
The Legal Treatment of Immovables Under the Civil Code of the Russian Federation

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This article offers a general survey of the regulation of immovables in Russian law since the introduction of the new *Civil Code of the Russian Federation* ("C.C.R.F.") in 1994. In light of the prohibition of private property during the Soviet era, the author begins by highlighting the C.C.R.F.'s conceptual understanding of immovables as objects of civil rights. The place of immovable property in other civilian jurisdictions as well as under the pre-revolutionary *Code of Laws of the Russian Empire* is canvassed in order to distinguish the approach adopted by the drafters of the C.C.R.F. The expansion of the category of immovables and the growth of different rights in immovables in the current law is explored, while the overall concept of immovables in the C.C.R.F. is explained as deriving from the notion of "things" rather than "property".

The discussion proceeds with an overview of the different types of rights in immovables that are provided for in the C.C.R.F. The right of ownership is described in some detail, with particular notice being taken of the various limitations upon the right which currently exists in both Russian public and private law. The author then sets out, often in a critical light, the other new rights in immovables prescribed by the C.C.R.F., namely the rights relating to usufructs, permanent use, servitudes, economic management, and operative administration.

The article concludes with an examination of how the C.C.R.F. regulates various transactions involving immovables and lays out the various legal requirements for the validity and opposability of such transactions. In this regard, the case of land transactions is given particular attention.

Cet article passe en revue la réglementation russe sur les immeubles depuis l'introduction du nouveau Code civil en 1994. À la lumière de la prohibition de propriété privée pendant l'ère soviétique, l'auteur débute en soulignant la compréhension conceptuelle des immeubles dans le Code comme objets de droits civils. La place qu'occupent les biens immeubles dans d'autres juridictions civilistes de même que sous le *Code des lois de l'empire russe pré-révolutionnaire* est examinée de façon à mettre en relief l'approche adoptée par les rédacteurs du Code. L'élargissement dans la présente loi de la catégorie des immeubles et des différents droits sur les immeubles est étudié, alors que le concept d'immeuble dans le Code est décrit comme provenant de la notion de «chose» plutôt que celle de «bien».

L'article se penche ensuite sur les différents types de droits sur les immeubles dans le Code. Le droit de propriété y est défini en détail et une attention particulière est portée aux diverses restrictions qui en limitent l'exercice et qui existent tant dans le droit public que dans le droit privé russe. L'auteur définit par la suite, d'une façon souvent fort critique, les autres nouveaux droits sur les immeubles édictés dans le Code, notamment les droits d'usufruit, d'usage permanent, de servitude, de gestion économique et d'administration en vigueur.

L'auteur conclut avec un examen de la réglementation de différentes transactions concernant les immeubles et expose les diverses exigences nécessaires à la validité et à l'opposabilité de telles transactions. À cet égard, les transactions de terrains sont étudiées.

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Introduction

The subject-matter of this article is immovable property which, as of the early 1990s, has rediscovered its place in civil commerce as a full-fledged object of civil rights. Immovables are principally regulated by the rules set out in the 1994 *Civil Code of the Russian Federation*¹ which are currently being developed further in other regulatory acts. These acts have been adopted in the areas of both private and public law.

One should not underestimate the importance of public law rules in the regulation of immovables. The nature of the immovable informs the nature of the "interference" of public law with regard to the regulation of issues related to immovables, as compared to the regulation of other objects of civil rights.² It is desirable that a sound, optimum balance between private and public law rules be struck in the regulation of immovables.

The C.C.R.F. has developed the basis for such a balance, signalling a marked departure from Soviet law under which immovables almost ceased to be full-fledged objects of civil rights. While creating a basis for the private law treatment of immovables, the C.C.R.F. directly provides for the adoption of public law rules where necessary,³ or defers to the rules established in the framework of other laws which define the scope of application of civil rules.⁴

This article will consider the concept of immovables as objects of civil rights, the types of real rights recognized by Russian law, the main aspects of transactions involving immovables, and the conditions imposed upon them by the C.C.R.F. Issues regarding the creation and termination of ownership, real estate succession, and a number of other matters will not be considered. Given that the influence of public law rules on real estate regulation is an independent issue requiring special research for its comprehensive treatment, this article will discuss it only to the extent it bears on the principal questions addressed herein.

¹ Part 1 was enacted in 1994: *Sobranie zakonodatelstva R.F.* (1994) No. 32, item 3301; and Part 2 was enacted in 1995: *Sobranie zakonodatelstva R.F.* (1996) No. 5, item 410 [hereinafter C.C.R.F.]. For the English-language translation, see P.B. Maggs & A.N. Zhiltsov, eds., *The Civil Code of the Russian Federation*, trans. P.B. Maggs & A.N. Zhiltsov (Armonk, N.Y.: M.E. Sharpe, 1997).

² A substantial element of the public regulation of immovables is state registration of rights in immovables and transactions thereupon, provided for in art. 131 C.C.R.F. as a unified system. Upon the adoption of the Federal law *On State Registration of Rights to Immovables and Transactions There-with*, *Sobranie zakonodatelstva R.F.* (1997) No. 30, item 3594, a unified registration system was implemented throughout the Russian Federation territory.

³ See e.g. art. 131 C.C.R.F. on the procedure for the registration of rights in immovables and transactions thereupon.

⁴ See e.g. art. 129(3) C.C.R.F. where the determination of the limits of alienation of land plots and other natural resources is referred to the legislation on land and other natural resources.

I. The Concept of Immovable Property as an Object of Civil Rights

The concept of immovable property existed in Russian law from the beginning of the eighteenth century.⁵ In volume 10 of the *Code of Laws of the Russian Empire*, this category was also introduced despite the absence of any general definition of "immovables". Rather, immovable property was defined by a rough listing of immovable objects, *i.e.*, land, various agricultural areas of economic significance, and houses. In the civil law of the Soviet era, the category of immovables was absent as such. The *Civil Code of the Russian Soviet Federated Socialist Republic* of 1922⁶ contained a special note to article 21 according to which "abolition of private ownership in land resulted in the termination of property division into movables and immovables." The land itself was proclaimed public domain and excluded from "private commerce".

Division of property as an object of civil rights into movables and immovables was reinstated in the 1991 *Fundamentals of Civil Legislation of the U.S.S.R. and Union Republics*.⁷ Article 4(2) of the *Fundamentals* defined as immovable the land and things firmly connected thereon (immovables by nature). The list of things firmly connected with land plots, though non-exhaustive, included buildings, installations, enterprises, other property complexes, and perennial plantings. Thus, the division of property into movables and immovables was based on a traditional Russian law classification of an object's physical and natural properties, *i.e.*, its ability or inability to be moved without disproportionate damage to its purpose. This is the main criterion of the *Fundamentals*, but not the sole one. The *Fundamentals* contained a rule according to which immovable property may be so designated on the basis of a formal legal criterion, but this may be done only by means of issuing legislative acts (immovables by virtue of law).

Upon the introduction of the general concept of immovable property, special legislative acts began to define the concept of immovables with respect to particular characteristics. Such concepts as "immovables in housing sphere"⁸ and "immovables

⁵ The term "immovable property" was used for the first time in the Decree of Peter I the Great on Primogeniture issued in 1714. It was substituted for different terms used in previous legislation which included a number of estates into a single legal category and mitigated "the distinctions among *votchiny* [patrimonies] and *pomestia* [estates]" (G.F. Shershenevitch, *Manual of Russian Civil Law* (Moscow: Spark, 1907) at 98).

⁶ Hereinafter 1922 Civil Code.

⁷ *Vedomosti S"ezda Narodnykh Deputatov S.S.S.R. i Verkhovnogo Soveta S.S.S.R.* (1991) No. 26, item 733 [hereinafter *Fundamentals*]. In the territory of the Russian Federation, the *Fundamentals* were applied from August 3, 1992 in accordance with the Regulation of the Supreme Soviet of the Russian Federation "On the Regulation of Civil Legal Relations During the Period of Economic Reform" (14 July 1992) *Vedomosti S"ezda Narodnykh Deputatov R.F. i Verkhovnogo Soveta R.F.* (1992) No. 30, item 1800.

⁸ Federal law *On Fundamental Principles of Federal Housing Policy*, *Vedomosti S"ezda Narodnykh Deputatov R.F. i Verkhovnogo Soveta R.F.* (1993) No. 3, item 99, art. 1.

in urban development”⁹ appeared which included land plots and a non-exhaustive list of connected property.

