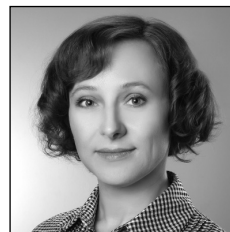




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Agreements and Decisions

1. Introduction

The aim of this article is to find an answer to the question of whether agreements and decisions as multi-lateral transactions differ from one another and, if so, how they differ and what the legal meaning of those differences is.

Agreements and decisions pertaining to the joinder of parties contain at least **two** declarations of will. Unlike a decision, an agreement may include not declarations of will but **will performances** (*Willensbetätigungen*)—that is, expression of will performed without the intention to tell anybody about one's intention to cause a legal consequence.^{*1} The standard example of such agreement is the agreement on transfer of cash into ownership, as concluded by the representative who manages the cash account of a party, on his behalf, with regard to himself, and which consists of two expressions of will that are not in pursuit of the aim of communication, aimed at the transfer of the right of ownership for currency notes, and the real act (of transfer of currency units from the cash account of the representative to the cash account of the party he is representing).^{*2}

Clause 154 of the Civil Code (CC) of the Russian Federation (RF) distinguishes between bilateral and multilateral agreements (deals), not mentioning decisions as multilateral deals. Such differentiation, which encourages jumping to an inappropriate conclusion with respect to multilateral deals being limited to agreements entered into by three or more parties, is not justified, **since a bilateral agreement is a type of multilateral agreement.**^{*3} As for decisions pertaining to the joinder of the parties, the omission of this type of multilateral deal from clause 154 of the Civil Code of the RF does not change anything in the merits of the case: since the decision consists of several expressions of will, aimed at causing legal consequences that correspond to their contents, it cannot be anything else but a multilateral deal. To eliminate the shortcomings mentioned above from clause 154 of the CC of the RF, it should reflect the fact that multilateral

¹ For discussion of will performance, see A. Manigk. Zum Begriff des Rechtsgeschäfts. – *Deutsche Juristen-Zeitung* 1902, pp. 281–282; *Idem*. Das System der juristischen Handlungen im neuesten Schrifttum. – *Jahrbücher für die Dogmatik des bürgerlichen Rechts* 1933 (83), pp. 56 ff.; A. Tuhr. *Der allgemeine Teil des deutschen bürgerlichen Rechts*. Bd. 2. Hälfte 1. Munich: Duncker & Humblot 1914, pp. 404–410; *Idem*. *Allgemeiner Teil des schweizerischen Obligationenrechts*. Halbbd. 1. Tübingen: Mohr 1924, pp. 137–138; K. Larenz. *Vertrag und Unrecht*. Hamburg, Teil 1. 1936, pp. 69–72; M. Keller, C. Schöbi. *Das schweizerische Schuldrecht*. 3. Aufl. Bd. 1. Basel: Helbing & Lichtenhahn 1988, pp. 34–36; A. Koller. *Schweizerisches Obligationenrecht. Allgemeiner Teil: Grundriss des allgemeinen Schuldrechts ohne Deliktsrecht*. Bd. 1. Bern: Stämpfli 1996, pp. 35–36; Е.А. Крашенинников, Ю.В. Байгушева. Односторонние и многосторонние сделки. – *Вестник Высшего Арбитражного Суда РФ* 2012/7, pp. 30–31, 40.

² A. Tuhr. *Der allgemeine Teil des deutschen bürgerlichen Rechts*. Bd. 2. Hälfte 2. Munich: Duncker und Humblot 1918, p. 362 and Note 180.

³ By answering the question about the ratio between twofold and multifold, which is identical to the ratio between bilateral and multilateral, since both of them are derivatives of the ratio between 'two' and 'many', Aristotle states clearly that 'two is many', which is why 'two is multifold' (Aristotle. *Metaphysics*. Vol. 1 of Works (4 volumes). Москва 1975, p. 264.

deals—i.e., those deals that are performed by two or more parties—that are set in contrast to unilateral deals are divided into agreements and decisions on the joinder of parties.

2. Agreements

Since we are not dealing with agreements including will performances, the agreement consists of **concerted** expressions of will. That the expressions of will are concerted means that each party has expressed its will in relation to another party, aimed at bringing about one and the same legal consequence (for example, establishing the obligations of the seller to transfer the object and the right of ownership of this object and the obligation of the buyer to pay the purchase price). Concerted expressions of will, as a rule, are not identical, meaning that the parties to the agreement shall express their will via different agreement functions (as in the case of a seller who says: ‘I’m selling’ and a buyer who says: ‘I’m buying’).^{*4} However, some agreements (for example, the contract of particular partnership—see clause 1041 (1) of the CC of the RF) consist of identical expressions of will, since their parties perform similar contractual functions.

The parties to the agreement wish to create the legal consequence in conformance with the contract’s contents, not isolated from each other but in connection with the expression of will of another party.^{*5} This is why, on its own, each of the expressions of will included in the agreement **is not a unilateral deal**.^{*6} Hence, if a minor concludes an agreement for the conclusion of which the consent of his legal representative is required, the expression of will of the minor in the absence of said consent shall not be the expression of will that cannot come into effect, which **would** be the case if he were to carry out a unilateral deal; jointly with the expression of will of the contractual counterparty, it can be approved and thus brought into effect by the legal representative.^{*7}

The actual composition of the agreement usually includes two concerted expressions of will. For example, a bank-guarantee contract (see clause 368 of the CC of the RF)^{*8} consists of the expression of will of a guarantor and the expression of will of a beneficiary, while a contract for forgiving of debt (see clause 415 of the CC of the RF)^{*9} consists of the expression of will of a debtor and of a creditor. However, agreements

⁴ A. Tuhr (see Note 1), p. 225; K. Larenz, M. Wolf. *Allgemeiner Teil des bürgerlichen Rechts*. 8. Aufl. Munich: Beck 1997, p. 447.

