

corresponding instance, a rule could be established on the mandatory suspension of its execution (if a corresponding petition of the party is submitted), provided that the grounds for the cancellation of the judicial act referred to by the complainant is connected with the evils of will (distortion of the actual content of the agreement reached in the settlement agreement).

As a drawback we also indicated a conflict situation in which the party present in the case categorically insists on the inadmissibility of resolving the issue of approval, referring to the fact that the initial will expressed by it (stated in the settlement agreement) was withdrawn, that they 'changed their mind' etc. We believe that for these situations a special rule in procedural legislation is needed, which would clearly and unequivocally establish that signing a settlement agreement does not imply revoking the will, that the question of the approval by the court is considered if at least one of the interested parties has a motion. The existence of such rules in civil law<sup>21</sup> in itself removes the question: the parties clearly see the consequences of signing an agreement requiring state registration from the content of the law.

The most significant drawback of the binding model, in our opinion, is that for judicial procedures that do not contain requirements for professional judicial representation, situations will arise where one of the parties does not really understand the consequences of approving the settlement agreement. It is clear that the standard clarification of procedural rights and obligations that the court does at the preparatory stage and at the beginning of the court hearing when considering the case on its merits,<sup>22</sup> does not have much effect here: the parties formally announce the right to enter into a settlement agreement, but it's important that such clarification would focus on the consequences of the approval of the settlement agreement and that it should be done in a situation that objectively precedes the approval. As mentioned above, the mechanism providing for the approval of a settlement agreement only with the attendance of all interested parties is fundamentally unacceptable, since it, in fact, allows the unscrupulous subject with his passive behavior to prevent consideration of the issue of approval. Consequently, the only possible way to clarify the consequences of the approval of a settlement agreement is to send the relevant court ruling to the absent party.

Thus, if the party that signed the settlement agreement fails to appear at the court session, and in the absence of its written application for approval, the court is obliged to postpone the trial and make a court ruling, which (besides offering to present its opinion on the approval of the settlement agreement) has to clarify the consequences of approving the settlement agreement. Accordingly, in the next court session, the court should consider the question of approval, regardless of whether or not the party that had not appeared in the previous court session appeared in the process.<sup>23</sup>

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21 This refers to paragraph 2 of Art. 165 of the CPC RF.

22 See item 1 part 1 art. 135, item 5 part 2 art. 153 APC RF, item 1 part 1 art. 150, art. 165 CPC RF.

23 Let us note that, commenting on the norms of the CPC of the Republic of Kazakhstan allowing the approval of a settlement agreement in the absence of parties (but if there is a statement to consider the issue without their participation), the retired judge of the city of Bremen G. Schnitger believes that it is quite enough if the indication of clarification of the legal consequences arising from the terms of the settlement agreement will be contained either in the application for approval of the settlement agreement, or in the settlement agreement itself (G Schnitger in *Commentary on the CPC of the Republic of Kazakhstan*, (Astana 2016) <[https://online.zakon.kz/Document/?doc\\_id=32469410#pos=5865;-36&sdoc\\_params=text%3D%25D0%25BC%25D0%25B8%25D1%2580%25D0%25BE%25D0%25B2%25D0%25BE%25D0%25B5%2520%25D1%2581%25D0%25BE%25D0%25B3%25D0%25BB%25D0%25B0%25D1%2588%25D0%25B5%25D0%25BD%25D0%25B8%25D0%25B5%26mode%3Dindoc%26topic\\_id%3D32469410%26spos%3D1%26Synonym%3D1%26tShort%3D1%26tSuffix%3D1&sdoc\\_pos=0](https://online.zakon.kz/Document/?doc_id=32469410#pos=5865;-36&sdoc_params=text%3D%25D0%25BC%25D0%25B8%25D1%2580%25D0%25BE%25D0%25B2%25D0%25BE%25D0%25B5%2520%25D1%2581%25D0%25BE%25D0%25B3%25D0%25BB%25D0%25B0%25D1%2588%25D0%25B5%25D0%25BD%25D0%25B8%25D0%25B5%26mode%3Dindoc%26topic_id%3D32469410%26spos%3D1%26Synonym%3D1%26tShort%3D1%26tSuffix%3D1&sdoc_pos=0)> accessed 7 August 2019.

Another issue that requires resolution in the implementation of a binding model is the need to single out the specifics of the exercise of the right of a person who (in the absence of a procedural opponent) insists on approving a settlement agreement. We believe that at least one such feature needs to be discussed.

