

## Protection of business reputation, litigations with mass media.

Recently, various publications in the press and social media have resulted in reputational damage lawsuits.

Business reputation or goodwill is a company asset, albeit intangible. Counterparties and clients look to it in order to evaluate company's market reliability and whether it can be trusted. In essence, business reputation is used to describe the ideas and beliefs the public at large has regarding the reliability, decency and professional expertise of a person or a company.

Defamation disputes with the media in cases of protection of reputation are mainly resolved in the framework of article 152 of the Civil Code of the Russian Federation.

Russian antitrust legislation applies to reputation disputes as unfair competition cases only when the parties are competitors.

Currently a lot of noteworthy defamation cases regarding business reputation are being brought before the court, although the majority of claims are still dismissed.

### DATA ON DEFAMATION CASES

	Arbitration courts		General jurisdiction courts			
	<i>Cases heard</i>	<i>Satisfied in favor of the plaintiff</i>	Disputes between individuals and companies		Litigations with mass media	
<i>Cases heard</i>			<i>Satisfied in favor of the plaintiff</i>	<i>Cases heard</i>	<i>Satisfied in favor of the plaintiff</i>	
<b>2019</b>	835	263	3140	1195	623	294
<b>2020</b>	940	354	2501	977	365	147

In the summer of 2021 PAO NK Rosneft managed to protect its business reputation on multiple occasions.

In the case against Dozhd TV Channel (Decision of the Arbitration Court of Moscow in case No. A40-37943/21-5-265, dated 05.08.2021), it succeeded in having the materials of an Internet article and statements in the TV show found to be untrue and defamatory. The defendant undertook to publish a refutation. The plaintiff in this case did not seek damages. In the case against Energy News Today Inc. (USA) who disseminated a misleading article in the Internet, the defendant was ordered to remove the disputed article and publish a rebuttal (Decision of the Arbitration Court of Moscow in case No. A40-123012/2021-134-715, dated 03.08.2021).

Dmitry Rogozin, the head of Roscosmos, also managed to protect his reputation in a dispute with three media outlets as co-defendants (Decision No. 2-3703/20 of the Ostankinsky District Court of Moscow, dated 16.12.2020). The appeal proceedings are currently pending.

What are the specifics of court proceedings in such cases?

## **PARTIES**

The parties to a dispute may be individuals or companies. Even if the names of the plaintiffs are not expressly mentioned in the disputed materials, yet they can be identified unambiguously, for example, by the relevant trademark, the court may hold that the business reputation has been harmed.

Reputational damage may also be caused by disparaging the professional reputation of plaintiff's senior manager, which may result in a loss of profits, especially in a highly competitive environment.

Defendants in such disputes are the authors of the disputable materials, as well as the disseminators (the editorial board or founder of the media, the owner of the Internet site, etc.).

The website administrator is typically not liable for the published information provided they are not the person to initiate the publication, chose the recipient of the information or affect its integrity. However since they are in a position to remove information held to be untrue, they may be ordered to do so by the court.

## **JURISDICTION AND LIMITATIONS OF ACTION PERIOD**

Arbitration Court - the parties to the dispute must be entrepreneurs, and the disputed information must be of an economic nature. Otherwise, the case is heard in the general jurisdiction court.

Limitation period is not applicable to such cases, except when information about an individual has been disseminated in the media.

The refusal of the media outlet can be appealed in court within a year from the date of publication of the defamatory material (Part 3, Article 45 of the Mass Media Law).

During the proceedings the plaintiff is advised to prove its business reputation, for instance, by providing the court with the fulfilled contracts and recommendation letters from the counterparties. Not all courts presume the plaintiff's good business reputation. A company's inclusion in significant business ratings may also help in proving its goodwill.

For the court to satisfy the defamation claim the publication must be:

1. defamatory in nature (the plaintiff bears the burden of proof),
2. false or misleading (the defendant bears the burden of proof),

3. disseminated (the plaintiff bears the burden of proof).

When there is no question regarding company's goodwill, its negative impact – **DEFAMATORY NATURE** - must be proven.