⁵ A. Tuhr (see Note 1), p. 224.

⁶ Similarly, this is the case with the **joint act** (*Gesamtakt*)—i.e., the expression of will consisting of several identical, parallel expressions of will (e.g., the consent for the transaction performed by the minor, expressed by both parents—see sub-clause 26 1) 1) (1) of the CC of the RF). However, unlike the joint act, an agreement is not just a simple combination of expressions of will but the **mutual action** of its parties (K. Larenz, M. Wolf (see Note 4), pp. 444–445).

⁷ A. Tuhr (see Note 1), p. 225; L. Ennecerus, H.C. Nipperdey. *Allgemeiner Teil des bürgerlichen Rechts*. 14. Aufl. Halbbd. 2. Tübingen: Mohr 1955, pp. 638–639; W. Flume. *Allgemeiner Teil des bürgerlichen Rechts*. 4. Aufl. Bd. 2. Berlin 1992, p. 635; E.A. Kramer. *Kommentar zu § 145. – Münchener Kommentar zum Bürgerlichen Gesetzbuch*. 4. Aufl. Bd. 1. Munich: C.H. Beck 2001, p. 1483.

⁸ The unjustified assumption of the Plenum of the Higher Arbitration Court of the Russian Federation with respect to the idea that the guarantor, by issuing the bank guarantee, performs a unilateral transaction should be disproved (see clause 3 of decree 14 of the Plenum of the Higher Arbitration Court of the Russian Federation, ‘About Individual Issues Concerning the Practice of Resolutions of Disputes Related to Contesting Bank Guarantees’, issued on 23 March 2012). The bank guarantee is a transaction by means of which the guarantor creates a material benefit for the beneficiary, consisting of the accession of the new right to the property of the beneficiary. However, the guarantor cannot force the right upon the beneficiary against his will, since the relations regulated by civil law are built upon terms of equality of their parties. The increase of the property of the beneficiary on the part of the guarantor can only be performed by consent of the parties. Hence, the bank guarantee is an agreement between the guarantor and the creditor on an obligation secured by means of the guarantee. See L. Ennecerus, H. Lehmann. *Recht der Schuldverhältnisse*. 14. Aufl. Tübingen 1954, p. 781; K. Larenz. *Lehrbuch des Schuldrechts*. 11. Aufl. Bd. 2. Munich: Beck 1977, pp. 395–396, 417; K. Larenz, C.-W. Canaris. *Lehrbuch des Schuldrechts*. 13. Aufl. Bd. 2. Halbbd. 2. Munich: Beck 1994, p. 76; H.-J. Lwowski. *Das Recht der Kreditsicherung*. 8. Aufl. Berlin: Erich Schmidt 2000, p. 381; N. Horn. *Bürgschaften und Garantien: aktuelle Rechtsfragen der Bank-, Unternehmens- und Außenwirtschaftspraxis*. 8. Aufl. Cologne: RWS-Verlag 2001, pp. 31–32; H. Weber. *Kreditsicherheiten: Recht der Sicherungsgeschäfte*. 7. Aufl. Munich: Beck 2002, p. 122; P. Bülow. *Recht der Kreditsicherheiten*. 6. Aufl. Heidelberg: C.F. Müller 2003, p. 505; C.-W. Canaris. *Bankvertragsrecht*. – H. Staub. *Großkommentar zum Handelsgesetzbuch*. 4. Aufl. Bd. 5. Teil 1. Berlin: Beck 2005, p. 750; E.A. Крашенинников. Фактический состав сделки. – *Очерки по торговому праву 2004* (11) (Yaroslavl), p. 6 (Note 6), 10 from Note 18; Ю.В. Байгушева. Договор банковской гарантии. – *Сборник статей к 55-летию Е.А. Крашенинникова*. Yaroslavl: ЯрГУ 2006, p. 88.

⁹ The opinion of C.C. Alekseyev on waiver of debt as a unilateral transaction of the creditor is erroneous (see C.C. Алексеев. Односторонние сделки в механизме гражданско-правового регулирования. – *Теоретические проблемы гражданского права*. Sverdlovsk 1970, p. 56). Imposing material benefit given by one party on another in the form of waiver of debt

can consist of expressions of will in greater numbers. In particular, this is the case with a simple partnership agreement (see clause 1041 (1) of the CC of the RF) that includes the expressions of will of three or more partners. Such agreements should be differentiated from those agreements consisting of two expressions of will under which each of them is performed by several parties (for example, several sellers and buyers within one purchase and sale contract). Each party to agreements that contain three or more expressions of will expresses his will in relation to another party, while the parties representing one and the same party to an agreement consisting of two expressions of will perform joint expression of will in relation to another party to the agreement, which is represented by several parties.