The fact is that if a procedural opponent (if he had not previously filed a petition for approval of a settlement agreement) fails to appear at the court session, the party present at the court session will have an opportunity for some procedural 'game': having a signed settlement agreement, this party can either make a request for approval, or keep silent about the fact of signing. In the latter case, the court will continue to review the case in a general manner, and the final judicial act is likely to have little in common with the agreement reached by the parties. It is clear that, by virtue of the principle of dispositiveness, it is impossible to oblige the side that appeared at the court session to file a petition for approval. But the situation when in the absence of an opponent (perhaps, hoping that the settlement will be approved regardless of his absence) the party gets the opportunity to vary the procedural behavior, actually 'holding' the settlement agreement as a backup option, does not seem to be completely correct either. For example, let's take a rather simple case: the parties signed a settlement agreement, one of them did not appear at the court session, and at this court session the court announced the results of the forensic examination previously appointed by it. If such a study is crucial for resolving a substantive dispute, then the party may, depending on its outcome, either file a petition for approval of a settlement agreement (if the result of the expert study is not in its favor) or not declare it (if, based on the result of the examination, substantive dispute is in its interests). In our opinion, in order to exclude such situations, it would be reasonable for the case when only one of the parties is present at the trial, to provide a rule according to which the right to petition for approval of a settlement agreement can be exercised only at the very beginning, at the moment when the court finds out whether there are any petitions that impede the consideration of the case. And if the party has not exercised this right, then the court can turn to the question of approving a settlement agreement only if the corresponding expression of will is expressed at the court hearing and by the second party.

Finally, it is necessary to discuss the issue of the admissibility of the allocation of specific grounds, in the presence of which the party could disavow its expression of will, expressed in the settlement agreement, before the question of its approval is resolved.<sup>24</sup> It is clear that such grounds should not coincide with those that will serve as a reason for refusing judicial approval of the settlement agreement. In other words, it is necessary to separate two completely different situations:

- the first: the settlement agreement was signed, but, in the opinion of the party, there is a defect, as a result of which it appeals to the court with a petition to refuse to approve it;
- the second: the settlement agreement is signed, the will itself is not questioned, but before considering the approval of one of the parties in an extrajudicial procedure, the party announced the refusal from the previously expressed will, resulting in no longer being in a state of bind.

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24 In order to eliminate the possible confusion of legal institutions, we note the important difference between the mechanism that allows the party to disavow its expression of will, expressed in the settlement agreement, from the previously considered institution of cancellation of procedural actions. In our opinion, the first legal phenomenon has a private law nature, while the second, on the contrary, is of a public law nature. And that is why, in disavowing its will, the party in the extrajudicial procedure appeals to the counterparty of the agreement constituting the content of the settlement agreement, while cancelling the procedural act that was performed, the person appeals neither to the procedural opponent, nor to other persons involved in the case, but exclusively to the court.

In the first situation described, there is no specificity, the court is charged to assess the relevant arguments of the party and (depending on whether such a defect exists or not) to approve the settlement agreement or deny its approval. The second situation looks fundamentally different, since here, when a petition for approval is received from one of the parties, the second objects to such an allegation, insisting that the legal effect of the concluded agreement is disavowed by the unilateral refusal it had previously declared. As a result, the court cannot immediately proceed to a substantive assessment of a settlement agreement; it needs to first find out whether there were real grounds for a unilateral refusal, and whether this secondary right was properly implemented by the party. Accordingly, if the court comes to the conclusion that the will of one of the parties is *de jure* disavowed, then the very question of approving a settlement agreement is not considered.

So, should certain grounds be singled out, which, in divergence from a general rule, will allow a party to withdraw from a signed settlement agreement? In answer to this question, one should consider firstly the flexibility and breadth of legal instruments that parties can use to conclude a settlement agreement, and secondly, the provided in the civil law grounds for unilateral termination of an agreement (withdrawal from an agreement).

