Theoretical and Legal Aspects of the Reclamation of Property from Unlawful Possession

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ABSTRACT

The article is devoted to the consideration of such issues as the permissibility of applying astreinte to vindication claims, the possibility of vindication of property that is not expressed in material form. The focus is on studying the prospects of vindication claims in relation to such a new object of economic relations as cryptocurrency. Using formal-logical, retrospective methods, as well as the method of legal constructions, the author first studies the problem of applying a court penalty under the rules of art. 308.3 of the civil code of the Russian Federation (structurally located in the section on binding rights) to a real-law claim-vindication claim; secondly, it analyzes the evolution of scientific views on the permissibility of extrapolating real rights to intangible objects, including those that exist in a virtual environment. It is concluded that the question of the legality of awarding an astreinte by a decision to satisfy a vindication claim is not clear in doctrinal terms, but judicial practice, in General, considers this issue positively; currently, Russian science is actively trying to determine the place of digital objects in the field of legal regulation. there are no fundamental obstacles to extrapolating the existing practice of the vindication analogy to the sphere of turnover of digital assets and values.

Keywords: replevin, astreinte, private law, cryptocurrency

For those cases where the property is removed from the possession of the owner, the traditional method of defense is a claim for reclaiming property from unlawful possession (vindication claim). Strictly speaking, the Civil Code, as well as the Resolution of the Plenum of the Supreme Court of the Russian Federation and the Plenum of the Supreme Commercial Court of the Russian Federation of April 29, 2010 No. 10/22, does not operate with the concept of "vindication", but this term is widely used in decisions of courts of different instances. The vindication claim is a classical civilistic construction, the conditions for its presentation have been sufficiently studied by modern legal science, but the question of how applicable the classical Roman interpretation of vindication protection is in modern economic realities remains relevant. The article does not aim to formulate and resolve all the multifaceted problems associated with the institution of reclaiming property from unlawful possession, but there are several unresolved theoretical and practical problems that have arisen relatively recently, the study of which is of considerable interest.

The admissibility of the application of astreinte (monetary penalty, court penalty) to vindication claims

The astreinte institute, which was assimilated to Russian law from French judicial practice in 2015, aims to strengthen the judicial decision, since it is imposed not in case of violation of an obligation, but for non-compliance with a public legal act of the court. Thus, when collecting a court penalty, the court does not resolve the dispute about the right. Given the relative novelty of astreinte in the Russian legal field and some instability of judicial practice, a single clear opinion on its legal nature and scope of application has not yet developed. One of the issues facing the law enforcement officer is the possibility of applying the astreinte to real claims, in particular, to claims for reclaiming property from unlawful possession.

Legal regulation of the institute of astreinte is currently performed by the article 308.3 of the civil code of the Russian Federation and Plenum of the Supreme court of the Russian Federation of March 24, 2016 No. 7 "On application by courts of certain provisions of the Civil code of the Russian Federation on liability for breach of obligations" (*hereinafter — Plenum No. 7*). The legislation establishes a norm of judicial penalty in the material law in the section on contractual rights, linking astreinte with the court's decision on the enforcing of *obligations* specifically, thus contrasting the rights of obligations with the rights of property. However, Plenum No. 7, having clarified that the court penalty is applied as a measure of liability for breach of obligations, separately noted the possibility of applying the astreinte to a negatory claim (p. 28). Therefore, it somewhat leveled the decisive importance of the location of standards on the judicial penalty in the Chapter "the Definition of Obligation", which naturally gave rise to discussions in the legal community, which essentially centres on the following: a) extending the application of Institute of judicial penalties on negatory claims, the Supreme court in no way argued that

the electoral decision accordingly, and if the court applied astreinte to one proprietary claim, it seems, there is no insurmountable barrier to the use of this mechanism, not only in the law of obligations, but also in the proprietary legal relations; b) on the other hand, the judicial penalty as a means of encouraging the enforcement of the act, providing for the elimination of violations of property rights, not connected with deprivation of possession, is expressly stated by the Supreme court as an exception, replevin is not mentioned and, therefore, astreinte is not applicable to the vindication requirements.

Turning to judicial practice, it should be noted that the number of acts in which the reclamation of property from unlawful possession is accompanied by a claim of judicial penalties is small, however, if the claim on the enforcing of astreinte is received, in most cases, the courts of first instance satisfy it essentially at a resolution of vindication to the plaintiff, and any correlation between the object of vindication and the amount of astreinte are not noted — it is stated, in our view, arbitrary, the rationale for the penalty is carried out formally, it, as a rule, is not disputed by defendants, and the courts are not inclined to reduce the size of astreinte compared to the amount requested by the plaintiff. Here are some examples:

a) the object of vindication is an apartment, the court has enforced a court penalty in the amount of 1 thousand rubles for each day of delay in the execution of the court decision, starting from the date of the decision on the case[1];