There are agreements that, alongside expression of will, also have **other constituent elements**.^{*10} For example, the actual composition of the tradition—or, in what amounts to the same thing—the contract for transfer of a movable object into ownership^{*11} consists of agreement on the transfer of the right of ownership of the object and of the real act (the transfer of the object)^{*12 *13}; the contract for the transfer of the immovable object into ownership includes agreement on the transfer of that ownership right and the state registration of this agreement^{*14}. The notarised claim-assignment contract, based on the transaction, consists of the agreement on the transfer of this claim and the actions of the notary public certifying the act.^{*15}

The entry into effect of some contracts depends on the availability of **a prerequisite lying outside the framework of their actual composition**.^{*16} A prerequisite for the entry of the contract into effect might be another transaction (for example, the creditor's consent to the transfer of the debt—see clause 391 (1) of the CC of the RF), an administrative act (for example, state registration of the contract of lease of a

is impossible for the same reason applicable to the enforcement of a right. This is why waiver of debt, as is bank guarantee, is a bilateral deal. See O. Gierke. *Deutsches Privatrecht*. Bd. 3. Munich: Duncker & Humblot 1917, pp. 173–174; A. Tuhr. *Allgemeiner Teil des schweizerischen Obligationenrechts*. Halbbd. 2. Tübingen: Mohr 1925, p. 567; H. Siber. *Schuldrecht*. Leipzig: Meiner 1931, p. 137; H. Becker. *Obligationenrecht. Allgemeine Bestimmungen* (Art. 1–183). 2. Aufl. Bern: Stämpfli 1941, p. 600; L. Ennecerus, H. Lehmann (see Note 8), p. 284; K. Larenz. *Lehrbuch des Schuldrechts*. 14. Aufl. Bd. 1. Munich: Beck 1987, p. 267; G.H. Roth. *Kommentar zu § 397. – Münchener Kommentar zum Bürgerlichen Gesetzbuch*. 2. Aufl. Bd. 2. Munich: Beck 1985, p. 1232; J. Gernhuber. *Die Erfüllung und ihre Surrogate sowie das Erlöschen der Schuldverhältnisse aus anderen Gründen*. 2. Aufl. Tübingen 1994, p. 370; E.A. Крашенинников. Правовая природа прощения долга. – *Очерки по торговому праву 2001/8* (Yaroslavl), pp. 40–42; A.A. Павлов. Прощение долга. – *Сборник статей к 55-летию Е.А. Крашенинникова*. Yaroslavl: ЯРГУ 2006, pp. 108–110.

¹⁰ L. Ennecerus, H.C. Nipperdey (see Note 7), p. 617; E.A. Крашенинников (see Note 8), p. 8.

¹¹ As for tradition, E.A. Suhhanov says: 'In the Russian civil law, the right for transfer of the object into the performance of the concluded contract ('tradition') is considered as a unilateral deal aimed at the performance of a contractual obligation' (*Гражданское право. Под ред. Е.А. Суханова*, том 3. Москва: Волтерс Клувер 2005 (2), p. 50). This assumption, which is not in agreement with either Russian civil law or the well-known fact that the transfer of the right of ownership can be performed only by means of entry into an agreement between the alienator and the acquirer, can be set against the following quote from F.C. Savigny: 'The tradition is an agreement, since it contains features typical of the notion of the agreement: [...] it contains the expression of will of two parties, aimed at [...] the transfer of ownership and property' (quoted by P. Dischler. *Rechtsnatur und Voraussetzungen der Tradition: gleichzeitig eine rechtsdogmatische Analyse der Systematik der schweizerischen Fahrmisübergabe*. Basel: Helbing Lichtenhahn Verlag 1992, p. 14).

¹² A. Manigk. *Das Anwendungsgebiet der Vorschriften für die Rechtsgeschäfte. Ein Beitrag zur Lehre vom Rechtsgeschäft*. Breslau: M. & H. Marcus 1901, p. 92; A. Tuhr (see Note 1), pp. 149–150, 221; L. Ennecerus, H.C. Nipperdey (see Note 7), p. 617; K. Larenz. *Allgemeiner Teil des deutschen bürgerlichen Rechts*. Munich: Beck 1967, pp. 317–318; W. Flume (see Note 7), pp. 26, 604; H. Hübner. *Allgemeiner Teil des Bürgerlichen Gesetzbuches*. 2. Aufl. Berlin: de Gruyter 1996, p. 280; E.A. Крашенинников (see Note 8), p. 8; П.А. Варул. Распорядительные сделки. – *Сборник научных статей в честь 60-летия Е.А. Крашенинникова*. Yaroslavl: ЯРГУ 2011, p. 39.

¹³ The contract of transfer of a movable object into ownership is recognised by Russian legislation in clause 491 (1) of the CC of the RF. This article interprets the transfer of the object sold with a proviso pertaining to the preservation of the ownership for the seller before the payment for the goods or the onset of other circumstances—i.e., of suspensive conditioned contract of the transfer of a movable object into ownership. Paragraph 1 of clause 491 of the CC of the RF separates the conditional tradition (real transaction) from the underlying unconditional purchase and sale (binding transaction) and also demonstrates that the agreement on transfer of the right of ownership of the object and the transfer of the object are different parts of the actual composition of this contract, since only the agreement is conditional, while the transfer, just as much as any real act, cannot be conditional.

¹⁴ E.A. Крашенинников. К вопросу о «собственности на требование». – *Очерки по торговому праву*. 2005/12 (Yaroslavl), p. 34 from Note 9; E.A. Крашенинников. Распорядительные сделки. – *Сборник статей памяти М.М. Азаркова*. Yaroslavl: ЯРГУ 2007, p. 27 from Note 12. The registration of an agreement on the transfer of the right of ownership of immovable property, **which is not a deal in itself**, should be distinguished from the state registration of the deal (for example, the agreement on the lease of a building or a construction entered into for a term of at least one year, as dealt with in clause 651 (2) of the CC of the RF).