The purpose of this study does not include a description of all admissible private-law tools that could be used in connection with a settlement agreement. Nevertheless, the most obvious example here is the usual contractual condition that gives one or both parties the opportunity to unilaterally withdraw from a settlement agreement not yet approved by the court if by a certain point concrete circumstances had occurred (or had not). For example, such a circumstance can be a deviation from a claim, declared by one of the parties in another case (this is a situation where there are several legal disputes between the parties, as a result of which disputing parties would like to settle them in a package). Accordingly, if such a refusal does not follow, the adversary gets the opportunity to disavow his/her will. Another example where it would be reasonable to allow the approval of the right to unilateral refusal may be the situation of the debtor's alleged use of borrowed funds, for example, from a credit institution (the defendant accepts the obligation to make certain payments under an approved settlement agreement only if a loan agreement will be concluded by a certain date prior to the approval of the settlement agreement). Then the negative decision of the bank on the provision of appropriate financing may just act as a circumstance that gives the defendant the right to withdraw from the previously expressed will.<sup>25</sup>

The contractual nature of the settlement agreement leads to the conclusion that the grounds for unilateral termination of the contract (withdrawal from the contract) established by civil law, in general, should also enable the interested party to 'withdraw' from the state of bind. For example, if in the period between the signing of a settlement agreement and the consideration of its approval, one of the parties was withdrawn the license to operate (which ultimately leads to the impossibility of fulfilling the obligation

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25 The last example, at first glance, may seem far-fetched: why do you need such a complication if the defendant can conclude a loan agreement before the conclusion of a settlement agreement? However, we believe that the bank is not always ready to provide a targeted loan for financing the contract, which has a very vague prospect of conclusion (and that is the unsigned settlement agreement). On the contrary, after the disputing parties entered into a settlement agreement within the framework of the above-proposed binding model (by virtue of which both the claimant and the defendant became bound by expressions of will), the bank has a more realistic opportunity to assess the risks of lending. In short, for turnover (and bank lending in particular) in the event of a legal dispute, it is more preferable to have a clear legal perspective of a disputed relationship, rather than when participants are ignorant, relying solely on a good will of the procedural opponent.

constituting the content of the settlement agreement), then the other party, of course, should be able to refuse a signed settlement agreement.<sup>26</sup>

At the same time, the use of separate civil structures, which are quite appropriate for private relations, cannot be considered admissible for the settlement agreement. In particular, the current Russian civil law allows parties of multilateral treaties to include as a condition the right to non-arbitrarily terminate such treaties by agreement not of all, but of the majority of persons participating in the said agreement.<sup>27</sup> In our opinion, a similar condition placed inside a settlement agreement should be considered null and void. The explanation here is related to the binding nature of the binding model identified above: if, as a general rule, one of the parties cannot withdraw its will, then it would be extremely illogical to give such a right, for example, to two defendants for the case when three subjects participate in the settlement agreement: specified co-defendants and claimant.

### **3. SETTLEMENT AGREEMENTS SIGNED BY THE PARTIES, THE APPROVAL OF WHICH WAS DENIED BY THE COURT**

We now turn to the problems of procedural and legal consequences in relation to the second of the groups we have previously identified.

The first set of questions that needs to be considered is related to the properties of the legal force of a judicial definition. So, does the definition, with which the court refused to approve of the settlement agreement, have the *prejudicial* property? This intermediate definition may contain judgments about certain facts established by the court, which relate to both the disputed substantive relationship and other legal relations.

In our opinion, on the issue of the content of the disputed (binding the plaintiff and the defendant) substantive legal relations, one should proceed from the basic premise, which is that the final conclusions can be made only in a judicial decision. It is this final judicial act that, in a certain sense, 'draws the line', since only at the time of its adoption in the court case should all the evidence be concentrated, and the court, examining it and evaluating it in aggregate, can make a reasonable judgment about the content of mutual rights and obligations of disputing parties. And therefore the circumstances established in the court decision, even if they contradict what was previously established in the interim definitions, should act as an irrefutable basis for future court cases that may arise between the same persons involved in the case.

However, this raises one not so simple question: what if, after the court refused to approve the settlement agreement, a final judicial act was issued that did not resolve the dispute on the merits? For example, if the court left the claim without consideration due to the non-appearance of the claimant at the court hearing,<sup>28</sup> then the court not

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26 Russian legislation directly provides for the possibility of such a refusal for 'ordinary' civil law contracts, establishing that 'if one of the parties to the contract does not have a license to carry out activities or membership in a self-regulating organization necessary to fulfill the obligation under the contract, the other party has the right to refuse the contract (fulfillment of the contract) and claim damages' (item 3 of article 450.1 of the CPC RF).

27 Paragraph 2, item 1 of Art. 450 of the CPC RF stipulates that 'a multilateral agreement, the execution of which is connected with the business activities of all its parties, may provide for the possibility of modifying or terminating such an agreement by consensus of all or most of the persons participating in the said agreement, unless otherwise provided by law. The contract specified in this paragraph may provide for a procedure for determining such a majority.'

