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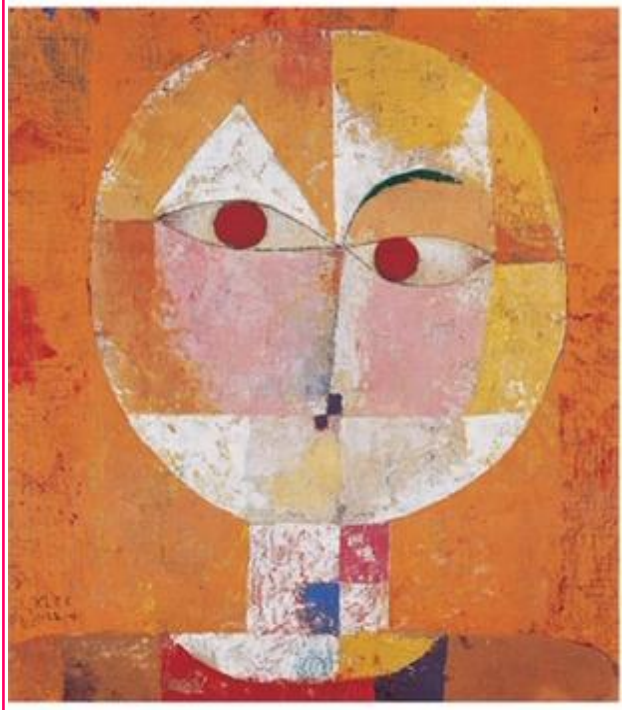

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# Analogy in loss recovery mechanism upon the termination of the contract

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**Abstract**

Based on a comparative analysis of Articles 524 and 393.1 of the Civil Code of the Russian Federation, the purpose of the study is to identify and propose a solution for the current problems of practical use and regulatory improvement of the mechanism for recovering abstract and specific losses. In result, improper use of the analogy mechanism in generalizing the rules of Art. 524 of the Civil Code of the Russian Federation by the Russian legislator has been identified. In conclusion, it is advisable to discard the indirect requirement of similarity or homogeneity of the substitute with the terminated contract.

**Keywords:** Analogy, Contract, Goods, Losses, Reasonableness.

# Analogía en el mecanismo de recuperación de pérdidas tras la terminación del contrato

**Resumen**

Basado en un análisis comparativo de los artículos 524 y 393.1 del Código Civil de la Federación de Rusia, el propósito del estudio es identificar y proponer una solución para los problemas actuales de uso práctico y mejora regulatoria del mecanismo para recuperar pérdidas abstractas y específicas . En consecuencia, el uso indebido del mecanismo de analogía en generalizar las reglas del art. 524 del Código Civil de la Federación de Rusia por el legislador ruso ha sido identificado. En conclusión, es aconsejable descartar el requisito indirecto de similitud u homogeneidad del sustituto con el contrato rescindido.

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**Palabras clave:** Analogía, Contrato, Bienes, Pérdidas, Razonabilidad.

## 1. INTRODUCTION

Regardless of the legal system in question, loss recovery is justly considered to be the most typical form of civil liability applicable in the event of violation of legal civil rights in contractual arrangements (SOLOMIN & SOLOMINA, 2017), which itself requires increased attention from specialists in civil law to the problems of respective legal mechanisms. In the context of the ongoing civil law reform in Russia, the problems of effective and fair compensation for losses are coming to the fore. In particular, with regard to the adoption of the Federal Law of March 8, 2015, No. 42-FZ, On the Introduction of Amendments to Part One of the Civil Code of the Russian Federation, and the enactment of the new rule of Art. 393.1. of the Civil Code of the Russian Federation on compensation for specific and abstract losses upon the termination of contract applicable to a wide array of contractual relations, the questions about how appropriately and effectively the compensatory function of civil law is reflected in the new rules are even more relevant (BULYGINA, 2015: ALHUSAINI, 2018).

The study of the compensation mechanism in the form of the difference between the price of the terminated contract and the price of the transaction concluded in return is of interest not only in terms of a civil remedy but also in terms of the work of the analogy method, on

the basis of which and through which the mechanism in question has been designed.

The general rules of Art. 393.1 of the Civil Code of the Russian Federation have clearly been created by analogy with the special procedure for determining losses upon the termination of supply contract, and since the mechanism itself has been designed on the basis of relatively specific legal categories: similar goods, similar agreement, similar price, the study in this perspective will not only help to advance towards the formation of a unified institution of civil liability, the need for development of which is rightly stated in modern studies on the civil law (VASILEVSKAYA, 2018), but it will also allow for evaluation of the analogy method as part of relatively defined rules, the form of which can be taken, among other things, by the protective remedies of civil law (TETTENBORN ET AL., 2017), and for laying the foundation for improvement of legislative regulation of protective remedies based on this method.