¹⁵ E.A. Крашенинников (see Note 8), pp. 8–9.

¹⁶ L. Ennecerus, H.C. Nipperdey (see Note 7), p. 613; K. Larenz (see Note 12), p. 318.

building or structure, entered into for the term of at least one year—see clause 651 (2) of the CC of the RF¹⁷), violation of the law (for example, the non-performance of an obligation secured by a bank guarantee, on the part of the principal being a prerequisite for the entry into effect of a bank-guarantee contract¹⁸), etc.

Many agreements are **binding** deals. Examples include contracts of purchase and sale (see clause 454 (1) of the CC of the RF), donation contracts (see sub-clause 572 (1) 1) of the CC of the RF), and leasing contracts (see sub-clause 606 (1) of the CC of the RF).¹⁹ Depending on whether binding contracts are entered into with the aim of the establishment of regulatory or protective obligations, they are divided into **regulatory**, **regulatory-protective**, and **protective** contracts.²⁰ The usual examples of regulatory contracts are the barter contract (see sub-clause 567 (1) of the CC of the RF), the contract for rental of living accommodation (see sub-clause 671 (1) of the CC of the RF), and the contract of work and labour (see sub-clause 702 (1) of the CC of the RF). A regulatory-protective contract is the contract of property insurance (see clause 919 (1) of the CC of the RF).²¹ The protective contracts are the forfeit (see clause 330 (1) of the CC of the RF), the contract of surety (see clause 361 (1) of the CC of the RF), and the bank-guarantee contract (see clause 368 of the CC of the RF).²²

Binding contracts exist in a contrast to **regulatory** contracts. The former often are entered into with the aim of the performance of binding contracts, preparing the transfer of property rights—in particular, the right of ownership—and mediate that transfer. For example, being a binding transaction, the contract of purchase and sale (covered by clause 454 (1) of the CC of the RF) obliges the seller to transfer the object and the right of ownership thereto, while it binds the buyer to pay for the object. The transfer of the ownership right for the purchased object takes place through the real contract (tradition), which for the seller is the order and for the buyer is the acquisitive transaction. The payment of the purchase price, since it is performed by means of paying in cash—i.e., through the transfer of the right of ownership into currency units—is also mediated by the real contract, the actual composition of which includes the agreement on the transfer of the right of ownership for currency units and the real act (the transfer of currency units). Thus the economic outcome pursued by the parties comes about only through the performance of the three transactions mentioned above.

In addition to the transfer of the movable object into ownership, examples of regulatory contracts include the contract for the establishment of servitude (see clause 274 (3) of the CC of the RF); the pledge agreement (see clause 341 of the CC of the RF); the claim-assignment agreement (see sub-clause 382 (1) 1) of the CC of the RF); the contract for the transfer of debt (see clause 391 (1) of the CC of the RF); the contract of the forgiving of debt (see clause 415 of the CC of the RF); the contract of establishment of the limited real right of the buyer to an object sold and transferred to him with a proviso of preservation of the right of ownership (see clause 491 of the CC of the RF); the contract of establishment of the limited real right of the tenant to a movable object transferred to his temporary ownership and use²³; and the marriage contract

¹⁷ Since state registration of the agreement is not included in its actual composition, the agreement that needs to be registered is deemed concluded not from the moment of its registration, as is claimed in clause 433 (3) and clause 651 (2) of the CC of the RF, but with the performance of the actual composition, prescribed by law for the agreement of this type. See Е.А. Крашенинников (see Note 8), p. 9 (specifically, Note 17); Д.О. Тузов. Заметки о консенсуальных и реальных договорах. – *Сборник научных статей в честь 60-летия Е.А. Крашенинникова*. Yaroslavl: ЯрГУ 2011, pp. 123–124.

¹⁸ Е.А. Крашенинников (see Note 8), pp. 9–10.

¹⁹ In sub-clause 222 (2) 1) of the CC of the RF, these contracts are referred to as orders. This term distorts their legal nature, because they are not deals directly aimed at transfer, encumbrance, change, or cessation of right.

²⁰ Е.А. Крашенинников. Основания возникновения притязаний. – *Очерки по торговому праву 2002/9* (Yaroslavl), pp. 6–9.

²¹ This ambivalent agreement is aimed at the establishment of two obligations, different in their legal nature: 1) the regulatory obligation of the insured party to make insurance payments and 2) the **protective** obligation of the insurer to pay out the insurance indemnity. А.Р. Sergeyev speaks against this interpretation of the obligation of the insurer, though unconvincingly. See А.П. Сергеев. Начало течения исковой давности в обязательствах по страхованию. – *Сборник научных статей в честь 60-летия Е.А. Крашенинникова*. Yaroslavl: ЯрГУ 2011, pp. 164–167.

²² Protective agreements are peculiar because their coming into effect depends on *condicio juris*. In particular, for the creation of an obligation of a guarantor, in addition to the conclusion of the agreement on a bank guarantee, the occurrence of the condition of the right is also required. The latter consists in non-performance or in the principal's inadequate performance of his main obligation. See Е.А. Крашенинников, Ю.В. Байгушева. Фактический состав возникновения гарантийного обязательства. – *Вестник Высшего Арбитражного Суда РФ* 2007/8, p. 45 ff.