28 This basis is provided for by the legislation of the Russian Federation for both arbitration and civil proceedings (see item 9 part 1 article 148 of the APC RF, para. 8 article 222 of the CPC RF).

only failed to make 'final' judgments about the disputed substantive legal relationship, but could not make them in principle. At the same time, the judicial definition could contain conclusions of a substantive nature related to the qualification of the disputed legal relationship or the content of the rights and obligations that arose, which, in fact, served as the basis for refusing to approve the settlement agreement. Is it possible to allow such a 'legal metamorphosis' when the occurrence of prejudicial determination would be made dependent on the final judicial act:

- if a court decision is made, the determination to refuse the approval of the settlement agreement has no prejudicial force;
- if the proceedings in the case are completed on grounds not related to the settlement of the dispute on the merits, then does the definition of refusal to approve the settlement agreement have such force?

The opinion has been expressed that by itself the prejudiciality of judicial definitions should be based on the absence of certain negative criteria and the presence of specific positive criteria (features).<sup>29</sup> Perhaps such an approach really should be a starting point for thinking about prejudice, but with regard to the issue under consideration, we believe that, despite the absence of negative and positive features, the final conclusion should be negative. Here we would point out two reasons.

The first is that the parties, having signed the settlement agreement, did not intend to continue the legal dispute and therefore, most likely, did not care about sufficiently filling the court case with the necessary evidence. It is logical to assume that in some cases the parties even deliberately kept silent about certain circumstances, not wanting them to be reflected in the court decision and become known to any other persons.

The second argument is more logical and implies a comparison of the consequences depending on different procedural scenarios. So, if the court refused to approve the settlement agreement, then later, as mentioned above, it is not bound by its own judgments about the disputed substantive relationship, since the judicial procedure provided for by the Russian procedural legislation allows the court to present new evidence, admit facts by the party, the conclusion of agreements on the actual circumstances and the commission of other actions that may lead the court to radically different conclusions about the facts. But we will look at the same situation in a somewhat modified scenario: the court also refused to approve the settlement agreement, but then left the claim without consideration due to the plaintiff's secondary failure to appear in court, and after that the plaintiff filed a new identical lawsuit. If in this situation a prejudice is allowed, then when considering a newly instituted court case, the court will be obliged to proceed from the facts established in the previously issued refusal definition. But this is completely devoid of any logic. The situation arises when if the substantive dispute is dealt with in the same court case, then there is no prejudice, and if the same dispute 'survived reincarnation' through the initiation of a new court case, then the prejudice miraculously arises.

Apparently, not too often, however, the definition, with which the court refused to approve of the settlement agreement, may contain conclusions about other (besides

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29 In particular, A M Bezrukov in one of his early works (A M Bezrukov, *Prejudicial connection of judicial acts* (Volters Kluver 2007) considered the adoption of the definition in the protocol form to be among the negative signs, and court hearing with the obligatory summoning of persons participating in the case and the ability to determine to act as an independent object of appeal – among the positive signs. Separately, we note that at the time of writing this study, A M Bezrukov has corrected his position, indicating to the author in the electronic correspondence the following:  
'A prejudicialness

disputed) substantive legal relations. We are talking about cases when the very reason for refusal is related to the fact that the agreement that constitutes the content of the settlement agreement enters into some kind of contradiction with another legal relationship, and such a contradiction is so essential that it excludes 'judicial legitimacy'.

It is clear that if the subject of another substantive legal relationship does not have the status of a person participating in the case, then the prejudice is excluded. But what about the reverse situation? Take, for example, the following case. The plaintiff (prior to the initiation of court proceedings) on the basis of the contract of assignment has acquired the right to claim the defendant. In the case on the side of the claimant, the original creditor with the status of a third party, who has no independent claims regarding the subject of the dispute, was involved. The claimant and the defendant apply to the court for approval of the settlement agreement, which implies, for example, a change in the timing of the performance of the principal obligation. In this case, the court qualifies the contract of assignment in the substantives of the court case as void. Should a settlement agreement be approved? It is absolutely clear to the court that the claimant did not become a creditor in the main obligation. Is it possible to ignore this circumstance? It is doubtful. In our opinion, the court should issue a definition of rejection, which should explicitly state that the approval of such a settlement agreement would violate the rights of the original creditor (the third party on the claimant's side), who due to the insignificance of the assignment did not drop out of the main obligation and the right (as agreed with the defendant) to 'dissect' the main obligation. So, suppose that the court finally issued such a definition of rejection, and then ended the case, leaving the claim without consideration. Will the definition of a refusal to approve a settlement agreement have the property of prejudiciality? For example, when presenting a new claim by the original creditor, do you need to establish the invalidity of the assignment according to the general rules of evidence, or considering that the original creditor had the status of a third party in the first court case, and the defendant remained the same, proceed from a predetermined fact?