An expert (typically, a linguist or a psychologist) is appointed by the court to assess the information based on defamation criteria. An expert must determine what the author meant given the circumstances, which entity the information in question refers to and whether it is speculative or assertive.

To put that in the context, in Rosneft vs. Dozhd TV Channel the linguist's assessment, defining real meaning behind Russian idiomatic expressions like "hanging a noodle on one's ears" («вешать лапшу на уши»), qualification of such juicy terms like "poppycock" («туфта») and "eyewash" («очковтирательство») was presented before the court. More importantly, the expert managed to prove the grammatical construction of the assertive nature of the information.

The courts hearing such cases pay attention to so-called "saving words". "Possibly", "might be", "it is not unlikely that...", "it is my belief that..." are the collocations that normally help authors escape liability. The information must be presented as a fact and not as a subjective opinion for a court to recognize plaintiff's claim. Facts, unlike opinions, can be verified and if found to be false, may become a valid cause for filing a defamation claim.

#### **LEGAL BASIS**

The provisions of the Constitution of Russian Federation guarantee every person's right to judicial protection of one's honor and dignity, which includes post-mortem privacy rights.

Under the Constitution a right to express one's opinion in any form not forbidden by law without prejudice to rights and liberties of others is also granted. Veracity of subjective opinion expressed by the defendant cannot be checked.

This requires that courts, as judicial authorities, maintain a balance between freedom of speech and right to protection of honor, dignity and reputation when hearing defamation cases.

It's noteworthy that in the above-mentioned dispute between Dmitry Rogozin and media the court has ruled that even when the facts are not expressly stated, the wording used hints at the author's awareness of such facts and therefore they may be assessed by the court. Hence, disputed statements could not have been qualified as an expression of journalist's opinion or a result of an analysis, but were presented as hard facts.

#### **VERACITY**

The defendant may not be held liable if they prove that the information is largely true. The defendant must prove the veracity of disputed information in key statements as determined by the court. The literal meaning of words and phrases used must be taken into account.

The mere disparaging nature of expressions is not enough to prove the defamatory nature of the information, since expressing a disparaging statement about a person or an event is protected under the freedom of speech clause of the Constitution and may not in and of itself result in a liability.

### ***DISSEMINATION***

The wrongful conduct on part of the defendant must manifest in dissemination of misleading information (sharing the information with at least one person) by way of publication, public speech, via Internet or through any other type of media, regarding the plaintiff, which is false and defamatory in nature (aimed at forming a negative public opinion of plaintiff's business qualities). Fact of dissemination may be established by any evidence that meets the requirements of relevance and admissibility (in practice, these are recordings of television programs, paper copies of printed publications, notarized Internet pages, etc.).

### **WAYS TO PROTECT BUSINESS REPUTATION**

Special remedies may be used in a defamation case:

- refutation of the defamatory statement
- publishing of the rebuttal
- retraction of the publication in question
- awarding of compensatory damages caused by the defamatory statement

*Public apology* is not specified as a legal remedy; however, the judicial practice is tentative.

To pursue the lattermost remedy the causal link between the publication and negative economic impact has to be established, for instance, the counterparty refuses to do business with the plaintiff while expressly stating that the published information has raised doubts regarding plaintiff's goodwill.

In assessing the compensation amount the courts determine the scale of the publication's impact. Press run, media outreach (local or national newspaper), citation index, Internet page view count are typically taken into account. The bigger audience means bigger compensation amount.

If the precise amount of compensation cannot be established, it is determined by the court taking into account all the circumstances of the case based on the principles of justice, proportionality and striving to eliminate the consequences of the violation.

It's worth pointing out that the media outlet may not be held liable for disseminating false and defamatory information if it copied the publication of a different media outlet verbatim (Article 57 of Mass Media Law) and presents a proof that the publisher was not aware of the falsity of the information.

The mass media, however, will still be ordered to publish a refutation of false statement. In the above-mentioned court cases this remedy has been utilized to full extent.

Since goodwill plays an important role in the business environment, the growing number of satisfied claims is a welcome change. Hopefully, this tendency in Russian judicial practice will help prevent unfair business practices without prejudice to the freedom of expression in our country.