²³ The legal basis for the two latter contracts is *causa solvendi*, while the actual composition of each of them consists of the agreement on the establishment of a relevant real right and the real act (the transfer of the object). See Е.А. Крашенинников, Ю.В. Байгушева. Спорные вопросы оговорки о сохранении права собственности. – *Очерки по торговому праву*

(see clause 40 of the FC of the RF), through which those to be spouses transform the right to joint property belonging to them into the sole property right of the husband.^{*24}

The legal consequence of the contract usually comes about within the legal sphere of the parties entering into it. Under the conditions for the validity of the principle of private autonomy (see clause 1 (1), sub-clause 2 (1) 1) of the CC of the RF), the parties to a contract cannot change the legal status of a party not entering into the contract against his will by their agreement.

If a party enters into the contract as a representative (see sub-clause 182 (1) 1) of the CC of the RF), the person who is being represented becomes the party to the contract. This is not a departure from the principle of private autonomy, since in the case of voluntary representation, the person represented grants, of his own will, the authorisation right to the representative, which enables him to enter into the contract on behalf of and with direct effect for the person being represented; in the case of legal representation, the person being represented is usually unable to enter into contracts independently, which is why his legal status can be changed only at the will of his legal representative.^{*25}

An exception to the principle of private autonomy is the possibility of entering into a contract on behalf of a third party, prescribed by clause 430 (1) of the CC of the RF, according to which the debtor undertakes to make provision not for his counteragent but for a third party indicated in the contract. However, the law minimises the effect of this exclusion by authorising the third party to reject the claim against the debtor that he has acquired against his will (see clause 430 (4) of the CC of the RF) if he is not interested in preserving this claim for himself.^{*26}

3. Decisions

The main difference between decisions and contracts lies in the fact that the principle of equality of the parties underlies any contract, while the basis for any decision is formed by the decision of the partners to manage the activities of a general partnership (see clause 71 (1) of the CC of the RF), the decision of a general meeting of shareholders to introduce changes to the articles of association of a joint-stock company (see clause 49 (4) of federal law 208-ФЗ, 'On Joint-Stock Companies', passed on 26 December 1995), the decision of a meeting of creditors about establishment of the size and procedure for payment of additional compensation to insolvency officials (see sub-clause 12 (2) 7) of federal law 127-ФЗ, 'On Insolvency (Bankruptcy)', passed on 26 October 2002), a decision of a general meeting of the owners of rooms in a block of flats about its renovation (see sub-clause 44 (2) 1) of the Housing Code of the Russian Federation), etc.—it is based on the **principle of majority rule**.^{*27}

Let's have a look at the most typical features of the decision about the joinder of parties as a type of multilateral deal.

The decision is made by means of **voting** on the issue put to the vote. The voting can take place in a meeting or outside a meeting, which means that it can take place either in the presence of the voters or in

2011/18 (Yaroslavl), p. 24, 27 from Note 12; E.A. Крашенинников, Ю.В. Байгушева. Элементы понятия представительства. – *Вестник Высшего Арбитражного Суда РФ* 2012/3, p. 32 and Note 113.

²⁴ Given the above-mentioned description, the implausible tall story made up by E.A. Suhhanov about valid Russian legislation not addressing executive transactions can be assessed at its true worth. See E.A. Суханов. О видах сделок в германском и в российском гражданском праве. – *Вестник гражданского права* 2006/2, p. 23.

²⁵ E.A. Крашенинников, Ю.В. Байгушева. Представительство: понятие, виды, допустимость. – *Вестник Высшего Арбитражного Суда РФ* 2009/12, p. 18.

²⁶ Clause 430 of the CC of the RF, along with Article 328 of the BGB, interprets binding contracts in favour of the third party. However, this circumstance does not rule out the possibility of assignment of a claim in favour of the third party, in the result of which this party becomes a proximate successor of the person assigning the claim. Such assignment of a claim with preservation of the right to reject the claim assigned to the third party does not contradict the law and is fully acceptable. See P. Heck. *Grundriß des Schuldrechts*. Tübingen 1929. p. 149; L. Enneccerus, H. Lehmann (see Note 8), p. 142; A. Blomeyer. *Allgemeines Schuldrecht*. 4. Aufl. Berlin: F. Vahlen 1969, p. 261; H. Kaduk. Fragen zur Zulässigkeit von Verfügungen zugunsten eines Dritter. – *Festschrift für Karl Larenz*. Munich: Beck 1983, p. 312 ff.; G.H. Roth. Kommentar zu § 398. – *Münchener Kommentar zum Bürgerlichen Gesetzbuch*. 2. Aufl. Bd. 2. Munich: Beck 1985, p. 1246; H. Dörner. *Dynamische Relativität: der Übergang vertraglicher Rechte und Pflichten*. Munich: Beck 1985, pp. 166 ff.; K. Larenz (see Note 9), pp. 232–233, 575 (specifically, Note 1); J. Esser. E. Schmidt. *Schuldrecht: ein Lehrbuch*. 7. Aufl. Bd. 1. Teilbd. 2. Heidelberg: Müller 1993, pp. 278–279; W. Bayer. *Der Vertrag zugunsten Dritter: neuere Dogmengeschichte – Anwendungsbereich – dogmatische Strukturen*. Tübingen: Mohr 1995, p. 203; W. Fikentscher. *Schuldrecht*. 9. Aufl. Berlin: de Gruyter 1997, p. 181.