The argument put forward earlier that the parties, having signed the settlement agreement, did not intend to continue the court dispute and therefore were not interested in presenting all the available evidence, obviously does not work here: both the plaintiff and the defendant wish to discontinue the proceedings, and therefore most likely, they will make the necessary efforts to refute the judgment of the possible insignificance of the assignment. In addition, the original creditor participates in the case, who is a party to the contract of assignment, and therefore has the most immediate interest, as a result of which, the available evidence will be presented with a high degree of probability to them at the time of resolving the issue of approving a settlement agreement.

Nevertheless, we believe that in the case when the court refused to approve the settlement agreement, referring to a different (other than binding the plaintiff and the defendant) substantive relationship, we should also proceed from the inadmissibility of prejudice. The explanation here is by and large based on the above logical reasoning: if the refusal definition does not bind the court with its judgment about the invalidity of

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, as an institution that limits the parties and the court in the possibilities of re-examining the circumstances and presenting evidence, can be applied with absolute precision to decisions and appeals decisions (in the terminology of the CPC RF). With regard to the definitions made in the course of the consideration of cases, here the prejudice should either be completely eliminated or left for exceptional cases, but at the same time fix some very strict criteria allowing it to be applied.

When solving any procedural issue, none should force the parties to commensurate each step with possible far-reaching substantive consequences (in particular, this applies to the non-professional process in the courts of general jurisdiction, where citizens may simply not be aware of the potential consequences of some or other unimportant procedural actions).

the assignment and subsequently (for example, when presenting additional evidence), it can come to the opposite conclusion in a court decision, then there are no reasonable arguments to restrict a court in the authority in a general manner to establish the validity or invalidity of a cession when considering a claim filed by the original creditor.

In addition to the property of prejudiciality, the judicial definition may also have a different property — exclusivity, which implies the impossibility of re-applying an identical petition (in this case, an appeal containing a request to approve a settlement agreement on the same conditions, about which the court has previously unequivocally expressed, refusing in approval).

From the point of view of procedural economy, of course, such repeated appeals should not be considered. And, it should be mentioned, the approach according to which the refusal definition has the property of exclusivity is supported by some authors.<sup>30</sup> We believe that a purely formal refusal to consider the issue of approving a settlement agreement only because of the fact that a similar issue has already been considered before should be questioned. There are several arguments here.

Firstly, for the proceedings in the court of first instance, the law does not prevent the parties of the case from submitting new evidence, such as those, which may lead to conclusions that are contrary to what the court had previously indicated in the refusal definition. In addition, a situation is quite permissible when new evidence will in general entail the establishment of other facts, and this in some cases may radically affect the conclusion on the approval of the settlement agreement.

Secondly, the circumstances themselves, which prevented the approval of the settlement agreement, may disappear (for example, if the court initially refused to approve the settlement agreement on a dispute about an individually-specific thing, referring to the fact that one of the owners of the thing does not participate in the settlement agreement, then after some time, the common share ownership may cease, and then such an agreement will no longer violate the rights of other persons).

Thirdly, it is impossible to exclude a change or cancellation of the law, which initially served as the basis for making a refusal definition, or the adoption of a new law, for example, legalizing an agreement constituting the content of the settlement agreement.

The second set of issues that should be considered is related to the institution of court costs.<sup>31</sup> Let us ask a general question: is there any specificity with regard to the distribution of such expenses in the event of a non-approval of the settlement agreement?

The current Russian procedural legislation connects the resolution of the issue of distribution of court costs with the final judicial act,<sup>32</sup> while giving the court discretionary

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30 So, for example, V V Yarkov, analysing the provisions of the CPC RSFSR, stated the following: 'According to part five of Art. 165 of the CPC, in case of the court's failure to reject the claim, the defendant's recognition of the claim or the court's non-approval of the settlement agreement of the parties, the court makes a reasoned decision. Therefore, in such cases one should also speak about the completed actual composition, but it does not give rise to those legal consequences that the person concerned or both parties were counting on. Such an actual composition performs law-preventing functions in the sense that it is impossible, for example, to again suggest that the court approve the settlement agreement on the same conditions that were not previously accepted by the court' (V V Yarkov, 'Legal facts in the mechanism for implementing civil procedural law' (Doctor of Legal Sciences Dissertation, Ekaterinburg, 1992).