Article 130 C.C.R.F.—in its specific definition of immovable property—is mainly based on the concept contained in the *Fundamentals*, and proceeds, in general, from the same criteria: (i) connection with land and impossibility to move without disproportionate damage to the purpose of the object (immovables by nature); and (ii) attribution to immovables by statute (immovables by virtue of law).

The laws of the Russian Empire distinguished between immovable and movable property solely on the basis of natural characteristics, though article 384 of volume 10 of the *Code of Laws of the Russian Empire* did contain reference to immovables “by statute”. At the same time, among the appurtenances of immovable property, article 390 of the *Code of Laws of the Russian Empire* specified praedial acts and abuttal layouts whose legal sense was reflected not in these instruments as corporeal things, but in the rights certified by them.¹⁰

In the course of elaborating the concept of immovables, the drafters also took into account the experience of legislative developments in foreign countries. However, the C.C.R.F. did not use the tripartite classification of immovables contained in the *Civil Code of France* and followed by the *Civil Code of Mexico*, the *Civil Code of Brazil*, and those of some other countries. Neither did the C.C.R.F. adopt the category of immovables by designation, convening both objects placed on land for the purpose of its servicing and operation, and movable things perpetually connected to immovable property and being, in effect, the natural extension of the immovable property.¹¹

The list of objects classified as immovables in the C.C.R.F. is not exhaustive. The category of immovables has broadened due to the specification of independent objects other than land, such as subsoil plots and solitary bodies of water. They are considered immovable by virtue of their natural physical properties and not by virtue of their constituting an organic whole with the land. Otherwise, it would be impossible to establish the ownership right to subsoil apart from the ownership in land.

Other natural resources such as forests are deemed immovables by virtue of their connection with land. Meanwhile, as a result of logging activities, forests may lose their immovable character. Accordingly, a clear-cut forest ceases to be immovable property, just as a building may be deconstructed into its component parts, making

⁹ Federal law *On Fundamental Principles of Urban Development in the Russian Federation, Vedomosti S"ezda Narodnykh Deputatov R.F. i Verkhovnogo Soveta R.F.* (1992) No. 32, item 1877, art. 1. With the adoption on May 7, 1998 of the *Urban Development Code of the Russian Federation, Sbornik zakonodatelstva R.F.* (1998) No. 19, item 2069 [hereinafter *Urban Development Code*], this law was deemed repealed.

¹⁰ See Y.S. Gambarov, *Course in the Civil Law*, vol. 1 (St.Petersburg, 1911) at 601-02.

¹¹ Art. 524 of the *Civil Code of France*; arts. 750-51 of the *Civil Code of Mexico*; and art. 43 of the *Civil Code of Brazil*.

them movables. Unexploited, mineral resources are considered immovable; however, they cease to be immovable from the time they are extracted from the subsoil.

Article 130 C.C.R.F. also defines as immovable buildings, installations, and perennial plantings by virtue of their connection with the land. In addition to those objects specified in the C.C.R.F., underground structures, such as mines and other installations, are also deemed immovable. At the same time, not every structure (installation) will be deemed immovable property, but only that which is, in fact, firmly connected with the land on which it is located. The *Code of Laws of the Russian Empire* did not recognize as immovable those structures “erected on another’s land by virtue of any contractual relations.”¹² Pursuant to current Russian law, structures duly registered and legally erected on another’s land will be classified as immovable.

The C.C.R.F. recognizes as immovable by virtue of law state-registered property like aircraft and sea-faring vessels,¹³ vessels of inland waterways and objects in space, while leaving open the possibility for other property to be classified as immovable by law.¹⁴

Unlike the *Fundamentals* which uses the concept of immovable property, the division of property into immovables and movables in the C.C.R.F. is based on the concept of a “thing”. Taking into account the definition of immovables contained in the C.C.R.F., other types of property, including property rights, may not be immovable either by nature or by virtue of a statute. The sole exception is recognition of immovable equivalents, such as property united under an enterprise.¹⁵

Limiting immovables to “things” does not follow foreign legislative trends in the definition of immovables, which generally follows a broader definition. Thus, in the *Civil Code of France*, the *Civil Code of Germany*, and in the codifications which have been developed under their influence—namely those of Italy, Mexico, and Brazil—the concept of immovables also includes property rights to immovable things. This is

¹² Shershenevitch, *supra* note 5 at 97, 208. The situation did not change even after the enactment in 1912 of the law *On the Right of Land Development*. The law as such did not resolve the issue of the nature of rights to such structures. The Governing Senate, however, hold the opinion that such structures should be considered movable property: see A.V. Kopylov, “Structure on Another’s Land: From Superficies to the Right of Land Development” in *Russian Civil Law in the Period of Transition to the Market* (Moscow: De Jure, 1995) at 109-10.

¹³ Recognition of transportation means as immovable property is not typical of foreign legislation. For example, art. 756 of the *Civil Code of Mexico* directly states that “vessels of any type shall be considered as movables.”

¹⁴ Such objects are classified as immovables so that the specific regime which is established with respect to immovable property applies also to these objects. However, it would be incorrect to assume that considering vessels as immovables automatically implies a full scope application of the regime; even the C.C.R.F. provides some exemptions. Thus, while the general rule requires the registration of contracts of lease of immovable property (art. 609(2) C.C.R.F.), this rule does not apply to the lease of transportation means (arts. 633, 643 C.C.R.F.).

¹⁵ Art. 132 C.C.R.F.

achieved through exhaustive enumeration of specific rights,¹⁶ by provision of property rights to immovable things,¹⁷ or by providing for rights related to the ownership of immovable property.¹⁸

Therefore, foreign statutes in most instances use the term "immovable property" to define the legal category under consideration, whereas Russian legislators use the term "immovable property" as a synonym for the term "immovable things" with the latter term carrying interpretive authority.

In the C.C.R.F., the concept of enterprise stands apart, to a certain degree, from other objects of civil rights. For the first time, an enterprise is treated by legislators as a specific object.¹⁹ This is illustrated, firstly, in a purely formal way. The enterprise is not mentioned in the general definition of immovables in article 130 C.C.R.F., but is introduced in article 132 C.C.R.F. which is included after the section on immovables and the registration of rights in immovables. Second, taking into account its various components, an enterprise is so heterogeneous that it can only be deemed part of a group of objects on the basis of its character as a specific property complex rather than on the basis of the individual character of its components, *i.e.*, claims, debts, and exclusive rights cannot be immovables following the logic of the C.C.R.F. An enterprise falls within the immovable category not by virtue of its indissoluble connection with land, but by the decision of the legislator to apply to this object the specifics of the legal treatment established for immovable property. Third, an enterprise is an object which does not correspond to the classification of immovable and movable things, as it is not a thing, not even a composite one.

Article 132 C.C.R.F. defines an enterprise for the purpose of its introduction into civil commerce as a single object. For this reason, its composition includes as its property such things as a set of exclusive rights, first of all, the rights in trademarks and service marks, as well as debts with "negative value" related to the activities of the enterprise. However, it should be noted that having considered an enterprise as immovable property, the C.C.R.F. does not thereafter subject it to the requirements established for immovables, but rather applies to it a number of special rules. Indeed, a special, more formal and rigid regime is established for transactions involving en-

¹⁶ Servitudes, land (base) duties, usufructs, and claims for recovery of possession of immovable property: art. 526 of the *Civil Code of France*.

¹⁷ Art. 813 of the *Civil Code of Italy* of 1942; art. 750 of the *Civil Code of Mexico* of 1928; art. 44 of the *Civil Code of Brazil* of 1916; and art. 904 of the *Civil Code of Quebec* of 1994.

¹⁸ Article 96 of the *Civil Code of the Netherlands*. At the same time, the *Civil Code of the Netherlands* does not include property rights in its concept of immovables, using the term "thing" in Book 3, art. 3.

¹⁹ For more about an enterprise as immovable property, see *Comments to the Civil Code of the Russian Federation*, vol. 1 (Moscow: Infra-Moscow, 1997) at 280-82; and O.M. Kozyr, "Immovables in the New Russian Civil Code" in *Russia's Civil Code: Problems, Theory, Practice* (Moscow: International Center for Financial and Economic Development, 1998) [hereinafter *Russia's Civil Code*] at 279-82.

terprises as compared to transactions performed with respect to other immovable property.