b) claimed property — refrigerated display case, enforced astreinte of one thousand rubles per each day of delay of liabilities execution as of the date of the expiration of the specified judicial act of the term for its completion (10 working days from the date the court decision comes into force) until the date of actual execution[2]; c) the object of vindication — advertising structures with a size of 1000 × 800 mm, a court penalty — 20 thousand rubles. 00 kopecks. for each day in case of non-execution of the court act[3]; d) object of a vindication claim — construction tools (30 items), the decision of the court is to enforce a court a penalty in the amount of 100 RUB per every day of non-compliance with court decisions, commencing from the day next after the expiry of one month from the date of entry of decision into legal force[4]; e) claimed property — two buildings with a total area of 906,6 sq m and 55 sq. m, respectively; astreinte — 2 thousand rubles for each day of non-execution of a court decision that has entered into legal force on this case[5]; f) when deciding of a vindication claim for the reclamation of land with an area of 95 sq. m. from unlawful possession in favor of the plaintiff, the court considered that "the establishment of compensation for waiting for execution of the decision in the amount of 100 thousand rubles at a time, as well as 50 thousand rubles for each month of non-execution of the court decision until the full execution of the requirements, without violating the balance of interests of the parties, leads to the fact that the execution of the judicial act for the defendant is more profitable than its non-execution"[6]. In all cases, the amount of the astreinte requested by the plaintiff was not reduced by the court.

It should be noted that there are rare cases of the court using its discretionary powers in terms of correcting the size of the astreinte when considering a vindication claim. For example, in the case considered by the Commercial Court of Saint-Petersburg and Leningrad region, the plaintiff asked the court to recover the penalty on a progressive scale — 30 thousand rubles. for each day of default during the first calendar month starting from the decision date, and further increase the penalty to 10 thousand roubles every month. The defendant petitioned for the reduction of the judicial penalty on the basis of article 333 of the civil code and changing the order of payments from progressive for the amount of money charged periodically, up to 30 thousand rubles. per month; the court, given that the court penalty is an evaluation category, considered it possible to establish a progressive order of payment of

[1] Decision of April 28, 2017 on case No. 2-1702 / 2017 [Electronic resource]. Pushkinsky District Court (St. Petersburg). URL: https://sudact.ru/regular/doc/sKUzma7xvhJx/ (date of reference: 15.11.2020).

[2] Decision of July 29, 2019 on case no. A76-30787/2018 [Electronic resource]. The Commercial Court of the Chelyabinsk Region (CC of the Chelyabinsk Region). URL: https://kad.arbitr.ru/Card/8b77d956-c694-4821-ba7e-0828e410bfa8 (date of reference: 15.11.2020).

[3] Decision of December 12, 2018 on case no. A75-14692/2018 [Electronic resource]. The Commercial Court of Khanty-Mansi Autonomous Okrug (CC of the Khanty-Mansi Autonomous Okrug). URL: https://kad.arbitr.ru/Card/67ce31cf-65ce-48d3-b691- b637296758ec (date of reference: 15.11.2020).

[4] Decision of June 20, 2019 on case No. 2-1085/2019 [Electronic resource]. Verkhnepyshminsky City Court (Sverdlovsk region). URL: https://sudact.ru/regular/doc/PqmWLuCHZAbW/ (date of reference: 15.11.2020).

[5] Decision of September 24, 2020 on case no. A54-5246/2020 [Electronic resource]. The Commercial Court of the Ryazan Region. URL: https://kad.arbitr.ru/Card/69435164-525f-427e-9073-21fb7b6c9ff5 (date of reference: 15.11.2020).

[6] Decision of November 29, 2019 on case no. A75-14926/2019 [Electronic resource]. The Commercial Court of Khanty-Mansi Autonomous Okrug URL: https://kad.arbitr.ru/Card/f3629119-2059-45fa-8629-62ccdf11ad27 (date of reference: 15.11.2020).

astreinte, but significantly reduced its size to 5 thousand rubles for each day of default during the first calendar month, commencing on the eighth day from the date of entry into legal force of the judgment, with a consequent increase in the amount of the penalty to 10 thousand rubles on the day of the second calendar month of default, with a consequent increase in the amount of the penalty to 15 thousand rubles per day for the third calendar month, and a further similar increase in the size of the penalty in 5 thousand rubles every month of default until the date of actual execution of the judicial act[7]. Moreover, neither the court nor the parties to the civil dispute provided any factual circumstances of the case in support of the stated claims and the decision made that would allow us to judge the reasonableness, fairness and relevancy of establishing of the procedure for paying the court penalty and its amount.

When evaluating the possibility of using astreinte to claims for vindication, the courts — both Commercial and of General jurisdiction, — base their decisions on the provisions of clause 31 of the Plenum № 7, which states that "in case of satisfaction of the claim on ordering of specific performance, the court has no right to refuse in its awarding", however, formally citing the court decision clarification of the Plenum № 7, the court does not hold more in-depth analysis of regulatory statutes, not allowing, thus, to understand why they allowed the application of the provisions of the law of obligations to the law of property.