31 According to the Russian procedural legislation, they include a state duty and costs associated with the consideration of the case (Article 101 of the APC RF, Part 1 Article 88 of the CPC RF).

32 The essence of the idea is very simple: court costs are borne by the person who lost the dispute (see Article 110 of the APC RF, Article 98 of the CPC RF); hereinafter the general rule.



power to assign all court expenses, regardless of the final judicial act, to a person abusing their procedural rights or not performing their procedural duties.<sup>33</sup> We also note that recently the approach of the Russian legislator and court practice to the possibility of reimbursement of court costs to a third party who does not declare independent claims has changed: if earlier for a third party such right was not recognized in principle, now it is acceptable if the following circumstances are present:

- a) such third party participated on the side in whose favor the final judicial act in the case was adopted;
- b) the actual procedural behavior of the third party contributed to the adoption of this judicial act.<sup>34</sup>

So, let us model the following situation: after the initiation of a lawsuit, the defendant proposes to innovate the obligation on favorable terms for the plaintiff; the parties eventually sign a settlement agreement, however, the court, having established a possible violation of the rights of another person, attracts him to participate in the case as a third party, who does not declare independent claims. Then, in a new court hearing, the third party presents evidence that the innovation really violates his subjective right, and the court ultimately refuses to approve the settlement agreement. At the same time, the further consideration of the dispute on the merits ends with the issuance of a court decision refusing to satisfy the claims.

Thus, both parties, as well as the third person, incurred the costs of participation in court sessions, in which the court considered the issues of bringing a third person to participate in the case and approving the settlement agreement (for simplicity, suppose that the court did not resolve any other procedural issues). Based on the general rule, since the consideration of the case was completed in favour of the defendant, the claimant will have to reimburse him including the costs incurred in connection with participation in such meetings. Is it possible to qualify the behavior of the defendant as abuse of procedural rights? We believe not: initially the goal with which he entered into the negotiation procedure, and then petitioned the court for approval of the settlement agreement, was not unsuitable as the defendant really wanted to settle the dispute. But the court issued the refusal decision precisely because the innovation proposed by the defendant was flawed. Does the claimant, who lost the substantive dispute, have to reimburse the legal costs of the defendant in respect of the two court hearings? How should be dealt with the costs incurred by a third party? Is it fair that their compensation in this situation is subject to the condition of the final resolution of the dispute between the plaintiff and the defendant? Is it paramount that a third party necessarily actively contributed to winning of one on whose side he is, if the third party itself pursued a

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33 In accordance with Part 2 of Art. 111 of the APC RF, the arbitration court has the right to charge all court costs in a case to a person abusing his procedural rights or not performing his procedural duties if this led to the disruption of the court session, delaying the trial, obstructing the consideration of the case and adopting a lawful and reasonable judicial act.

34 See part 5.1 of Art. 110 APC RF, part. 4 of Art. 98 of the CPC RF (as amended by the Federal Law of 28 November 2018 N 451-FL 'On Amendments to Certain Legislative Acts of the Russian Federation'), as well as item 6 of the Resolution of the Plenum of the RF Armed Forces of 21 January 2016 N 1 'On some issues of application of the law on reimbursement of costs associated with the consideration of the case.' For administrative proceedings, the Constitutional Court of the Russian Federation, in addition to these circumstances, also highlights the need (forced need) of court costs, the reasonableness of their limits and some other criteria, the presence of which allows the interested person to demand reimbursement of costs (see Decree of the Constitutional Court of the Russian Federation of 21 January 2019 N 6 P 'In the case of the verification of the constitutionality of Article 112 of the Code of Administrative Procedure of the Russian Federation in connection with the complaint of citizens N.A. Balanyuk, N.V. Lavrentieva, I.V. Popova and V.A. Chernyshev').

different goal which is to prevent his property from becoming subject to court-approved novation?