II. Types of Rights to Immovable Property

In order to introduce immovables into civil commerce, Russian legislators had to define those rights which may be related to immovable property. Almost any right in things or of an obligation may form the set of rights whose object is immovable property. This fact points to the importance of the scope of powers vested in the holders of such rights.

A. *The Right of Ownership*

The right of ownership is a right that gives its holder the broadest powers over immovables. It carries the same three powers as the right of ownership to any other property, namely the powers of possession, use, and disposition.²⁰ These powers are traditionally used in statutes to express the scope of the right of ownership. Even volume 10 of the *Code of Laws of the Russian Empire* referred only to this triad in order to describe the right of ownership. The same triad of powers has since been reproduced in all Russian Civil Codes, the current C.C.R.F. being no exception.

Yet the scope of a power such as the right of disposition can be substantially narrowed when immovables are restricted in circulation.²¹ The C.C.R.F. does not impose any other general constraints on the owner's powers because of the very nature of this type of property. The provision of article 209(3) C.C.R.F. stating that "[t]he possession, use, and disposition of land and other natural resources ... may be conducted by their owner freely, unless this causes harm to the environment or violates the rights and lawful interests of other persons" is based on article 36 of the *Constitution of the Russian Federation*. The civil law significance of this provision consists in the fact that it concretizes those clauses in the C.C.R.F. which define limits to be observed in the exercise of civil rights and does not constitute a rule specifically restricting the rights of owners.

Other features specific to the right of ownership of immovables are related to the designated purposes of immovable assets, primarily housing premises and land parcels. The need to preserve the designation of such assets stems from the fact that it

²⁰ Art. 209(1) C.C.R.F. The transfer of immovable property for entrusted administration is treated by the C.C.R.F. as a form of the owner's exercise of his powers to dispose of such property. The rights enjoyed by the entrusted administrator are personal rights rather than real rights.

²¹ If an asset is barred from civil commerce by a statute, this means that it may only exist in state ownership. As for municipalities, they may own those immovables whose circulation is restricted only by an express statutory stipulation and may not own those things removed from commerce. This is true, for example, of subsoil plots which may, by virtue of a statute, be owned only by the State and not by municipalities, and of other natural assets under special protection which are reserved for federal ownership and have been excluded from commerce.

determines the nature of their possible uses. For example, in order to use a housing premises for non-residential purposes, the owner must first transfer the premises to non-housing stock in accordance with the rather complicated procedure prescribed by article 288(3) C.C.R.F. Furthermore, all immovables in cities and other urban areas will, in connection with the entry into force of the Urban Development Code,²² be zoned according to their specific use. A land parcel which is designated by a statute for agricultural or other purposes may only be used within those limits.²³

Violation of zoning requirements for immovable property may have adverse consequences, including the termination of the right of ownership. In the case of housing premises, judicial sale by public auction would follow such a violation.²⁴ Similarly, in the case of land parcels, seizure resulting from a decision of an agency of state authority or of a court would be followed by a sale by public auction.²⁵

In some cases, the rule requiring that the designated purpose of immovables be preserved may also affect the ability to dispose of such property. Land parcels included for agricultural use, for example, may only be sold to those parties capable of ensuring their proper use. It is noteworthy, however, that the latter provision is not contained directly in the C.C.R.F., but is set out in special regulatory acts.

Overall, the rules regarding the zoning of immovables are designed to protect the public interest, thereby delimiting the scope of ownership according to individual categories of immovable property. It is not in every case, however, that the limitation of the owner's powers is in the public interest. It may also be effected in the interest of individual parties, for instance, the neighbours of the owner of immovable property.

The encumbering of land parcels and buildings with a servitude is made possible pursuant to articles 274 and 276 C.C.R.F. For example, the right of way across a land parcel—when granted in the interest of even a limited number of persons—may make it impossible for its owner to develop the land parcel. Although article 274(2) C.C.R.F. stipulates that “[t]he burdening of a land parcel with a servitude does not deprive the owner of the parcel of the right of possession, use, and disposition of this parcel,” the powers in question may in practice be materially restricted. To be sure, the owner in this case may go to court to demand that the servitude be terminated, but he will have to discharge the difficult burden of proving that should the servitude continue, the land parcel can no longer be used as designated.

The owner's powers over immovables acquired on some special grounds face further limits. This is true in the case of immovable property purchased against the payment of rent. Where the payee of rent is assured lifetime support, the possibility of alienating or otherwise burdening immovables transferred to his ownership is condi-

²² *Supra* note 9.

²³ Art. 260(2) C.C.R.F.

²⁴ Art. 293 C.C.R.F.

²⁵ Arts. 285-86 C.C.R.F.

tional on the payee's consent.²⁶ In addition, such property is lawfully held on pledge by the rent recipient²⁷ who retains, according to express statutory stipulations,²⁸ the right throughout the duration of the contract of rent to demand the return of such property if he transferred the immovable to the payor's ownership without charge. Thus, the payor's right of ownership is terminated in the event that the latter fails to perform his obligations.

B. Limited Rights in Things

Limited rights in things are for the first time treated by the C.C.R.F. as an independent legal notion. Article 216 C.C.R.F. contains an incomplete list of rights deemed to be rights in things, which comprises the right of lifetime inheritable possession of a land parcel, the right of permanent (or indefinite) use of a land parcel, servitudes, the right of economic management of property, and the right of operative administration of property. The right of a homeowner's family members to use the residential premises in which they live together with the owner is likewise considered to be an independent right in things.²⁹

Whereas servitudes are known to virtually all legal systems and certain parallels can be traced between rights in things and rights in land, the right of economic management of property—which characterizes the participation of business entities owned by the State or municipalities in civil commerce—is unique to Russian law. All such rights may be established with respect to immovable property, and most of them with respect to immovables alone.

Although the list of limited rights in things, as set forth in the C.C.R.F., is not exhaustive, one deep-rooted doctrinal opinion is that the range of limited rights in things may only be extended by statute. Unlike personal rights, the scope of limited rights in things is determined directly by statute, which is why all their variations should likewise be defined by statute.³⁰ Regarding pledges (mortgages), article 334 C.C.R.F. includes them among personal rights, although it grants pledgees those remedies to protect their rights which are based on the law of things³¹ and proclaims the rule whereby pledges are to follow those things which they charge.³²

²⁶ Art. 604 C.C.R.F.

²⁷ Art. 587 C.C.R.F.

²⁸ Arts. 599(2), 605(2) C.C.R.F.

²⁹ Art. 292 C.C.R.F.

³⁰ See E.A. Sukhanov, ed., *Civil Law*, vol. 1 (Moscow: B.E.K., 1998) at 590-92; L.V. Shchennikova, *Rights in Things in Russia's Civil Law* (Moscow: B.E.K., 1996) at 18-19; and E.A. Sukhanov, "Development of the Notion of Rights in Things During Transition to the Market" in *Russia's Civil Law During Transition to the Market* (Moscow: De Jure, 1997) at 73-92.

³¹ Art. 347 C.C.R.F.

³² Disputes about the nature of pledges, which were conducted by legal experts in pre-revolutionary Russia, have not stopped to this day. See M.I. Braginsky & V.V. Vitryansky, *Law of Contracts: General Provisions* (Moscow: Statut, 1997) at 395-404.

1. The Right of Lifetime Inheritable Possession

The right of lifetime inheritable possession and the right of permanent use of land parcels may be granted for land parcels in state or municipal ownership.³³ Other land-owners may relinquish possession of their land parcels along with the immovables located thereon under a contract of use for a term, including a lease. Such rights in things, first regulated by the *Land Code of the Russian Federation*,³⁴ are currently governed by the C.C.R.F., and then only by its Chapter 17 which has yet to take effect.³⁵ The corresponding clauses were dropped from the 1991 Land Code during a period of active agrarian reform in 1993.³⁶

The holders of the right of lifetime inheritable possession—a right which extends only to natural persons—enjoy extensive powers in the possession and use of land parcels, including the right to own any structure that they build on the land.³⁷ Therefore, the subject of the right of lifetime inheritable possession of a land parcel may at the same time hold other immovables on the same land parcel on other legal grounds, namely, ownership.

The right to build structures, however, is limited by statutory conditions for the use of the land parcel concerned, which effectively enforce zoning regulations with respect not only to their owners, but also to their titularies. For example, construction of office compounds is prohibited on lands designated for agricultural use.