Familiarization with the scientific literature allowed us to identify a number of assumptions about the reasons for the current practice that allows the use of such a means of stimulating the execution of a court decision as astreinte in vindication disputes.

1. When applying an astreinte to a vindication claim, the court thus identifies a real-law claim for the reclamation of property with an obligation claim for forcing the debtor to specific performance, although this is contrary to the doctrinal provisions of civil law.

2. The existence of the following logical chain is assumed: due to direct instructions, the astreinte applies to the debtors on performance of specific obligations, but a clear prohibition on the use of the provisions of section 308.3 to the specific performance of vindication suit is not contained in the civil code of the Russian Federation and Plenum No. 7, moreover, there is a possibility of application of this article to property claims (item 28 of the Plenum No. 7, Article 304 of the Civil Code of the Russian Federation — negatory claim). Obligations in accordance with part 2 of article 307 of the civil code arise "from contracts and other transactions, ... and from other grounds specified in the civil code of the Russian Federation", the latter in accordance with subparagraph 3 paragraph 1 article 8 of the civil code can be attributed to a judicial decision establishing civil rights and obligations. Accordingly, if the court decides to withdraw and award the object of vindication, the defendant will have an obligation on the basis of the court decision. And the provisions of Article 308.3 of the Civil Code of the Russian Federation may be applied to such an obligation. In such reasoning, in our opinion, it is possible to see a particular logical flaw — vindicatory action, being a claim for a property reclamation, is enforceable in the manner prescribed by the legislation on enforcement of proceedings, and, as has been noted by higher instance courts, it is unacceptable to articulate the court's decision concerning reclamation of property from unlawful possession as an obligation of the defendant to perform certain actions[8], since the enforcement of the court judgment on the defendant is committed by another person — the court bailiff, which, however, does not deprive the defendant of the opportunity to voluntarily transfer the reclaimed property to the plaintiff. In addition, we should agree with the opinion of M. A. Rozhkova, according to which the obligation of a person to execute the judgment in its legal essence is not always a contractual relationship in the meaning of article 307 of the civil code[9].

3. The following theory is based on the assumption that replevin is actio in personem because from the moment of the violation of the absolute rights of a vindicant, of the property rights, the vindication obligation arises, for the specific performance of which (return of things) the claim of the owner is directed, and if there is an obligation, then an astreinte is applicable. Without going into more detail in challeng-

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[7] Decision of June 19, 2019 on case no. A56-120154/2018 [Electronic resource]. The Commercial Court of St. Petersburg and the Leningrad Region. URL: https://kad.arbitr.ru/Card/04a1013d-05c7-4eb5-b003-02ea9bcc120b (date of reference: 15.11.2020).

[8] On the Approval of the Program for Improving the Efficiency of Commercial Courts in the Russian Federation in 1997-2000 and the Action Plan for Implementing the Program for Improving the Efficiency of Commercial Courts in the Russian Federation in 1997-2000 [Electronic resource]: Order of the Supreme Commercial Court of the Russian Federation No. 14 of 18.09.1997. SPS Consultant Plus. URL: http://www.consultant.ru/cons/cgi/online.cgi?req=do c&base=ARB&n=41808#06491031580382487 (date of reference: 15.11.2020).

[9] *Rozhkova M. A.* On the Issue of Obligations and the Grounds for Their Occurrence [K voprosu ob obyazatel'stvakh i osnovaniyakh ikh vozniknoveniya] // Bulletin of the Supreme Commercial Court of the Russian Federation [Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii] Moscow : YURIT-Vestnik, 2001. No. 6. p. 69-85.

ing this thesis, which seems doubtful to us, we note that this approach is not widely used in civil law.

4. The analogy of law is called to be the basis for vindication claim astreinte — the effect of astreinte can be extended to proprietary claims, especially in cases where vindicant has no other effective means of stimulating the execution of a judicial act issued in his favor and it does not affect the rights, freedoms and legitimate interests of others.

It seems that the latter approach is more appropriate, because the legislator as a general rule has spread the effect of the rule on the judicial penalty only on obligation relations[10] by placing it in the section on contractual rights of the Civil code, which is the source of the substantive law, and the use of astreinte to the vindication action — property demand — is possible only as analogy of the law, if we consider the claims of reclamation of a thing (the vindication and specific enforcement of obligations) as having a similar civil-legal nature. Reference to the analogy of the law as to the method of legal regulation in civil law according to paragraph 1, article 6 of the civil code, is based on the flexibility of civil law relations and the effect of the super-mandatory principle of fairness.

Getting into the sphere of the appellate instance, the issue of astreinte is resolved positively. For example, the Fifteenth Commercial Court of Appeal (Rostov-on-Don) held that it was necessary to change the subject of the optional claim and its regulatory basis. Having claimed a vindication action, the plaintiff, in addition, demanded, in case of non-return of the tray (kiosk), the recovery of losses in the form of its value in the amount of 45 thousand rubles, and the court of first instance satisfied the claim. The appeal pointed to incorrect qualification of the court of first instance of this requirement because: a) in its legal entity the statement of claim meets the criteria set forth in article 308.3 of the civil code and not article 393 of the civil code; b) judicial penalty may be recovered in a lump sum; c) the amount of liquidated damages can be equal to the cost of vindicated property[11].