In our opinion, in such a situation it is necessary to proceed from the following. Yes, the conclusion of civil contracts violating the rights of other persons should not be rewarded. And if such a deal was challenged in a separate court case, then the defendant as the losing party would also be charged with property compensation related to judicial protection. However, in our example, the novation verification did not take place in another court case - the court conducted it as part of the procedure for approving a settlement agreement. Here we can conditionally talk about a certain *optional* substantive dispute,<sup>35</sup> the consideration of which ended with a refusal to approve the settlement agreement. But who is considered to be the winning party in this case? It is clear that this is not the defendant (it was he who proposed the innovation that did not stand the test of 'judicial legitimation'). Perhaps, it is necessary to identify the procedural victory of the plaintiff? And there are very serious doubts as the claimant, too, wanted the approval of the settlement agreement. Yes, in the beginning the initiative to innovate a disputed obligation came from the defendant, and yet the claimant's will was in line with the will of the procedural opponent, because they both expressed a desire to end the dispute on agreed terms. Logically, we come to the conclusion that the only entity that has benefited from the non-approval of the settlement agreement is a third party. Indeed, although it did not have the status of a disputant, it was its subjective right that the court defended by accepting the refusal definition. Moreover, an important point is that for this case it doesn't matter at all on which side a third person was involved in the case (this is explained by the fact that in optional substantive disputes a third person may well have an independent interest against the plaintiff and the defendant).

Such a (perhaps rather artificial) separation of the dispute concerning judicial review of the agreement, which constitutes the content of the settlement agreement, opens the way to a different, more fair approach to resolving the issue of court costs. This approach, we believe, should be as follows:

- firstly, the general rule on the distribution of court costs should be extended only to those expenses that individuals incurred in connection with the resolution of the 'main' dispute (meaning the substantive dispute between the plaintiff and the defendant, about which the case was initiated);
- secondly, there should be exceptions from this rule that would take into account the nature of the procedural behavior of the disputants (for example, the presence of procedural abuse in their actions);
- thirdly, court costs incurred by persons involved in the case, in connection with the consideration of individual issues that essentially relate to optional substantive and legal disputes, should be distributed depending on the actual interest of each person in

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35 The term 'optional substantive dispute' proposed by us implies a completely independent (different from the 'main') substantive dispute, which is being considered in the framework of an already initiated lawsuit. It is important that the consideration of such a dispute does not imply a change in the procedural and legal status of the persons involved in the case, and the actual subjects who have mutually exclusive substantive interests may not coincide with the disputing parties.

Separately, we note that it is necessary to distinguish the proposed design of an optional substantive dispute from the concept of a 'separate dispute' in Russian legal doctrine for insolvency (bankruptcy) cases. The latter is characterized by the initiation of independent judicial proceedings, a special subject composition and some other signs that are not inherent in the optional dispute (for more on the signs of a separate dispute, see. Y D Podolsky, 'Separate insolvency (bankruptcy) disputes' (Candidate of Legal Sciences Dissertation, Ekaterinburg 2018).

resolving the optional dispute, persons to participate in the case and the results of the resolution of such disputes in interim judicial acts adopted on the 'main' dispute.

Returning to the content proposed above, we will make brief conclusions. The costs of the plaintiff and the defendant to participate in the court session, in which the court considered the issue of bringing a third party to the case, each party must bear independently (this court session is in no way connected with the final resolution of the dispute, it only preceded the resolution of the agreements). Similarly, each of the parties must assume the expenses that it incurred in the next court session (when the refusal was issued). And finally, the expenses of the third party, which it incurred to protect its subjective right, are subject to reimbursement by the claimant and the defendant, since it was they who opposed the third party, insisting on the approval of the settlement agreement.

The general logic of the distribution of court costs for optional substantive disputes should also apply to those costs that the persons involved in the case will incur in the courts of the verification instances. In other words, if, for example, when the claimant and (or) the defendant makes complaints about the refusal definition, their satisfaction will be denied, then no property compensation on the basis of participation in the trial court between the parties (claimant and defendant) should not be made, however third party legal fees are refundable. However, some nuances should apparently be associated with the definition of the obligated subject. If both parties filed complaints, then the claimant as well as the defendants would have to reimburse the court expenses to a third party. If the complaint is filed only by one party, then the second party must reimburse court costs only if it has supported the arguments related to the grounds for annulment in the court of the verification instance.

The situation with the non-approval of the settlement agreement may be even simpler: the court is empowered to refuse to 'legitimize' the agreement reached by the claimant and the defendant in case a violation of the law is established<sup>36</sup>. Here, as we see, there is no subject (a third person) opposing the parties, but does this mean that only a general rule is enough to distribute court costs?

We believe that (as in the case with a third person described above) it makes sense to separately single out that part of court costs that relates exclusively to the court session in which the court considered the question of approving the settlement agreement. Why should the distribution of these costs follow a general rule? The very purpose of holding such a meeting is in no way connected with the resolution of the dispute on the merits. The parties try to complete the judicial procedure, and then, if the court does not approve the settlement agreement because of a conflict with the law, one of them gets the right to demand reimbursement of court costs from another. What is the logic behind this? In our opinion, a reasonable approach requires the opposite: so that such expenses as a whole will be removed from the operation of the general rule. And if we agree with this thesis, then the following question logically arises: what should be the mechanism for the equitable distribution of such expenses?