## 2. METHODOLOGY

To ensure effective use of the methodological potential of civil legal science in essential components such as (a) scientific material about the current legal environment, (b) abstract concepts and their systematized combinations, and (c) practical conclusions and proposals aimed at improvement of the legislation and legal practice

(SERGEYEV & TERESHCHENKO, 2015), the study addresses the scientific views of Russian and foreign scientists on the calculation and recovery of losses that the non-breaching party suffers upon the contract breach by the other party, as well as on the problems of applying the analogy method in the legal regulation of economic activity. The article critically evaluates several special and relatively specific legal categories normatively included in the compensation mechanism for specific and abstract loss recovery upon the termination of violated contracts and analyzes materials of law enforcement practice, including judicial acts on certain disputes and general acts of the supreme judicial authorities of the Russian Federation.

A special role in the study is played by a reference to the provision of the Decree of the Russian Federation Supreme Court Plenum of March 24, 2016 No. 7 On Application by Courts of Certain Provisions of the Civil Code of the Russian Federation on Liability for Violation of Obligations that clarify the rules of Art. 393.1 of the Civil Code of the Russian Federation. The article predicts the development of the institutions under study and proposes specific solutions for their regulatory and law enforcement improvement.

## 3. RESULTS

The main result of the research was scientific and practical confirmation of the universality, effectiveness and generally positive

role of the analogy method in the legal regulation of economic activity and in the design and application of protective legal remedies.

A case study of how the accumulated practical experience of applying the rules of Art. 524 of the Civil Code of the Russian Federation on the consequences of terminating supply contract on the basis of analogy outside the supply relationship developed into a specific regulatory decision that eliminated the discovered legal gap highlights one of the most important functions of the legal analogy – its ability to be a creative basis for bridging law-making gaps (DVORKIN, 2004).

Improper use of the analogy mechanism when generalizing the rules of Art. 524 of the Civil Code of the Russian Federation on the specifics of loss recovery upon the termination of a violated supply contract and formulation of a general rule on the procedure for the simplified determination of specific and abstract losses upon the termination of any contract by the Russian legislator has been identified.

The problem of lack of uniformity in the court practice of establishing similarity of goods that are the subject of a violated contract and are subjected to delivery within a replacement transaction when resolving court disputes related to the application of Art. 524 of the Civil Code of the Russian Federation on compensation for specific and abstract losses incurred as a result of a violation of the supply

contract has been discovered. The most acceptable of the approaches used by the courts have been cited (BOGDANOV, 2016).

Given a highly probable transfer of the litigation practice of applying Art. 524 of the Civil Code of the Russian Federation to disputes that fall within the rules of Art. 393.1 of the Civil Code of the Russian Federation, the present study gives ground to a critical attitude to the rejection of generalization in Art. 393.1 of the Civil Code of the Russian Federation of the special delivery concept similar goods substituted by the alternative category comparable goods.

The conclusion has been inferred that to replace the term comparable goods, work or services used in the general rule with a more appropriate term similar subject of performance is advisable. Considering the results of the conducted theoretical analysis and with regard to the need for establishing more specific boundaries of reasonableness and good faith of the creditor's conduct and to its assessment by the court, it was proposed to improve the wording of Art. 393.1 and 524 of the Civil Code of the Russian Federation through specific legislative clarifications.

## 4. DISCUSSION

Prior to the inclusion of the new Art. 393.1 of the Civil Code of the Russian Federation, rules on calculating specific and abstract

losses associated with the termination of a violated contract were expressly provided in Art. 524 of the Civil Code of the Russian Federation only for relations under supply contracts. However, some scholars obviously following the line of reasoning completely natural for the realm of law, such as an issue that is not regulated by law is solved by analogy with a comparable issue for which the law contains the necessary solution ... and if two similar cases should be dealt with in a similar way and the legislature has settled a law on how to treat one of them, the other matter requires a similar resolution, saw the fundamental possibility of applying the rules established by Art. 524 of the Civil Code of the Russian Federation to other types of contractual obligations through Art. 6 of the Civil Code of the Russian Federation, subject to legal analogy.

That being said, in a number of cases the courts, including the supreme authorities, have approved of this idea, allowing for the calculation of losses on the basis of conditions of the transaction in exchange for the canceled one, or on the basis of the current price outside the supply relationship. Particularly, in paragraph 5 of Decree No. 54 of July 11, 2011 On Certain Issues of Settlement of Disputes Arising from Contracts on Real Estate to be Created or Acquired in the Future, the Plenum of the Supreme Arbitration Court of the Russian Federation indicated for lower courts that when considering disputes related to the failure to fulfill a contract for the sale of a future real thing, it is necessary to proceed from the position according to which in the absence of immovable property to be transferred into the buyer's ownership, the buyer has the right to demand not only return of the

sum paid to the seller and the interest on it, but also compensation for the losses, including losses in the form of the difference between the price of the immovable property specified in the sales contract and the current market value of such property.