The right of a titulary to dispose of land is limited by article 267 C.C.R.F. He may transfer the parcel on lease or for a term of uncompensated use (while remaining liable to the owner for the parcel's use according to its designation), but may not execute any transactions entailing its alienation, *i.e.*, he may not sell, mortgage, or otherwise alienate the parcel. However, the possessor of a land parcel may transfer his right to it, including by will.

At the same time, while not owning structures on land, the possessor may freely alienate them, for example, under a contract of sale and purchase. In accordance with

³³ Considering special requirements for the owner of a land parcel and the general rule (which extends to all rights in things) that the right of lifetime inheritable possession of a land parcel should pass to the new owner in the event of a change in ownership, it appears that a parcel made available with the right of lifetime inheritable possession may only be transferred from one public owner to another or alienated into the ownership of the holder of the right in things, which will then discontinue. The sale of such a land parcel to another natural person or legal person may only be carried out after the termination of the right of lifetime inheritable possession.

³⁴ *Vedomosti S"ezda Narodnykh Deputatov R.S.F.S.R. i Verkhovnogo Soveta R.S.F.S.R.* (1991) No. 22, item 768 [hereinafter 1991 Land Code].

³⁵ The only provision of that chapter already in force is art. 216 C.C.R.F. which determines the law-of-things nature of such rights.

³⁶ Presidential Decree No. 2287 "On Bringing Land Legislation of the Russian Federation Into Line with the Constitution of the Russian Federation" (24 December 1993) *Sobranie aktov Prezidenta i Pravitel'stva R.F.* (1993) No. 52, item 5084.

³⁷ Art. 266 C.C.R.F.

articles 271 and 552 C.C.R.F., the alienation of a structure entails the acquisition by the purchaser of the right to use that portion of the land parcel which is occupied by the structure and is required for its use. For this reason, the state or municipal owner of such a land parcel may, against its will, end up with yet another lawful possessor, the holder of a different right in things—the right of permanent use of the parcel.

2. The Right of Permanent Use (Without Limit of Time)

The right of permanent use (without limit of time) of land parcels is formulated in the C.C.R.F. with respect to both legal and natural persons. Some provisions³⁸ make it possible to speak of the right of permanent use of land as belonging to any owner rather than simply to a public owner, even though articles 268 to 270 C.C.R.F. treat this right as applicable only to state and municipally owned land. Land legislation is likewise silent on the permanent use of a land parcel belonging to a natural person or a legal person.

The rights of possession, use, and disposition of a land parcel which belong to the possessor are much narrower than those of an owner by right of lifetime inheritable possession. The former may possess and use the parcel to the extent prescribed by legislation and by the deed.³⁹ That the holder of the right in things must use the land parcel strictly as designated also suggests the possibility of putting up buildings, structures, and other facilities for only those purposes for which the parcel has been made available. It also follows in this case that all newly built structures pass into the ownership of the subject of the right in things.⁴⁰

Methods of disposition—*e.g.* transferring the land parcel by lease or for a term of uncompensated use—are made conditional on the owner's consent,⁴¹ and no other disposition options are available to the holder of the right of lifetime inheritable possession. The holder still may dispose of his right, as well as the land parcel itself, by alienating a newly constructed building into the ownership of another party in the same manner in which this may be done by the subject of the right of full economic management. The right of permanent use does not pass by inheritance, but in the event that the corresponding legal person is reorganized, it passes to another legal person by way of succession.

3. The Right of Development

The right of development has a long history in Russia. Whereas in Roman law the superficies determined the right of construction on another party's land, the Russian

³⁸ Arts. 264, 271(1) C.C.R.F.

³⁹ The mention of such an act providing the parcel for use in art. 269(1) C.C.R.F. is further confirmation that arts. 268-70 C.C.R.F. construct the right of permanent use of land parcels in relation to lands in state or municipal ownership.

⁴⁰ Art. 269 C.C.R.F.

⁴¹ Art. 270 C.C.R.F.

right of development took shape as the developer's right in things to another's land parcel.⁴² This right was characterized as being inheritable, alienable (the landowner's consent to its assignment to third parties was not required nor did he enjoy the right of first refusal regarding the assigned right), of a fixed term (which was established by the parties' agreement at between thirty-six and ninety-nine years), and was to be enjoyed on a paid basis. The developer's possession of the land parcel was to strictly meet its designated purpose; even the undeveloped surface of the site was to be used for construction purposes.⁴³

Upon the expiry of the right of development, the developer left the constructions to the landowner if the latter requested their preservation. The developer was entitled to receive remuneration for such structures, which consisted, however, not of the value of the buildings or other facilities concerned, but of the value of the corresponding construction materials less the amounts needed to pull the structures down. The statute did not give a definite answer to the question of whether the developer had the right of ownership to the newly built structures during the period of his right of development. Scholars have also differed on this question, but only a minority have found grounds for recognizing the developer to be the owner of such structures.⁴⁴

The C.C.R.F. does not presently provide for the right of development as an independent right to either the respective buildings or to the land. The powers belonging to the lifetime inheritable possessor or the permanent user of a land parcel to construct buildings and structures on the land⁴⁵ can hardly be seen as such. Let us note only that this kind of right to build structures on another party's land parcel differs from the traditional right of development primarily by being connected with another limited right in things to the land which is held by the same subject. The right of construction on the land parcel may not be isolated or transferred to another party separately from the underlying right in things. Moreover, the C.C.R.F. views this power precisely as the right rather than the obligation to build a structure over a specified time period, as was the case under the 1912 law *On the Right of Land Development* and even the 1922 Civil Code.⁴⁶

The regulation of construction on another party's land and outside rights in things are not provided for in the C.C.R.F. in great detail. Only article 263(2) C.C.R.F. men-

⁴² The 1912 law *On the Right of Land Development* defined the right of development as the right to hold in things fixed-term, alienable, and inheritable possession of another party's land as a construction site for a consideration. See V.I. Sinaisky, "General Part and Law of Things" in *Russian Civil Law* (Kiev, 1914) at 267.

⁴³ See Kopylov, *supra* note 12 at 101-08.

⁴⁴ *Ibid.* at 108-12.

⁴⁵ Arts. 266(2), 269(2) C.C.R.F.

⁴⁶ Under the law *On the Right of Land Development*, the time period was fixed by the contract; under the 1922 Civil Code, by the Civil Code for one year, after which the right of development could be sold by public auction (art. 80 of the 1922 Civil Code). This right existed in Russia until the corresponding clauses of the 1922 Civil Code were invalidated by a Decree of the Presidium of the Russian Soviet Federated Socialist Republics Supreme Soviet on February 1, 1949.

tions the owner's right to authorize other parties to build on his land parcel, but no light is shed on either the nature of the developer's right or on his specific powers and obligations.

Article 271 C.C.R.F.—devoted to the land-related rights of the owner of a building, structure, and other immovables located on a land parcel belonging to another party—provides for the building owner's use rights to the corresponding portion of the parcel. It is presumed that such rights are granted on a permanent basis. So what happens when the building owner's right to use the land parcel is terminated? Under article 272 C.C.R.F., rights to immovable property located on such a land parcel are to be determined by the agreement concluded between the owner of the parcel and the owner of the respective immovable. In the absence of such agreement, the consequences of termination of the right of use of the land parcel are to be determined by a court proceeding according to certain rules.⁴⁷ The owner of the parcel has the right to demand the removal of the building from the land, and the court may recognize the right of either of the owners to acquire the other's property in only the following two cases: (i) if the demolition of the building (structure) is forbidden by legislation (where, for instance, the building is a historical or cultural monument), or (ii) where the value of the building clearly exceeds the value of the land parcel. In such instances, the court issues a ruling at its own discretion, but not on its own initiative. The relevant claim must be presented by one of the parties. In the same situation, the court, taking into account the bases for the termination of the right of use of the land parcel, may establish conditions for the use of the land parcel by the owner of the immovable for another term, *i.e.*, set conditions for the parties' future obligations.

This situation appears to counter the economic needs of Russian society. It would be useful for a statute to specifically regulate the traditional right of development.

4. Servitude

Servitudes—despite being governed by Chapter 17 of the C.C.R.F., whose entry into force has been postponed—have already become widespread both in practice and in legislation. For example, the Federal law *On State Registration of Rights to Immovables and Transactions Therewith*⁴⁸ establishes detailed rules for the registration of servitudes, which make it possible to fulfil all formal requirements with respect to such rights.