We believe that the basic approach to the allocation of expenses incurred by the parties in connection with the court hearing, which considered the approval of the settlement agreement, should be that each party must accept such expenses at its own expense (regardless of the outcome of the dispute settlement on the merits). However, there are cases when a non-approval of a settlement agreement is connected exclusively with the actions (inaction) of only one of the parties. We are talking here not about any abuses, but about flaws, shortcomings, which such a party incurred when concluding a settlement

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<sup>36</sup> See part 5 art. 49 APC RF, part 2 art. 39 CPC RF.

agreement, which ultimately led to the renunciation of the definition. For example, a party to make an agreement constituting the content of a settlement agreement should have received corporate approval, but in fact the parties signed a settlement agreement in its absence. The court, having established this circumstance, refused to approve the settlement agreement. Accordingly, even if the subsequent dispute is considered on the merits and the court decision is made in favor of the party that did not receive corporate approval, court costs in the part relating to the court session, at which the approval was resolved, should be assigned to that side.

#### 4. CONCLUSION

Summarizing the abovementioned, we shall formulate brief conclusions on the problems that arise when analyzing the institution of unapproved settlement agreements.

So, in our opinion, the issue of the obligation for the disputing parties (the plaintiff and the defendant) of the agreements signed after the initiation of judicial proceedings can be resolved on the basis of two fundamentally different models:

1) the binding model, which assumes that the party to the document has already expressed its will to commit a specific procedural action. Therefore, if the agreement itself is submitted to the court case by only one of the parties, the court should consider the legal consequences of such an agreement, proceeding from the fact that the will of both parties has already been expressed earlier;

2) the model of the necessary co-directed will, which is based on the fact that the signing of the agreement is considered only as a kind of formal prerequisite for the implementation of the procedural action, the addressee of which is the court. And this action (as far as an agreement is concerned) can find its manifestation exclusively in the expression of the co-directed will of both subjects. Accordingly, if at least one of the entities that participated in the signing of the agreement did not submit a petition to the court to consider it, then the court has no reason to consider this procedural issue.

When comparing these models, it is concluded that it is necessary to give priority to the binding model. The pro arguments come down to maintaining the stability of the turnover, providing the parties with the opportunity to use flexible legal instruments, as well as developing respect for the reached agreements.

On the issue of the prejudice of the determination by which the court refused to approve the settlement agreement, it is proposed to depart from the general rule on the mandatory nature of a judicial act that has entered into legal force. This is explained by the fact that the final conclusions on questions of fact can only be made in a court decision (because only by the time of its adoption in a court case all evidence should be concentrated, and the court, having examined them and evaluated in aggregate, can make a reasonable judgment about the content of the mutual rights and obligations of the disputing parties). Accordingly, the interim findings of a substantive nature that the court makes in the rulings should not be linked either by the court that is considering the case, or by any other court when considering another dispute with the same persons.

The term 'optional substantive legal dispute' is introduced into scientific circulation, which should be understood as a completely independent (different from the 'general between plaintiff and defendant) substantive legal dispute, which is being considered in the framework of an already initiated legal case. A distinctive feature of the optional substantive legal dispute is that, firstly, its consideration does not imply a change in the procedural legal status of the persons participating in the case, and secondly, actual entities having mutually exclusive substantive interests may not coincide with

disputing parties (the plaintiff and the defendant). At the same time, the suggested design of the optional substantive dispute is proposed to be distinguished from the concept of 'separate dispute' highlighted in the Russian legal doctrine for insolvency (bankruptcy) cases.

Based on the distinction between the concepts of the general and optional substantive legal dispute, a fundamentally different approach to resolving the issue of court costs of a third party that does not state independent claims regarding the subject of the dispute is substantiated. In particular, it is proposed to extend the effect of the general rule on the distribution of court costs only to those expenses that the persons incurred in connection with the resolution of the main dispute (the dispute between the plaintiff and the defendant). As for the legal costs incurred by the persons participating in the case in connection with the consideration of certain issues that relate to optional substantive legal disputes, they should be allocated depending on the actual interest of each person in resolving exactly the optional dispute. In this case, it is also necessary to take into account, on whose initiative the person was involved in the case and the actual results of the resolution of the optional substantive legal dispute in an interim judicial act.