It should be noted that in a number of court decisions, when satisfying the plaintiff's claims on the vindication claim, the enforcement of the astreinte was refused. In all the decisions, the reasons for refusal were fundamentally different. Thus, the Sovetsky District Court of Novosibirsk denied the enforcement of astreinte because of its inapplicability to the vindicatory claims, stating that, first, the plaintiff in accordance with the General rules of action proceedings must justify their right to the claim for recovery of legal penalties, second, astreinte would be possible, if the claimant filed a claim: 1) on the compulsion of the debtor to refrain from performing certain actions; 2) on the compulsion to eliminate the violation of property rights not related to the deprivation of possession; 3) on the compulsion to perform the specific obligation; 4) on the obligation of the defendant to perform certain actions that are not related to the transfer of property or sums of money. Accordingly, the use of astreinte for the reclamation of property from unlawful possession is not provided for by the current legislation, and therefore the claim to recover the legal penalties should be denied[12].

The commercial court of Sverdlovsk region, while not denying the possibility of the enforcement of astreinte on vindication claims, found the consent of the plaintiff on the implementation of the dismantling and removal of the disputed equipment (installations for the processing of rubber, plastic [carbon-containing] waste "Reactor-1") on its own and for its own account to be justified and fair, considered it necessary to impose a duty to provide plaintiff with access to equipment with the aim of dismantling and removal on the defendant, but refused satisfaction of claims of the claimant on collecting of the judicial penalty from the defendant, since the imposition of a judicial penalty is the right of the court based on the principles of civil law, including the inadmissibility of benefit from unlawful or bad faith behavior, but in this situation, the decision of the court depends on the actions of the plaintiff in the case[13].

The Commercial Court of the Ivanovo Region when considering a claim for the recovery of property from the OAO (open joint Stock company) Ivanovskiy Broiler and the recovery of 5.5 thousand rubles as judicial penalties for each day of default of the judicial act has established that the defendant

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[10] It is interesting that the legislator implemented the provisions on astreinte in procedural law only three years after its introduction into substantive law (Article 174 of the APC and 206 of the CPC are a reflection of the substantive rule of Article 308.3 of the Civil Code). These articles should be applied in a normative unity — the court may exercise the right to impose an astreinte in the case provided for in Article 308.3 of the Civil Code.

[11] Resolution of October 14, 2019 on case no. A32-20685/2019 [Electronic resource]. The Fifteenth Commercial Court of Appeal. URL: https://sudact.ru/arbitral/doc/bkJYtivMuNUp/ (date of reference: 15.11.2020).

[12] Decision of February 4, 2020 on case No. 2-2466/2019 [Electronic resource]. Sovetsky District Court of Novosibirsk (Novosibirsk region). URL: https://sudact.ru/regular/doc/BMQ90DBITNUC/ (date of reference: 15.11.2020).

[13] Decision of December 31, 2019 on case no. A60-48073/2019 [Electronic resource]. The Commercial Court of the Sverdlovsk Region. URL: https://kad.arbitr.ru/Card/ae190ad1-f6f2-4a1d-967c-476c4fc86ef0 (date of reference: 15.11.2020).

was declared insolvent, and with reference to the legal position of the Supreme court of the Russian Federation stated in definition from 26.11.2019 No. 308-ЭС19-21590, denied recovery of astreinte because the penalty "will not perform the catalytic function tool of legal action after the recognition of the defendant as bankrupt and introduction of procedure of receivership concerning the defendant because of the inability of the defendant to dispose of its property and material adverse consequences to its creditors»[14]. The Sixth Commercial Court of Appeal (Khabarovsk) approached the issue differently: the plaintiff asked for a penalty in the amount of 20 thousand rubles per day from the date of entry into force of the court's decision, the first instance reduced the amount of the astreinte to 1 thousand rubles per day.[15]. The vindicant, appealing against the decision, pointed out that reduction of penalty will not encourage the debtor to the execution of the judgment, since the defendant did not fulfill an enforceable court decision for recovery of property, it is possible to execute the judgment regarding to the spouse of the defendant, who conduct commercial activity, is the founder of commercial companies with a turnover more than 250 million rubles and on the basis of the marriage contract is obliged to take action to preserve the property of the spouse. The financial manager of the debtor requested to cancel the decision on the imposition of the astreinte in full, since the defendant in connection with the bankruptcy procedure had no financial resources and was unable to dispose of its property, which is the bankruptcy estate, and the execution of the court decision was possible through the use of enforcement mechanisms without the use of the astreinte. The courts of appeal and cassation rejected the plaintiff's arguments and financial management as untenable, stating that, first, the need to make it more unprofitable to not execute a court decision than to preserve property is not an evidence in itself about the need to increase the amount of the penalty, which is defined by the first instance, and secondly, the court's decision on the vindication of the disputed land is not executed by the defendant, there are no objective reasons or reasons beyond control that prevent the transfer of the disputed property, in connection with which, the defendant's evasion from the execution of a judicial act is illegal, and the insolvency law does not release the debtor from the obligation to execute a court decision that restored the plaintiff's property rights, therefore, the recovery of a court penalty from the defendant in these circumstances, in order to encourage him to timely perform the enforced specific obligation, is justified[16].