A servitude is a limited right in things to immovables, including both a land parcel⁴⁹ and a building or structure,⁵⁰ which is not connected with the possession of such property and which consists in a party's right to use one or more useful properties of another party's immovable. To use the language of article 277 C.C.R.F., a servitude is

⁴⁷ Art. 272(2) C.C.R.F.

⁴⁸ *Supra* note 2.

⁴⁹ Art. 274 C.C.R.F.

⁵⁰ Art. 277 C.C.R.F.

the right of limited use of another's land parcel (positive servitude) or the right to bar other parties, including the owner, from putting the immovable property to certain uses, *i.e.*, to require that the owner of an adjacent immovable refrain from using it in a particular manner (negative servitude). Although the C.C.R.F. does not prohibit the establishment of negative servitudes, the provisions of articles 274 to 277 C.C.R.F. are formulated with respect to positive servitudes. Strictly speaking, this means that negative servitudes, in order to be legitimate, need to be expressly mentioned in a statute. Meanwhile, a practical need for such servitudes, most notably those regarding lighting and external appearance, is already in evidence.

The C.C.R.F. does not mention servitudes established on other types of immovables. This gap is filled by other statutes. For example, the *Water Code of the Russian Federation*⁵¹ provides for private water servitudes, and stipulates that those general provisions on servitudes which are set out in civil legislation only apply to water servitudes to the extent they are not inconsistent with the Water Code itself.⁵² This amounts to an attempt to "edit" civil legislation through the instrumentality of an act of another branch of law. However, the attempt is not too successful. It appears quite strange, for instance, that article 43 of the Water Code requires that encumbering a water asset with a servitude be negotiated with the party to whom the water asset has been provided for long- or short-term use (*i.e.*, with the user for not more than twenty-five years, not with the actual owner).

As to the division of servitudes into real servitudes and personal servitudes (established in the interest of a specific party), the C.C.R.F. has virtually disregarded this classification. Whereas servitudes in general are designed as rights of the owner of specific immovables (*i.e.*, as real servitudes), once it is possible for a party other than the owner to require that a servitude be established, article 274(4) C.C.R.F. is quick to say that a servitude may be established not only when demanded by, but also "in the interests of," the party to whom a land parcel has been granted with the right of lifetime inheritable possession or the right of permanent use. The statute thus adopts the structure of a personal servitude which is known to be of a provisional rather than a constant nature. This development in the C.C.R.F. does not appear logical, as it would be more reasonable to grant the holder of rights in things to land the possibility of requiring the establishment of a servitude which should be established precisely in favour of the land parcel possessed and used by the person in question in order to ensure the continuity of the right of limited use of neighboring immovable property.⁵³

⁵¹ *Sobranie zakonodatelstva R.F.* (1995) No. 47, item 4471 [hereinafter Water Code].

⁵² *Ibid.*, art. 43.

⁵³ The acuteness of the problem is not mitigated by art. 275(2) C.C.R.F., according to which "[a] servitude may not be an independent subject of purchase and sale or pledge and may not be transferred in any manner to persons who are not owners of the immovable property to ensure the use for which the servitude was established." This literally means that upon a land parcel's passing into the lifetime inheritable possession or permanent use of another person, the servitude may not be transferred to its new possessor because the latter is not the owner.

The water servitude as described in article 43 of the Water Code is likewise designed as a personal servitude.

It has been noted that Russian law is also familiar with personal servitudes in the sphere of housing relations. In the opinion of some authors, these include, among others, the right to lifetime use of a dwelling house or a portion thereof as established by a legacy.⁵⁴ It appears that this right—as with the right of the owner's family members to share the same housing premises as per article 292 C.C.R.F.—is an independent right in things, since it is connected not only with the use but also with the possession of such premises, whereas a servitude does not grant possession.

According to article 274 C.C.R.F., it is primarily land parcels that are burdened with servitudes and this is true not only of those parcels which directly adjoin immovables in whose interest such servitudes are established. In addition to land parcels, the statute permits servitudes on buildings, structures, and other immovables whose limited use is required regardless of the use of the corresponding land parcels.

Encumbering immovable property with servitudes does not deprive its owner of the rights of possession, use, and disposition with respect to such property. Moreover, the owner of immovables burdened with servitudes is entitled to demand commensurate payment for their use. Unless the parties agree upon the amount of such payment, the sum will be determined by a court. Cases where servitudes may be established without charge should be specified by statute.

Despite these conditions, a situation may arise where the owner, as a result of the establishment of a servitude, will not be able to use his property according to its designated purpose. In such a case, he is entitled to go to court to demand that the servitude be terminated.⁵⁵ This possibility, however, is made conditional on the land parcel belonging to a natural person or a legal person. There is no doubt about the application of this provision where the natural person or legal person owns the parcel. What happens, though, if the land parcel is owned by the State or a municipality and has been transferred to the natural person or legal person for lifetime inheritable possession or permanent use, while the person possessing and managing the land parcel is unable to use it according to its designation as a result of the established servitude? For example, a right of way may be established with respect to a land parcel used for agricultural production and its possessor will, therefore, be deprived of the possibility of organizing any hydrotechnical facilities and building hot-houses and other similar structures on the parcel. It would seem that a court in such a case should interpret article 276(2) C.C.R.F. as using the term "belonging" to signify possession not only by right of ownership, but also by some other right, and should accept requests from the

⁵⁴ Art. 538 of the *Civil Code of the Russian Soviet Federated Socialist Republic, Vedomosti S"ezda Narodnykh Deputatov R.F. i Verkhovnogo Soveta R.F.* (1964) No. 24, item 406 [hereinafter 1964 Civil Code]; and A.P. Sergeyev & Y.K. Tolstoi, eds., *Civil Law*, vol. 1 (Moscow: B.E.K., 1997) at 439.

⁵⁵ Art. 276 C.C.R.F.

owner of the immovable property for an end to the servitude if the parcel's good faith possessor is deprived of the possibility of putting it to normal use.

The term "public servitude" has recently emerged in legislation and doctrine to describe a variety of servitudes.⁵⁶ One example is article 43 of the Water Code whereby "everyone may use water assets in public use and other water assets, unless otherwise provided for in legislation of the Russian Federation." It seems that this right of use should not be seen as an independent right in things, but as a limitation of the right of ownership. It is not accidental that the C.C.R.F. has extended the qualities of a servitude to the similar right of free access to state or municipal land parcels which are not closed to the general public (and not just the right of access, but the right of access to such parcels and of use of natural assets found there). Neither have these qualities been extended to the right of free passage across a private land parcel, unless the owner has put up readily visible "no trespassing" notices. Article 262 C.C.R.F. which regulates such issues is found in the statute's provisions on ownership, although it is included in the same chapter that deals with servitudes.

A strong argument may be made for denying "public servitudes" the status of a servitude. First, a right in things should have a specific rightholder. Therefore, it is wrong to accept everyone who is willing to profit from the benefits of immovables as holders of this right. It should be remembered that personal servitudes are established for a term, for example, a lifetime. Real servitudes may be open-ended, but where a right is granted to all and sundry, it would be impossible to link it to immovables whose interests will be satisfied because of the servitudes. Second, an interested party usually initiates the establishment of a servitude, while public servitudes are established almost automatically, by virtue of a statute and without any initiative required on the part of any future beneficiaries. Third, there is the formal, yet important, requirement of state registration which is carried out upon a petition from a specific party for a servitude to arise. According to article 27 of the Federal law *On State Registration of Rights to Immovables and Transactions Therewith*, such petitions may be filed by the owner of the property being encumbered or the party benefiting from the servitude if he has an appropriate agreement. As noted above, neither of these players can be identified in the case of "public servitudes", which is why the requirement to register the servitude in such instances simply cannot be observed.

As for those rights called "public servitudes" in the Urban Development Code, and in Presidential Decree No. 1535,⁵⁷ they, in general, do not have grounds for being recognized as servitudes, since they may only be established as rights in things by a statute, while article 64 of the Urban Development Code stipulates that public servitudes "shall be established by regulatory legal acts of agencies of local self-government," and does not define such servitudes or determine their range. As to the

⁵⁶ Sergeev & Tolstoi, *ibid.* at 441; and Shchennikova, *supra* note 30 at 5-42.