²⁷ A. Tuhr (see Note 1), p. 232. 'For making a decision, [...] the majority rule is in effect,' states W. Flume (see Note 7), p. 602.

their absence. Accordingly, clause 50 (2) of federal law 208-ФЗ, 'On Joint-Stock Companies', prescribes voting at a meeting when the decision is being made by shareholders and about the election of the Board of Directors, while clause 38 (1) of the federal law On Limited Liability Companies (14-ФЗ), passed on 8 February 1998, prescribes the possibility of voting outside the meeting when the members of the company are making a decision about the allocation of issue-grade securities. The procedure for voting is established by special legislation and acts of the company in which the voting takes place.

By voting on the issue put to the vote, each participant expresses his will in terms of a 'yes' or 'no'.^{*28} This expression of will, which, together with the expressions of will of other voters, constitutes the actual composition of the decision, **is not a unilateral deal**, since it cannot in itself cause legal consequence corresponding to its content.^{*29} The expression of will of a person taking part in making of a decision has to be expressed to the other participants or to their representative, who is usually the chairman of the meeting or another person authorised to oversee the voting.^{*30}

Expressions of will of people taking part in making a decision are similar to expressions of will of the parties to a contract, since both of them are mutual expressions of will—i.e., expressions of will performed by the parties in relation to each other or to representatives of other parties. However, unlike the expressions of will of contractual counteragents, the expressions of will of people taking part of making a decision can be aimed at different legal consequences, since the participants express their will in the sense of a 'yes' or 'no'.^{*31} Since the people taking part in making a decision usually perform expressions of will in relation to one and the same person, their expressions of will are similar to the expressions of will of people performing a joint act. However, in the joint act, the expressions of will, which are identical in their content, are expressed by one party to the deal and are directed to their recipient as an addressee of a unilateral deal or to the common representative of several parties, acting on one side of the contract, while the people taking part in the decision-making express their will, meaning 'yes' or 'no', as different parties to the deal and address the person carrying out the voting as the representative of another party to the deal; hence, in a contradiction to the opinion of A. Tuhr^{*32} and H. Brox^{*33}, the expressions of will of the people taking part in making a decision are not parallel expressions of will.

The decision is aimed at the **formation of common will** of those who are part of the company^{*34} ^{*35}, which means the will of the majority of voters, who have voted with similar meaning, and also at the establishment of an obligation of each member of the company to other members to behave in accordance with the common will along, with the right of each participant, corresponding to this obligation, to demand this type of behaviour from other participants.

The common will of the company can be the will of the **simple majority** of the voters, expressed during voting. A simple majority of the voters may consist of a minority of the members of the company.

²⁸ The opinion of the people abstaining from the vote, even if they were present at the meeting during which the voting took place, is not taken into consideration in determination of the legal consequence of the decision that has been made; this is why they are not taken into consideration as people taking part in making of the decision in question. See L. Enneccerus, H.C. Nipperdey. *Allgemeiner Teil des bürgerlichen Rechts*. 14. Aufl. Halbbd. 1. Tübingen: Mohr 1952, p. 438 and Note 8; W. Hadding. *Kommentar zu § 32*. – H.T. Soergel. *Bürgerliches Gesetzbuch. Kommentar*. 12. Aufl. Bd. 1. Stuttgart: W. Kohlhammer 1987, p. 319; K. Larenz, M. Wolf (see Note 4), p. 206 (specifically, Note 62); D. Reuter. *Kommentar zu § 32*. – *Münchener Kommentar zum Bürgerlichen Gesetzbuch*. 4. Aufl. Bd. 1. Munich: Beck 2001, p. 625.

²⁹ K. Larenz, M. Wolf (see Note 4), p. 206.

³⁰ When receiving the expressions of will of the voters, the person authorised to moderate the voting performs the function of a passive representative (*passive Vertreter*) – i.e., the representative who receives the expression of will of the third party on behalf of and with direct action for the party represented (for discussion of passive representation, see L. Rosenberg. *Stellvertretung im Prozess. Auf der Grundlage und unter eingehender, vergleichender Darstellung der Stellvertretungslehre des bürgerlichen Rechts nebst einer Geschichte der prozessualischen Stellvertretung*. Berlin: Vahlen 1908, pp. 5–9; A. Tuhr (see Note 9), p. 283; H. Oser, W. Schönenberger. *Das Obligationenrecht. Allgemeiner Teil* (Art. 1–183). 2. Aufl. Zurich: Schulthess 1929, p. 223; W. Flume (see Note 7), p. 754; P. Gauch, W. Schluep, J. Schmid, H. Rey. *Schweizerisches Obligationenrecht. Allgemeiner Teil*. 7. Aufl. Bd. 1. Zurich: Schulthess 1998, pp. 286, 295; E.A. Крашенинников, Ю.В. Байгушева (see Note 25), pp. 12–13).

³¹ 'We are not dealing with the agreement here, since the voting underlying the decision' is not aimed at reaching of consensus (U. Hüffer. *Aktiengesetz*. Munich: Beck 1993, p. 599).

³² A. Tuhr. *Der allgemeine Teil des deutschen bürgerlichen Rechts*. Bd. 1. Leipzig: Duncker & Humblot 1910, p. 515.

³³ H. Brox. *Allgemeiner Teil des Bürgerlichen Gesetzbuchs*. 8. Aufl. Cologne: Carl Heymanns 1984, p. 54.

³⁴ W. Flume (see Note 7), p. 602; U. Hüffer (see Note 31), p. 599; H. Hübner (see Note 12), p. 282; D. Reuter (see Note 28), p. 618.