Summing up the preliminary results, it can be noted that the decisions of the courts that deny the possibility of collecting astreinte due to its inapplicability to vindication claims are rather an exception to the rule. In some cases, allowing for the possibility of a court penalty in principle, the courts still refuse to satisfy the claim, deducting situational restrictions depending on the circumstances of the case.

Admissibility of vindication of property not expressed in material form

The term "property" is actively used by the Russian legislator, but it is not set definitively, which creates the need for interpretation. The constitutional court of the Russian Federation, relying on the jurisprudence of the European court on the implementation of international instruments on human rights, attaches to the concept of "property" a rather broad content, including, besides the things, the entire array of enshrined rights that the applicant can prove having; shares or monetary claims based on contract or tort; economic claims in the form of benefits in accordance with the law on social security based on the public law; the right of claim belonging to the creditors; the right to perpetual use or lifelong inherited ownership of a land parcel, etc.

Thus, based on the fact that the right to freely use property guarantees, in essence, the right of ownership, the European Court of Human Rights postulates that a person can own any property, both expressed in material form (things), and representing rights to things and rights of claim, if it is sufficiently established that this right can be legally implemented, which, as L. Lapach and A. O. Rybalov rightly note, leads to a different understanding of property rights in constitutional legal sense (the object of any property based on the aforementioned approach) and in civil-law branch sense (an object is

[14] Decision of March 20, 2020 on case no. A17-7445/2019 [Electronic resource]. The Commercial Court of the Ivanovo Region. URL: https://kad.arbitr.ru/Card/04e58719-e21f-4993-91ea-2ec125b47c49 (date of reference: 15.11.2020).

[15] This application was received after the court satisfied the vindication claim at the stage of enforcement proceedings.

[16] Resolution No. 06AP-627/2020 of March 16, 2020 on case No. A73-2848/2019 [Electronic resource]. The Sixth Commercial Court of Appeal (Khabarovsk). URL: https://kad.arbitr.ru/Card/b5dbc615-a896-4f06- 8f84-8ddd4317c38b (date of reference: 15.11.2020).

traditionally recognized as thing, the main symptom of which is materiality, part of the collective category of "property")[17].

The identification in legislation of the generic term "property" as an object of civil rights (article 128 of the civil code) and as an object of the vindication claims (article 301 of the civil code) has a negative impact on law enforcement practice, as in the classic sense, although not enshrined in law, the object of vindication is an individually-defined, specifically existing thing belonging to a particular person, that does not fully correspond to the interpretation of the concept of "property" in contemporary law doctrine.

Thus, the legislator allowed the possibility of the existence of a real right in relation to specific objects — property that is not actually things, without providing for a special method of protection, and the practice, in turn, considered real-law claims, in particular, the claim of property, a valid option for the protection of civil rights, which gives rise to various forms of quasi-indicative claims.

The problem of vindication of property that does not have a distinctive feature of the thing — materiality, has been discussed in the scientific literature for a long time and regularly. For example, for a long time there have been fierce discussions about the admissibility of vindication claims against undocumented shares. Agreeing that the classical application of "proprietary" provisions to non-tangible, non-documentary securities (which by their legal nature are settled property rights) is legally incorrect, some researchers insisted on the impossibility of presenting vindication claims in general and on the need to use other methods of protecting the violated right; the others considered the possibility of declaring them analogs of things (in fact, legal fiction) and, accordingly, "proprietary" legal regulation as a general rule; the third, excluding the recognition of property rights as objects of property rights, considered it expedient to recognize for such special rights claims "the absolute effect" similar to real law by virtue of a direct indication of the law", i. e. to extend to them the condition of real law, without recognizing them as things[18].

Resolving disputes about the reclamation of the securities, the courts proceed from the fact that special rules for vindication in respect of securities are established by law: for documentary in article 147.1 of the civil code, for non-documentary in article 149.3 of the civil code[19], as well as relying on the decision of the Supreme Commercial Court of the Russian Federation from 29.08.2006 № 1877/06, which recognizes that the requirement to restore registry records about ownership of not available in the form of tangible material objects book-entry shares to a specific person is vindicatory in nature, and the ruling of the SCC dated 14.07.2009 No. 5194/09, where it is explained that a vindication claim is an acceptable method of protection of the rights of the persons who lost their book-entry shares in addition to the will, and a number of other similar decisions of the higher courts.