⁵⁷ "Basic Provisions of the State Program of Privatization of State and Municipal Enterprises in the Russian Federation After July 1, 1994" (22 July 1994) *Sobranie zakonodatelstva R.F.* (1994) No. 13, item 1478.

extensive list of public servitudes found in Presidential Decree No. 1535, it is sufficient to recall that Presidential Decree No. 1535 itself has been approved not by statute, but by regulatory act: a presidential decree. Accordingly, it cannot be said that such servitudes belong to the category of rights in things.

Therefore, "public servitudes" should be viewed as limitations imposed on the owner's rights in the public interest described earlier in this article. In order to avoid confusion, it would be advisable to use a different term, for example, "public encumbrances", to denote such limitations.

5. The Right of Economic Management and the Right of Operative Administration

The right of economic management and the right of operative administration, which arise out of the right of operative administration granted by the 1961 *Fundamentals of Civil Legislation of the U.S.S.R. and Union Republics* and the 1964 Civil Code, apply not to individual things, but to the property system belonging to a legal person—a state or municipally-owned enterprise—in the former case or "attached" (to quote from the Civil Code) to an institution (whether state, municipal or private), or to a treasury enterprise (which may only be federally owned) in the latter case.⁵⁸ These are rights in things for the economic or other use of the owner's property by a legal person that, not being the owner of the property, participates in commerce on its own behalf.⁵⁹ Only legal persons existing in the special statutory forms of a state (municipal) enterprise or institution (or a federal treasury enterprise) can be the subjects of these rights and the enterprises concerned may only belong to a public owner: the State or a municipality.

One point of significance regarding the treatment of immovables is that the subject of the right of economic management may, with the consent of the owner (represented by the appropriate property management committee or by another duly authorized agency⁶⁰), dispose of the immovables, including by way of alienation as

⁵⁸ It should be noted that if a land parcel is attached to an enterprise or institution by the right of permanent use, such a parcel cannot be subject either to the right of economic management or the right of operative administration. This part of the property will belong to the enterprise or institution in question by the independent law of things right of permanent use. However, those buildings and structures erected on the land parcel may not pass into the ownership of the enterprise or institution but will become part of the property system belonging to the latter by right of economic management or operative administration.

⁵⁹ Though the C.C.R.F. classifies the right of economic management and the right of operative administration among limited rights in things, one fairly popular opinion expressed in legal literature is that such rights are not by their nature independent rights in things, but represent a method for managing the owner's property through organizations established by the owner himself: see V.A. Dozortsev, "Fundamental Features of the Right of Ownership in the Civil Code" in *Russia's Civil Code, supra* note 19 at 242-60.

⁶⁰ For example, an agency authorized to represent federally-owned railroad transport enterprises would be constituted according to art. 4 of the Federal law *On Federal Railroad Transport, Sobranie*

per article 295(2) C.C.R.F.⁶¹ The proceeds of alienation will belong to the enterprise by the same title: the right of economic management. Since the enterprise's powers of possession, use, and disposition of the property make up the substance of the right in things, their scope is determined only by statute, specifically by articles 294 and 295 C.C.R.F. Therefore, the conclusion of such agreements between the owner and the enterprise which aim to alter the limits of the enterprise's powers is illegal and the corresponding conditions of such agreements are void. Nor may the owner personally enter into agreements to dispose of property under economic management instead of consenting to the execution of such agreements by the enterprise. Should a state agency (agency of local self-government) issue an act to dispose of property at the request of the enterprise owning the immovables in question, such an act should be invalidated by a court.⁶²

The right of an enterprise to acquire immovables (under transactions on a paid basis, as a result of new construction, etc.) is only limited by its established legal capacity which is determined by the owner, as well as by the financial possibilities of the enterprise, with due regard for the fact that the owner is entitled to a portion of its profits.⁶³ In this case, too, the enterprise will not become the owner of the respective immovables, but will hold them under the title of economic management.

By contrast, an institution as holder of the right of operative administration may not, as per article 298(1) C.C.R.F., alienate or in any other manner dispose of property attached to it, including immovable property.⁶⁴ The only exception is a special entity, the treasury enterprise, which likewise possesses its property by right of operative administration. The scope of operative administration in the latter case is broader, as

zakonodatelstva R.F. (1995) No. 35, item 3505, by the federal executive authority for railroad transport.

⁶¹ The object of the right of economic management is a property system within the meaning of art. 132 C.C.R.F. (the enterprise). This is why the rules regarding immovables should apply to the disposition of both individual immovables making up part of the property system, and all assets of the enterprise as a whole. In the latter case, however, the immovables will be disposed of not by the subject of the right of economic management, but by the owner himself after winding-up the legal person that holds the right of economic management.

⁶² This approach is supported by clauses 39 and 40 of Resolution No. 6/8 of the Plenum of the Supreme Court of the Russian Federation and the Plenum of the Supreme Court of Arbitration of the Russian Federation "On Some Issues Related to the Application of Part I of the Civil Code of the Russian Federation" (1 July 1996) *Vestnik Vysshogo Arbitrazhnogo Suda R.F.* (1996) No. 9, item 15.

⁶³ Art. 295(1) C.C.R.F.

⁶⁴ This applies to property assigned by the owner to the institution or acquired out of funds allocated to the institution according to the budget. The C.C.R.F. also stipulates a different situation where the institution is, in keeping with its constating documents, granted the right to undertake income-generating activities. However, art. 298(2) C.C.R.F. does not expressly describe the nature of the right acquired by the enterprise to such income and to the property purchased with such income, and speaks only of the "independent disposition" of the income concerned. One opinion aptly voiced in legal literature is that in this case, the property belongs to the institution by the right of economic management: see E.A. Sukhanov, "Problems of the Legal Regulation of Relations of Public Ownership" in *Russia's Civil Code*, *supra* note 19 at 223-25.

the statute grants the treasury enterprise the right to alienate or otherwise dispose of property attached to it, including immovables, subject to the owner's consent.⁶⁵ Therefore, the second variety of the right of operative administration with respect to powers regarding immovables is equated to the right of economic management. Yet this equation does not extend to the owner's possibilities in withdrawing immovables. The owner may at his own discretion withdraw both from a treasury enterprise and from an institution such property as he may deem redundant, unused, or used other than according to its designation. This, of course, applies equally to immovables. In order to withdraw property belonging to a state or municipally owned enterprise by the right of economic management, however, the above-listed circumstances and the owner's resolve will not suffice. Rather, the owner will first have to wind-up the enterprise as a legal person.⁶⁶

C. Personal Rights

Legislators place virtually no limits on the range of personal rights whose subject matter may be constituted by immovables. The C.C.R.F. provides special regulation for the rights of a lessee, a pledgee of immovables, and a trustee of immovable property. It should, however, be kept in mind that the scope of such powers is defined both in the statute and in the contract, although the statute offers a fairly broad definition. For example, a trustee may exercise, within the limits set by the statute and the contract, the powers of an owner with respect to immovable property subject only to the requirement that all cases of disposition must be provided for directly by the trust deed.⁶⁷ The rights of a lessee, especially those of the lessee of an enterprise, are similarly extensive as well. The lessee may not only grant for temporary use or sublet elements of the leased property (with the exception of land parcels and other natural assets), but may also realize them under contracts of sale and purchase, provided that such actions do not reduce the value of the leased property.⁶⁸

III. Key Transactions

A. Transactions Involving Immovables

Transactions involving immovables are regulated by the C.C.R.F., which sets the requirements for their form and state registration. The State almost always takes a neutral stand with respect to the purposes and conditions of a transaction involving

⁶⁵ Arts. 296(1), 297(1) C.C.R.F.

⁶⁶ A different option is also possible: the alienation of the enterprise to another public owner which will be carried out by a decision of the owner of the enterprise, but will make it possible to preserve the legal identity of the enterprise and, consequently, the right of economic management to its property: art. 300(1) C.C.R.F.

⁶⁷ Art. 1020(1) C.C.R.F.

⁶⁸ Art. 660 C.C.R.F.

immovable property. The only exception is the contract of sale for housing premises, for which the statute provides, as a material condition, a list of persons retaining the right to use the housing premises being sold along with a description of those rights.⁶⁹ The C.C.R.F. usually requires two mandatory elements to be included in contracts involving immovables: (i) the subject matter of the contract, and (ii) its price. A broader range of material conditions is established for the contract of entrusted administration⁷⁰ and the mortgage contract.⁷¹

As to form, the statute in most cases requires such contracts to be in writing, while the execution of a single document signed by the parties to the transaction is required for contracts of sale and purchase, lease, and entrusted administration. A contract for the sale of an enterprise must at all times be accompanied by an inventory record, an accounting balance, a report by an independent auditor, and a list of all debts included in the structure of the enterprise.⁷² Failure to follow these rules should be taken as a breach of the formal requirements of the contract.