Given the fact that the main principles of civil law are directly implemented when the analogy mechanism is used in law enforcement, the requirements for reasonableness and justice reach the significance of the principles of civil law (VINICHENKO, 2014); bearing in mind that the rules that are not tied to the specifics of the subject matter of supply contract are quite applicable by analogy outside of the supply relationship (ROMANETS, 2000), such a doctrinal and judicial approach could be supported.

At the same time, as an additional argument for such support, it can be taken into account that in both Russian and foreign scientific studies, the method of legal reasoning by analogy is generally recognized as a common and effective way to bridge legal gaps that can create long-term legal consequences for society, to keep the regulatory impact within the framework of the principle of legal equality, and to indicate that the analogy as a whole is characteristic of human thinking and is immanent to everyday practical and theoretical reasoning, while in law it significantly contributes to the promotion of doctrinal stability and systemic coherence, creates the principle of repeatability of achieving legal objectives and, therefore, predictability of legal planning, i.e. it allows to more accurately predict how a particular life situation would be considered in terms of the law.

There are even more reasons for doubts about the admissibility of spreading the rules of Art. 524 of the Civil Code of the Russian Federation beyond the scope of supply relations by analogy to similar relations due to the fact that it is common to consider analogy in science as an undesirable and the worst tool applicable only in exceptional cases of legal pressure BALASHOV AND MISHUTINA (2009) because the use of analogy is poorly taught and poorly practiced, and the analogy itself is an extremely controversial and complex form of reasoning and often becomes nothing more than a cover for unrecognized legislation from the bench (SCHAUER AND SPELLMAN, 2017). It is worth considering such a nuance as the penchant of Russian law enforcers for normativism as they tend to resolve legal issues on the base of specific statutory references. This means that the demand for loss recovery in the form of price difference as a special way to determine the losses without making appropriate amendments to the rules of the Civil Code of the Russian Federation is not able to gain common use and support of courts of first instance that prefer to rely on the explicit text of statutory regulations rather than on legal analogy (SADIKOV, 2009).

## 5. CONCLUSION

Considering the analysis, we believe that in order to ensure the optimal universalization of the mechanism enshrined in Art. 524 of the Civil Code of the Russian Federation, the legislator should settle on

the term similar subject of execution and emphasize that the characteristic similar by definition does not imply identity. To define a substitute, it is advisable to abandon the term similar contract, discard the indirect requirement of similarity or homogeneity of the substitute with the terminated contract, replacing the narrow terms bought and sold with broader ones acquired and executed.

If the legislator constructively accepted the above criticism and decided to include the terms specific losses and abstract losses adopted in science directly in the law, as well as to legalize the explanations contained in Resolution No. 7 adequately formulated by the Plenum of the Supreme Court of the Russian Federation, Art. 393.1 of the Civil Code of the Russian Federation could be read as follows:

Article 393.1. Loss Recovery upon Termination of Contract.

1. If the failure or improper performance by the debtor resulted in early termination of the contract and the creditor has concluded a contract in exchange, the creditor who acted reasonably and in good faith has the right to demand the recovery of specific losses from the debtor in the form of difference between the price established in the terminated contract and a higher but reasonable price for the same or similar performance under the terms of contract concluded in exchange for the terminated contract.

2. If the creditor acting in good faith has not entered into a contract to replace the terminated contract but there is a current price

for the same or similar performance with respect to the subject of execution stipulated by the contract, the creditor is entitled to demand abstract losses from the debtor in the form of difference between the price established in the terminated contract and the current price.

Art. 524. Loss Recovery upon Termination of Supply Contract.

1. If, within a reasonable time after the termination of contract due to a breach of obligation by the seller, the buyer, based on one or more replacement transactions, has purchased the same or similar goods instead of those provided for by the contract from the other party (from other parties) at a higher but reasonable price, the buyer has the right to demand recovery of specific losses from the seller in the form of difference between the price established in the contract and the price of transactions in exchange.

2. If, within a reasonable time after the termination of contract due to a breach of obligation by the buyer, the seller, based on one or more transactions, has sold the goods to the other party at a price lower than the one stipulated by the contract, the seller has the right to demand recovery of specific losses from the buyer in the form of difference between the price established in the contract and the price of transactions in exchange.

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