Features of vindication protection, as pointed out by the Commercial court of the far Eastern Federal district, based on regulatory provisions of article 149.3 of the civil code, are as follows: "the Vindication claim is formulated as the claim to return the relevant securities, and not their reclamation (as book-entry shares do not exist in paper form and are stored in the form of account, that is, they are not a thing); the owner is entitled to require those securities into that the owned book-entry shares are converted»[20].

The position of the Commercial court of the Chelyabinsk region seems more logical. In the case № A76-122/2019, the Court, referring to paragraph 7 of the Information letter of the Presidium of the SCC dated 21.04.1998 № 33, pointed out that "in order to protect the rights of shareholders who have lost book-entry shares belonging to them, a submission of claims for the restoration of rights to lost securities by shareholders is possible, which by analogy of law subject to review by the rules in article 301,

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[17] *Lapach L.* The Concept of "Property" in Russian Law and in the Convention for the Protection of Human Rights and Fundamental Freedoms [Ponyatie «imushchestvo» v rossiiskom prave i v Konventsii o zashchite prav cheloveka i osnovnykh svobod] // Russian Justice [Rossiiskaya yustitsiya]. 2003. No. 1. p. 19 (in rus); *Rybalov A. O.* Ownership (Commentary to Art. 209 of the Civil Code of the Russian Federation) [Pravo sobstvennosti (kommentarii k st. 209 GK RF)] [Electronic edition]. Moscow : M-Logos. 2017. p. 17-19. (in rus) URL: https://m-lawbooks.ru/wp-content/uploads/2017/06/027-kniga-Pravo-sobsvennosti.pdf (date of reference: 15.11.2020).

[18] See for example: *Rybalov A. O.* Ownership (Commentary to Art. 209 of the Civil Code of the Russian Federation) [Pravo sobstvennosti (kommentarii k st. 209 GK RF)] [Electronic edition]. Moscow : M-Logos. 2017. 96 p. URL: https://m-lawbooks.ru/wp-content/uploads/2017/06/027-kniga-Pravo- sobsvennosti.pdf (date of reference: 15.11.2020); *Sukhanov E. A.* Property Law: a Scientific and Educational Essay [Veshchnoe pravo: nauchno-poznavatel'nyi ocherk]. Moscow : Statut. 2017. 559 p. (in rus); *Selivanovsky, A. S.* Legal Regulation of the Securities Market: Textbook [Pravovoe regulirovanie rynka tsennykh bumag: uchebnik]. Moscow : Publishing House of the Higher School of Economics. 2014. 580 p. (in rus)

[19] Resolution of March 20, 2020 on case no. A59-7663/2018 [Electronic resource]. The Commercial Court of the Far Eastern District. URL: https://sudact.ru/arbitral/doc/h5vBge1Ap8m5/ (date of reference: 15.11.2020).

[20] See Ibid.

302 of the civil code»[21]. That is, the court clearly distinguished that an undocumented security is not a thing, therefore, a vindication claim is impossible. However, the violated right must be protected, so a claim for recovery of rights is possible, to which, by analogy with the law, the articles 301, 302 of the civil code are to be applied. Thus, despite the fact that the courts generally have a positive attitude to the possibility of protecting undocumented securities under the rules of Articles 301, 302 of the Civil Code of the Russian Federation, cases of decisions that do not allow such quasi-identification are not rare, which allows us to characterize the current judicial practice in disputes of this kind as somewhat unstable.

The situation is similar with the claim of a share (in the authorized capital or an ownership interest). In the ruling of the SCC dated 17.11.2009 № 11458/09 it is noted that the recovery of a share in the authorized capital of a company from unlawful possession by a company, taking into account substantive qualifications, can be rightly regarded as vindicatory requirement in relation to article 301, 302 of the civil code. It is impossible to vindicate an ownership interest according to the classical regulations, as the interest is rather a legal phenomenon, not physical, it is not a thing. However, the legislator recognizes this kind of property, thus, in case of violation of the ownership interest the owner should be protected, for example, in the form of a claim for restoration of the right to a share with the application by analogy of the rules of articles 301, 302 of the civil code, which, in fact, was indicated by the Presidium of the Russian Federation in the Resolution from February, 9th, 2010 № 13944/09. A similar position is established in paragraph 42 of the Resolution of the Plenum of the Supreme Court of the Russian Federation and the Plenum of the SCC from 29.04.2010 № 10/22 "On certain questions arising in judicial practice when resolving disputes relating to the protection of the right of ownership and other real rights".

Some changes in the issue of protection of interests were made by the institute for the restoration of corporate control, introduced in 2014. The rules for the plaintiff's claim for the return of the interest in share capital stipulated in clause 3 of article 65.2 of the civil code were repeatedly and rightly criticized by civil law scholars, starting with the fact that it is unclear what meaning of the concept of "interest" does the legislator use (the interest of a participant of the Corporation, regardless of the method of consolidation — stock or the share, or OOO only), and ending with the use of cumbersome, unclear legal structures in the text, such as: "if it leads to unjust deprivation" or "extremely negative social and other publicly significant consequences."