³⁵ If the company is the body representing another legal person, the formation of the common will of the members of the company is the formation of the will of the legal person himself.

In particular, this is the case if only eight out of 10 members of the company are present at the meeting at which the voting is taking place and three of them vote with the meaning 'yes' whilst five abstain from voting. So that the most important decisions of the company cannot be made via votes of a minority of members, the law sometimes prescribes the formation of common will of the company by the **qualified majority** of votes. For example, the decision to introduce changes to the articles of association of a limited liability company is made through a majority of not less than two thirds of the total number of votes of the members of the company (see sub-clause 37 (8) 1) of federal law 14-Φ3, 'On Limited Liability companies'), while a decision about the restructuring of a joint-stock company shall be made by a majority of three fourths of the votes of shareholder-owners of voting shares taking part in the general meeting of shareholders (see clause 49 (4) of federal law 208-Φ3, 'On Joint-Stock Companies'). The formation of common will of the company by simple or qualified majority of votes may be prescribed not only by law but also through a contract (e.g., a simple partnership contract—see clause 1044 (5) of the CC of the RF).

Cases wherein the common will of the company is determined by the will of **half** or even a **minority** of the people taking part in making a decision are possible too. Therefore, if the vote of the member who has made the highest-value contribution to the share capital of a general partnership has crucial importance; the uniform voting of half of the members taking part in making a decision leads to their victory in the voting only if the member with the deciding vote votes among them.^{*36} If the vote of one of 55 people taking part in making a decision at the general meeting of shareholders has the weight of four votes, 26 members casting uniform votes are going to win only if the person holding the vote that is worth four votes votes among them. The cases described above do not constitute an exception to the principle of majority rule, because the majority here are the voters who have won in the voting together with the voter whose vote has priority over those of other participants on account of the special importance that the decision being made has for him.

For some decisions of a company, the law prescribes **unanimity** of participating votes. For example, clause 1044 (5) of the CC of the RF states that decisions on the common issues of the parties to a simple partnership contract shall be made only by common agreement, while sub-clause 19 (2) 1) of federal law 14-Φ3 ('On Limited Liability Companies') states that a decision of the general meeting of shareholders in the company pertaining to an increase in share capital in connection with the acceptance of a new member should be made unanimously by all participants. However, these decisions are based not on the principle of majority rule but on the principle of equality, which is valid in relation to contracts. This is why in reality these are not decisions but **contracts**^{*37}, aimed at causing the legal consequence, similar to the legal consequence of a decision.

The law mentions the decision also if one person (for example, a shareholder who owns all of the shares in a joint-stock company that entitle their holders to votes—see clause 47 (3) of On Joint-Stock Companies (federal law 208-Φ3)—or the only member of a limited liability company, as discussed in clause 39 of federal law 14-Φ3, On Limited Liability Companies) expresses his will, in accordance with which the members of the company should act—for example, the members of the management board of the joint-stock company (see clause 70 (1) of the law On Joint-Stock Companies) or of the limited liability company (see sub-clause 41 (1) 1) of On Limited Liability Companies). It seems—and actually is true—that in both cases we are dealing not with decisions but with unilateral deals, because decisions cannot consist of the expressions of will of only a single person.

The obligation to act in a certain way, conditioned by the decision that corresponds to the common will of the company, is imposed upon **each** of its members, regardless of whether he has taken part in the voting and whether he has voted with the meaning 'yes' or 'no'. The content of this obligation is determined by the content of the issue put to the vote and the result of the voting. It can be either the obligation of **performance of an action** or the obligation of **forbearance**. Let us consider an example in which the parties to a contract of simple partnership, who have common business, have made a decision about the conclusion of a certain contract with a third party; each member undertakes to express his will to another member, which is an element of their common offer or acceptance. If the parties to the contract of simple partnership, each

³⁶ If the vote of one participant in making of a decision has priority over the vote of another participant, the latter person may be overruled in the decision by two voters casting the opposing vote.

³⁷ A. Tuhr points at this circumstance: 'If the consent of all participants present at the meeting is needed, [...] the name and the form of the decision conceal the transaction of the contractual type' (A. Tuhr (see Note 1), p. 236, specifically, Note 204).

one of them authorised to act on behalf of all other parties, have made the opposite decision, all members undertake to abstain from conclusion of the contract about which the decision was made.

The right and obligations of the members of the company, arising from the decision, constitute **corporate** relations, built among the parties. The decision cannot cause an obligation for the members of the company (or for a legal person that this company represents) to a third party or parties. In order to cause such an obligation, all members of the company or their common representative have to carry out a relevant transaction.^{*38} In particular, the decision made by the general meeting of the members of a limited liability company about the assignment of A as the head of said company does not cause the emergence of the rights and obligations in A that would bind him with this company; they emerge in A only after a relevant management contract has been concluded with A by the chairman of the general meeting of the members of the company at which A was elected as the head of the company (see clause 42 (3) of federal law 14-ΦЗ, 'On Limited Liability Companies'); in doing this, the chairman of the general meeting shall act as a representative of all members of the general meeting, and, since they form the body of the limited liability company, the expression of their common will is equal to the expression of the will of the company itself.