In some cases, transactions must be notarized. The C.C.R.F. imposes such a requirement for mortgages⁷³ and contracts of rent.⁷⁴ However, before January 30, 1998—*i.e.*, prior to the coming into force of the Federal law *On State Registration of Rights to Immovables and Transactions Therewith*—notarial form was also required for the sale of immovables and enterprises and for gifts of immovables.⁷⁵ At the same time, any other transaction involving immovable property may, at the request of any of the parties, likewise be notarized.⁷⁶ Such a request is binding upon the co-contractors, and disregarding it entails the invalidity of the contract in question.

The consequences of failing to observe the formal requirements of a contract differ depending on whether the required form is notarial or simply written. In the former case, the outcome is, of course, the invalidity or, more precisely, voidness of the transaction. Where ordinary written form is prescribed, failure to observe it does not, according to the general rule, entail the invalidity of the respective transaction unless

⁶⁹ Art. 558(1) C.C.R.F.

⁷⁰ Art. 1016 C.C.R.F.

⁷¹ Art. 339 C.C.R.F.

⁷² Art. 560(1) C.C.R.F.

⁷³ Art. 339 C.C.R.F.

⁷⁴ Art. 584 C.C.R.F.

⁷⁵ Arts. 239, 257 of the 1964 Civil Code provided for the notarial certification of transactions involving immovables in only a very limited number of circumstances. Subsequently, notarization was prescribed for some transactions involving land parcels such as the sale of a parcel by one individual to another for individual home building or for use as a personal subsidiary plot, kitchen garden, or orchard: Federal law *On the Right of Nationals of the Russian Federation to Receive Into Private Ownership and for Sale Land Parcels for Personal Subsidiary Farming, Gardening, Horticulture and Individual Home Building*, *Vedomosti S"ezda Narodnykh Deputatov R.F. i Verkhovnogo Soveta R.F.* (1993) No. 1, item 26, art. 2. Nevertheless, the notarization of transactions involving immovables has not become the general rule, a fact reflected in the C.C.R.F.

⁷⁶ Art. 163(2) C.C.R.F.

its invalidity in this case is provided for by statute or the contract. As far as transactions involving immovable property are concerned, the C.C.R.F. calls for the harshest consequence—invalidity—where parties fail to observe form-related requirements with respect to contracts for the sale of immovables or enterprises, for the leasing of buildings, structures or enterprises, and for entrusted administration. In these cases as well there are grounds for believing that the respective transactions should be deemed void rather than voidable.⁷⁷ Restitution of prestations in the event of invalidity applies equally to transactions involving immovables, unless, of course, other consequences are stipulated by statute. The C.C.R.F. itself limits general consequences only in the case of contracts of sale of enterprises. Such consequences may be invoked only if they do not violate the rights and statutory interests of both parties' creditors or of other third parties, and does not undermine the public interest.⁷⁸

The registration of most transactions involving immovables is obligatory according to the C.C.R.F. Mandatory registration is sometimes stipulated by other statutes, most notably the Federal law *On State Registration of Rights to Immovables and Transactions Therewith*. Whereas state registration was previously integral to the form of the transaction,⁷⁹ the development of trade in immovables has lent it independent significance as a method of recording a deal that imports recognition by the State.

The registration of rights to immovables and related transactions is not an end in itself, but a means of placing trade in immovables within civilized frameworks that promote public openness and transparency. This is why article 131 C.C.R.F. provides for the registration of related transactions in a consolidated state register with the provision of information about registered transactions and rights to any interested third party.

Transactions involving immovables are subject to registration in cases stipulated by the C.C.R.F. and the statute on registration.⁸⁰ Therefore, exceptions from the general rule requiring registration for such transactions are contained even in the C.C.R.F. itself (it does not, for example, prescribe registration for those leases of buildings and structures carrying terms of less than one year) and may be set forth in a special statute rather than in a lower-level regulatory act.

Article 165 C.C.R.F. provides for the severest of the possible consequences of failure to register a transaction with immovables. Such a transaction is voided and, therefore, does not give rise to any legal consequences at all. This consequence, how-

⁷⁷ See Braginsky & Vitryansky, *supra* note 32 at 281-82.

⁷⁸ Art. 566 C.C.R.F.

⁷⁹ The 1964 Civil Code required contracts of sale and purchase for dwelling houses and *dachas* (country homes), as well as contracts of gift for dwelling houses to be registered with the executive committee of a rural council of people's deputies (art. 257 of the 1964 Civil Code). The registration requirements were made in articles titled "Form of Contract for the Sale and Purchase of a Dwelling House" and "Form of Contract of Gift." There was, of course, nothing said about any consolidated register, which was simply unnecessary as the purposes of registration were different.

⁸⁰ Art. 164(1) C.C.R.F.

ever, is only invoked in those cases stipulated by statute. The C.C.R.F. itself mostly adopts a different approach. Where a contract is subject to state registration, it is, by the general rule, deemed to have been concluded from the moment of such registration.⁸¹ It is exactly this principle that is realized in the case of contracts involving immovable property.⁸²

In the event that a party to a transaction chooses to behave in bad faith by avoiding registration, the court is, at the request of the other party, in a position to rule that the transaction be registered.⁸³ In such cases, the actions taken by the parties prior to the court ruling will not affect the rights in the immovable property even as between the parties. The court ruling by itself does not replace registration but is sufficient to oblige a registering authority to register the transaction.

There are a number of exceptions to the general rule requiring the obligatory registration of transactions involving immovables. One such exception is established by the C.C.R.F. with respect to the contract for the sale of immovable property.⁸⁴ Should immovables be sold, it is not the contract as such, but the passing of rights under the contract that is subject to registration. This is why the issue of voiding the contract itself for failure to register the same cannot altogether arise. Furthermore, article 551(2) C.C.R.F. allows the parties to a contract for the sale of immovables to perform the contract prior to the state registration of the transfer of rights under the contract. Of course, such performance does not affect the parties' relations with third parties. Therefore, in the event of a dispute between parties to a performed contract, the court will consider the owner to be the purchaser of the immovables who has not registered his rights to such property, although this will not affect their relations with third parties in any way. Apart from this, the court is entitled to order the registration of the transfer of the right of ownership if either party fails to register the passing of the right of ownership to the corresponding immovables.⁸⁵

B. Transactions Involving Land Parcels

Without going into the specifics of transactions involving different types of immovables (housing premises, enterprises, etc.), it is useful to consider transactions involving land parcels or other immovables where land parcels (or rights in them) also become the subject matter of the transaction.

Historically, Soviet land statutes regulated assets like land parcels independently from the regulation of other immovables, in particular, buildings and structures which

⁸¹ Art. 433 C.C.R.F.

⁸² Arts. 558, 560, 651, 658 C.C.R.F.

⁸³ Art. 165(3) C.C.R.F.

⁸⁴ What is meant is the sale of buildings, structures, housing premises, land parcels, and other immovables (c. 30, § 7 of the C.C.R.F.) other than enterprises specifically regulated by c. 30, § 8 of the C.C.R.F.

⁸⁵ Art. 551(3) C.C.R.F.

constituted the subject matter of civil law regulation.⁸⁶ In practice, however, a substantial share of transactions involving immovables like buildings and structures is connected with the transfer of the respective land parcels or various rights in them. In such cases there arise a number of both theoretical and practical problems.