In the classical model of limited vindication, implemented in Article 302 of the Civil Code, individually determined property, improperly and illegally in the possession of an unauthorized person, is subject to return, subject to certain rules aimed at protecting a bona fide acquirer. The rate of recovery of securities (article 147.1 of the civil code), being a special rule is in disjunctive connection with article 301-303 of the civil code, and contains: a) an indication that the rightful owner can act as a plaintiff; b) a ban on vindication of bearer securities, as well as order and registered ones certifying a monetary claim; c) a provision that the acquisition of a security by a bona fide person does not cure the vice of its disposal for an unscrupulous acquirer. In respect of book-entry securities (article 149.3 of the civil code) a quasivindication applies: "broadening" and the transformation of the object of vindication is allowed — the return of the same amount of relevant securities i. e. not those lost, but the same (paragraph 1); a vindication of those securities it that securities debited from the account have been converted (paragraph 2); the acquisition by the defendant of such securities on organised markets or compensation of all necessary expenditure for their purchase (p. 3). And finally, the restoration of corporate control (clause 3 of Article 65.2 of the Civil Code of the Russian Federation) is viewed as a method of protection other than vindication, not limited to the remuneration and good faith of the acquisition of shares (interest), provided that the final buyer is paid fair compensation. However, this rule is essentially a variation of Losungsrecht — an institution used in countries, the civilistic doctrine of which is based on unlimited vindication and causality, which is an original compromise between the conflicting interests of the owner and the bona fide buyer. Losungsrecht provides the owner (holder) with an unlimited opportunity to claim the property from the acquirer, provided that the latter is reimbursed for the purchase price paid by him, in the Russian version — limited by the condition of disposal against one's will. The logic and motives of the legislator, who differentiated them when claiming participation shares, where "fair compensation" should be paid, and non-documentary and documentary securities, where this compensation is not expected, are not entirely clear. Given the above, we should agree with the position of A. V. Yegorov, who noted that in comparison with vindication, the restoration of corporate control is a less convenient and

[21] Decision of June 11, 2019 on case no. A76-122/2019 [Electronic resource]. The Commercial Court of the Chelyabinsk Region. URL: https://sudact.ru/arbitral/doc/udEhP7bect5o/ (date of reference: 15.11.2020).

less fair method of protection for the plaintiff, therefore, only those plaintiffs who for some reason lost vindication claims will resort to restoring corporate control[22].

Thus, it can be stated that at present the civil law provides for several mechanisms of vindication and quasi-vindication, differentiated depending on the object of civil rights being claimed, which in practice leads to the establishment of the right to restore property interests according to the vindication model, even in cases where the classical theory objects to this.

The discussion about the possibilities of a vindication claim as an effective way to protect property rights has intensified with the emergence of such new objects of economic relations as "digital assets and values". Created just over a decade ago, the "blockchain" technology led to the introduction of cryptocurrency (a type of digital money) and tokens (the equivalent of shares) into trade, requiring the state to find ways to regulate them in public and private law. Now there is a process of searching and establishing those objective characteristics and elements that would allow laying the foundation for legislative regulation of legal relations regarding the digital environment. Undoubtedly, there is a certain specificity due to the digital form, but essentially civil rights do not change. Since the Roman law did not know anything about these digital elements of civil turnover, it is not necessary to speak about any system and continuity of legal and doctrinal regulation, there is a need to develop a legal regulation system that is optimal for regulating cryptocurrencies and other digital assets in the Russian legal field, without relying on the Roman heritage and looking at foreign constructions.

Currently, there are attempts to integrate "digital assets" into existing legal mechanisms, which raises many questions: is cryptocurrency a type of property, given that the term "property" is collective and ambiguous, the list of objects of civil rights enshrined in Article 128 of the Civil Code of the Russian Federation is not exhaustive; are the concepts of "cryptocurrency" and "digital currency" synonymous; what are the features of the legal regulation system of such property, the existence of which is inextricably linked with the use of "blockchain" technology, which is an information system based on a distributed registry; should a new legal regulation system be created for digital assets and in this case it is necessary to determine which one, or should we extend the system of real rights to them?