Since the decision is a transaction, only persons *sui juris* can participate in making decisions (see clause 21 (1) of the CC of the RF). The law here does not refer to highly personalised transactions; this is why each member of a company can take part in making decisions through voting representatives (*Stimmbote*)^{*39} or grant the right to take part in the voting to some other person—for example, in the voting at the general meeting of shareholders (see clause 57 (1) of On Joint-Stock Companies) or the owners of properties in a block of flats (see clause 48 (1) of the HC of the RF).

As any other transaction can, the decision can be invalid—for example, in consequence of not conforming to legal requirements (see clause 168 of the CC of the RF). If there is a circumstance that invalidates one of the expressions of will that is part of the actual composition of the decision, the guidelines of the CC of the RF as to the invalidity of transactions shall apply to this expressions of will, in a parallel to transactions, although the expression of will is not a transaction. For example, the voting of a person who is not *sui juris* can be held to be void (see sub-clause 171 (1) 1) of the CC of the RF)^{*40}, while the voting of a person who was mistaken as to the legal nature of the transaction in question can be contested (see clause 178 (1) of the CC of the RF).^{*41} Invalidity or inefficient contesting of the expression of will included in the decision leads to invalidity of the decision as a whole only if a result of the invalidity of this expression of will is that the decision has been made by 50% or a minority or, if a qualified majority is required for making of the decision, a simple majority of votes.^{*42}

The special procedure for performing the expression of will on the part of the people taking part in making a decision assumes the availability of special reasons for invalidity of that decision, connected with the non-performance of the voting procedure prescribed by law or contract. Therefore, for example, pursuant to clause 43 (6) of federal law 14-ΦЗ ('On Limited Liability Companies'), a decision of a general meeting of the members of the company that is made in connection with an issue not on the agenda of the meeting is not valid, regardless of legal recognition of this decision as being invalid, and, consequently, it is a void transaction.

³⁸ K. Larenz, M. Wolf (see Note 4), p. 447.

³⁹ U. Leptien. Vorbemerkungen zu § 164. – H.T. Soergel. *Bürgerliches Gesetzbuch. Kommentar*. 12. Aufl. Bd. 1. Stuttgart: Kohlhammer 1987, p. 1268; U. Hüffer (see Note 31), p. 619.

⁴⁰ The voting of a minor, as a rule, does not require any special consent of the minor's legal representative, because the permission granted by the legal representative for participation of the minor in the company includes participation in making decisions of this company. See L. Enneccerus, H.C. Nipperdey (see Note 7), Halbbd. 1, p. 438 (specifically, Note 7); H. Hübner (see Note 12), p. 282.

⁴¹ The fact that the expression of will included in the actual composition of the decision can be claimed to be void or disputable matters in determination of the subjects of the obligation to compensate for damage that has been caused by this decision. So, in accordance with sub-clause 71 (2) 3) of federal law 208-ΦЗ, 'On Joint-Stock Companies', passed on 26 December 1995, which is applied here by analogy, a member of the management board of the joint-stock company is under no obligation to compensate for losses incurred by the company through this decision if he voted for this decision under threat and afterward contested his vote.

⁴² L. Enneccerus, H.C. Nipperdey (see Note 7), Halbbd. 1, p. 438 (specifically, Note 7). 'The validity of the decision is affected by invalidity of the vote of one participant only if he had to cast his vote for the sake of the required majority,' says A. Tuhr (see Note 1), p. 517.

4. Conclusions

The expressions of will included in the contract are concerted expressions of will. The fact that the expressions of will are concerted means that each party has expressed will in relation to another party, aimed at causing one and the same legal consequence. As a rule, contractual expressions of will are not identical, meaning that the parties to the contract express their will in different contractual functions.

The actual composition of the contract may consist of concerted expressions of will or feature some other constituent elements (for example, a real act, the state registration of a contractual agreement, or the assistance of a notary public). The cases wherein the contract, in addition to the expressions of will of the parties, includes also other constituents should be distinguished from those in which there is a prerequisite lying outside the framework of the actual composition of the contract for that contract's entry into effect. Another transaction, an administrative act, and violation of the law can be such prerequisites.

Binding contracts can be aimed at the establishment of regulatory and protective obligations. Accordingly, they are divided, as mentioned above, into regulatory (for example, contracts of purchase and sale), regulatory-protective (for example, contracts of property insurance), and protective contracts (for example, the surety contract). The regulatory contracts not researched by civilists include the contract for establishment of the limited real right of the buyer to the object that has been sold or transferred to him with a proviso of retaining the right of ownership and the contract of the establishment of the tenant's limited real right to the movable object transferred to his temporary ownership and use. The legal basis of these contracts is *causa solvendi*, while the actual composition of each of them consists of an agreement on the establishment of a relevant limited real right and the real act (of the transfer).

In summary, the main difference between the contract and the decision lies in the fact that the principle of equality of the parties underlies the contract, while the basis of any decision is formed by the principle of majority rule.

The decision is described by the following peculiarities: a) it is made by voting on the issue put to a vote; b) each participant in making of the decision performs the expression of will meaning 'yes' or 'no'; c) the decision is aimed at the formation of common will of the members of the company, under which the will of the majority of those voting with similar meaning is assumed along with the establishment of the obligation of each member of the company to other members to behave in accordance with the common will and also the establishment of the right of each member to demand such behaviour from the other members, in line with this obligation; and d) the rights and obligations of the participants that arise from the decision constitute the corporate relations that are built among the participants.

The decision is invalid if, as a result of its invalidity or inefficient contesting of the expression of will embodied in the decision, it turns out to have been made by 50%; a minority; or, if a qualified majority is required for making of the decision, only a simple majority of votes.