Even though buildings and structures are by definition immovables owing to their attachment to land, Russian law treats them as though they were the principal thing with respect to the land parcels—at least those parcels on which they are located and which are required for their operation—where the owner of buildings and the owner of the land parcels on which such buildings sit are different persons. This is borne out by the fact that according to the C.C.R.F., an owner or lessee of a building who does not own the land parcel under the building acquires the statutory right to use the parcel⁸⁷ and, in the event that the building or structure is sold by the owner of the respective land parcel and that the contract does not define the rights in the parcel transferred to the purchaser, the purchaser acquires the right of ownership to the land under the building.⁸⁸ Moreover, article 555(2) C.C.R.F. establishes the presumption whereby the price of the corresponding portion of the land parcel being transferred together with the building or structure or the right to the said portion is included in the price of the building or structure, unless otherwise stipulated by a statute or the contract. The only exception to this approach is constituted by the rules set out in article 272 C.C.R.F. which stipulate that if the rights of the owner of a building to use the land parcel occupied by the building are terminated, the future of the building should be decided beforehand. Options include practically all possible scenarios, from the demolition of the building or its paid transfer into the ownership of the landowner to the acquisition of the land parcel by the building owner and the establishment of conditions for the use of the parcel by the owner of the immovable property.

As for mortgages, article 340(3) C.C.R.F. allows the mortgaging of a building or structure only with the simultaneous mortgaging of the respective land parcel or that portion of the parcel which functionally supports the facility being mortgaged, or the corresponding leaseholding rights. This rule applies where the pledgor is the owner or lessee of the land parcel. Should the pledgor have other rights to the land, a mortgage contract may not be deemed valid pursuant to article 340(3) C.C.R.F. Those rights to a land parcel which belong to the pledgor and, during the levy of execution upon a building, to the purchaser should be determined with reference to article 37 of the 1991 Land Code, according to which the transfer of the right of ownership to a building, structure, or other facility also imparts the right to use the respective land parcel.⁸⁹ At the same time, the presumption of the C.C.R.F. is such that during the mortgage of a land parcel, the right of pledge does not extend to the pledgor's build-

⁸⁶ The sale and purchase of land parcels were not merely disallowed by Soviet land legislation, they were treated as a criminal offence: see the *Land Code of the Russian Soviet Federated Socialist Republic, Vedomosti Verkhovnogo Soveta R.S.F.S.R.* (1970) No. 28, item 581.

⁸⁷ Arts. 271, 552, 652 C.C.R.F.

⁸⁸ Arts. 273, 552 C.C.R.F.

⁸⁹ See Resolution No. 6/8, *supra* note 62, item 16, art. 45.

ings or structures located or being built on the parcel, unless the contract provides otherwise.⁹⁰

Therefore, the C.C.R.F. reflects the supremacy of the building owner's interests over those of the land parcel owner despite the fact that the C.C.R.F. says virtually nothing about rights like the right to develop another party's land parcel. This position of the C.C.R.F. is explained by the fact that buildings have been drawn into civil commerce quickly and actively, whereas the same process with relation to land has been proceeding phase by phase and is still far from complete. As a result, building owners often come to acquire rights to land other than the right of ownership, while the State or the respective municipality remains the owner of the land parcel concerned. This situation persists even though the period between 1992 and 1997 saw the enactment of a number of Russian statutes and presidential edicts guaranteeing the possibility for natural and legal persons to acquire land parcels in ownership.⁹¹ Moreover, article 4.6 of Presidential Decree No. 1535⁹² enables the owners of privatized enterprises, buildings, and structures either to buy the land parcels under such facilities into their ownership or to take them on long-term lease. Nevertheless, in many cases where land remains under state or municipal ownership, only the right to conclude leases for the respective land parcels is allowed, and the State or municipality attempt to govern this limited form of alienation by issuing their own regulatory acts.

This situation has prompted the statutory prioritizing of the interests of the owners of buildings located on other parties' lands. Furthermore, the legal practice, especially recently, has been to protect the statutory rights of the owners of privatized facilities to

⁹⁰ Art. 340(4) C.C.R.F.

⁹¹ The most notable of these were the Federal law *On the Right of Nationals of the Russian Federation to Receive Into Private Ownership and for Sale Land Parcels for Personal Subsidiary Farming, Gardening, Horticulture and Individual Home Building*, *supra* note 75; Presidential Decree No. 323 "On Urgent Measures to Implement Land Reform in the R.S.F.S.R." (27 December 1991) *Vedomosti S"ezda Narodnykh Deputatov R.S.F.S.R. i Verkhovnogo Soveta R.S.F.S.R.* (1992) No. 1, item 53; Presidential Decree No. 1767 "On the Regulation of Land Relations and the Development of Agrarian Reform in Russia" (27 October 1993) *Sobranie aktov Prezidenta i Pravitel'sva R.F.* (1993) No. 44, item 4191; Presidential Decree No. 198 "On the Right of Ownership of Natural Persons and Legal Persons to Land Parcels Under Immovables in the Countryside" (14 February 1996) *Sobranie zakonodatelstva R.F.* (1996) No. 8, item 740; Presidential Decree No. 337 "On the Realization of Citizens' Constitutional Rights to Land" (7 March 1996) *Sobranie zakonodatelstva R.F.* (1996) No. 11, item 1026; Presidential Decree No. 485 "On Guarantees for Owners of Immovables in Their Acquisition of Land Parcels Under Such Immovables Into Ownership" (16 May 1997) *Sobranie zakonodatelstva R.F.* (1997) No. 20, item 2240; and Presidential Decree No. 1263 "On the Sale to Natural Persons and Legal Persons of Land Parcels Designated for Development and Located Within Urban and Rural Communities, or Rights of Lease Thereto" (26 November 1997) *Sobranie zakonodatelstva R.F.* (1997) No. 48, item 5546.

⁹² *Supra* note 57. Presidential Decree No. 1535 remains in effect pending the adoption by the State Duma of the Federal Assembly of the Russian Federation of another privatization program based on a new statutory regime.

acquire necessary land rights, always in accordance with the procedure prescribed by federal legislation.⁹³

With the development of commercial transactions involving immovables, once it becomes possible to determine the correlation of the market values of buildings and land parcels, it may be necessary to adjust some provisions of the C.C.R.F. on the supremacy of the rights of building owners. Unfortunately, it will hardly be possible to work out an unequivocal solution to all cases. Nor is there such a cure in the legislation of market economies. In some cases, priority is given to the rights of land parcel owners. For example, the fixed-term right of development or a long-term agreement to lease land for construction more often than not results in the transfer to the landowner of the particular building upon the expiry of the term. In other instances, statutes prioritize the interests of the owner of immovables located on another party's land. The *Civil Code of Quebec* offers a compromise in the event that the superficies is terminated. Upon the expiry of superficies, the owner of the subsoil acquires the right of ownership to the structure but is required to reimburse its value to the superfiary. If the value of the structure is comparable to or exceeds the value of the land parcel, the reverse presumption takes effect and the owner of the structure is able, at his option, either to acquire the right of ownership to the land or to relocate the structure at his own cost.⁹⁴ The corresponding balance of interests can also be achieved by agreement. It is important to find a balance of economic interests and a matching legal solution. It is likewise necessary to take into account the nature and source of the building owner's rights to the land. The same solutions will not work in cases such as land leases, the provision of land with the right of development, and the acquisition of lawful rights to land during the purchase of a building.

The sale of land parcels in Russia today is subject to the fundamental rules set out in articles 549 to 558 C.C.R.F. on the sale of immovables. These rules principally require absolute clarity in the definition of the subject matter of the agreement and an indication of the price directly in the agreement for a transaction to be valid. At the same time, the practice of concluding agreements for the sale of land parcels through bidding (by tender or auction) has become widespread. The first mention of the possibility of holding a tender or auction to sell land parcels was made in Presidential Decree No. 1767,⁹⁵ while Presidential Decree No. 1263⁹⁶ has made the sale of land parcels (or leaseholding rights to them) through bidding the general rule, with their sales through other arrangements only permitted in those cases stipulated by legislation. As far as land parcel leases are concerned, the C.C.R.F. itself, while prescribing

⁹³ This is also characteristic of Moscow arbitration courts, especially in disputes related to rights acquired by the owners of privatized facilities. This is borne out by the review entitled "On the Practice of the Federal Arbitration Court of the Moscow Circuit in the Resolution of Cases Connected With the Conclusion, Alteration, Termination and Performance of Lease Contracts" *Vestnik Vysshhego Arbitrazhnogo Suda R.F.* (1998) No. 7 at 74-75.

⁹⁴ Arts. 1116-18 C.C.Q.

⁹⁵ *Supra* note 91.

⁹⁶ *Ibid.*

the application of general rules on leases, allows for the establishment of special rules by other statutes.⁹⁷ Otherwise, transactions with land parcels are fully subject to the C.C.R.F.'s rules on transactions with immovable property.

⁹⁷ Art. 607(2) C.C.R.F.

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