The case of the TOO (limited liability partnership) "CROWDVIZ" is of considerable interest to understand the possibility of protecting cryptocurrencies within the existing regulatory framework. The essence of the claim: the plaintiff ("TOO CROWDIS") initiated the ICO (Initial Coin Offering — digital process of public financing in a business project in exchange for providing a private tokens) and carried out the sale of tokens on the virtual platform of the defendant — ICO Adm.in (OOO "KRIPTON"); the defendant received the cryptocurrency due to the tokens issued by the plaintiff between October 2017 and February 2018, having a key that allowed to dispose of cryptocurrency, and blocked the platform of ICO "TOO CROWDIS", unlawfully possessing cryptocurrency owned by the plaintiff. The claims were formulated as follows: "To oblige the transfer of ETH1922, 903438 to the plaintiff's digital wallet for ETH…» That is, the plaintiff actually chose a vindication claim as a method of defense, justifying it by the fact that the cryptocurrency is a digital asset that has individualizing characteristics, and acting similarly to how securities market participants protect their rights. The Commercial Court of Moscow denied the claim, making the following conclusions: a) cryptocurrency is other property, namely property rights; b) the plaintiff has not presented evidence that the cryptocurrency of specific types in a certain number belongs or belonged to the plaintiff, and that the subject of the dispute became the property of defendants; C) the pending complaint is a dispute about the presence of digital rights, in connection with which the protection of the right by returning the specific property may not be carried out due to the nature of the disputed property. The appeal left the decision unchanged, stating that: a) transactions with cryptocurrency are not protected by the laws of Russia; b) the concept and legal status of cryptocurrency are not defined by the current legislation, so it is not possible to apply the rules governing similar relations to cryptocurrencies by analogy; c) it is impossible to clearly determine to which category does the cryptocurrency belong ("property", "asset", "surrogate", "information"), but the court of first instance correctly defined cryptocurrency as other property; g) the law does not known any means for protection of rights, as the obligation to provide a refund of cryptocurrency in digital wallets of the contributors in proportion to the size of the contribution of each contributor, and the claim for the reclamation of unlawful possession of flash drives with access to the crypto wallet (to transmit password) was not stated by the plaintiff[23].

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[22] *Egorov A. V.* Restoring Corporate Control. Pros and Cons of the New Design of the Civil Code of the Russian Federation [Vosstanovlenie korporativnogo kontrolya. Plyusy i minusy novoi konstruktsii GK RF] // Arbitration practice [Arbitrazhnaya praktika]. 2015. No. 7. p. 84-91. (in rus)

[23] See documents on the court case no. A40-164942/2019 [Electronic resource]. URL: https://kad.arbitr.ru/ Card/db741b81-cf91-4880-99b3-140e4b4e15c1 (date of reference: 15.11.2020).

The specifics of this dispute is that the subject of the claim is located inside the information system and has left the possession of the original owner of the password (holder) without his knowledge or against his will in a virtual environment specifically. Is it possible to vindicate (directly or by analogy) property that is in virtual form? The problem is that the legal nature of the subject of the dispute is not defined by law, and therefore a paradoxical situation arises — the court refers the cryptocurrency to other property (property law), recognizing its material value, but refuses to protect it, because it does not find a basis for this in material law, not seeing the possibility of applying even an analogy. The nature of the access right (password) to the "property right" — cryptocurrency and possible ways to protect it are also the subject of discussion. Science has yet to work out a decision on the relationship and correlation of the definitions of "cryptocurrency", "digital currency", "digital asset", "digital rights", since the legislator does not use the concept of "cryptocurrency" at all. Under the Digital Financial Assets Act (CFA) which comes into force on January 1, 2021, it is proposed to understand several types of digital rights as Digital Financial Assets: a) monetary claims; b) rights under equity securities; c) rights to participate in the capital of a non-public joint stock company (AO); d) the right to demand the transfer of equity securities, while the digital currency is not directly referred to as a digital financial asset, digital right or property by the law in the adopted version (although the original version proposed the term "cryptocurrency", which was classified as a type of property in electronic form) and is considered as "a set of electronic data contained in an information system". Digital rights, as correctly noted by M. A. Rozhkova, "in fact, have turned into a designation of property rights recorded in electronic (digital) form, which meet two criteria: first, they must be explicitly named as digital in the law; second, they must be acquired, implemented and alienated on an information platform that meets the criteria established by law"[24].

In sum up the study of the question, we believe it is possible to draw the following conclusions.

First, we should recognize the established practice of the use of astreinte to the vindication requirements, although in doctrinal terms the question of the legality of the enforcement of astreinte by a decision to satisfy the vindicatory claim is not clear.

Secondly, the introduction of new forms of intangible property into civil circulation is constantly taking place, and this process is unlikely to ever be completed. The active development of the digital (virtual) sector of the economy along with the real one leads to the fact that the classical understanding of vindication as a real-legal method of protecting an individual-defined thing existing in specific form does not fully meet the needs of economic entities, leads to contradictions between the needs of the economy and the conservative legislative system. Currently, Russian science is actively trying to determine the place of digital objects in the field of legal regulation. The use of proprietary methods of protection regarding property rights as a general rule is not allowed, but civil-law regulation should ensure the stability of relations in statics and predictability in the dynamics, therefore by filling the legal gaps, law-enforcers rightly and successfully used the provisions for reclaiming of property from unlawful possession in respect of book entry securities and ownership interests by the analogy with the law, due to the lack of other more effective remedy. In this regard, we do not see any fundamental obstacles in extrapolating the current practice of the analogy of vindication to the sphere of turnover of digital assets and values.

Specific legal nature of objects of civil rights (no-things), such as securities (certificated and uncertificated, which is, in fact, recorded property right of claim), shares in the "digital assets and values" necessitates the development of certain rules and recommendations to adapt vindication mechanisms to cases of reclamation from unlawful possession or to create new legal structures that will require in-depth civil law developments.

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