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ON THE EVOLUTION OF THE CONCEPT OF A CIVIL CONTRACT

The article is devoted to the analysis of the development of the concept of a civil law contract. Although the doctrine of a civil contract has a long history of development, it is characterized by insufficient elaboration. Interest in this issue in legal science is still preserved.

Initially, people received information about the institution of the treaty from myths, early religions, and ethical attitudes. The civil law contract is the subject of research of both domestic and foreign civil law and the general theory of law. Analysis of scientific, monographic, educational and methodological literature, legislation shows how ambiguous the views of researchers on the definition of the concept of "contract". Particularly, the article emphasizes that a significant role in the development of contract law belongs to Roman lawyers.

However, an analysis of the various types of contracts that existed in the Laws of 12 tables and in the Justinian Code allows us to conclude that Roman lawyers did not develop a unified understanding of the contract.

The Roman treaty system distinguished two types of treaties: contracts and pacts.

Studying and researching foreign civil legislation shows that the civil legislation of different states also has different formulations of the meaning of the concept of "agreement".

Key words: state, law, contract, legal system, legal institution, civil law, legal fact, legal relationship.

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Азаматтық келісім ұғымының эволюциясы туралы түсінік

Мақала азаматтық-құқықтық келісім тұжырымдамасының дамуын талдауға арналған. Азаматтық келісім доктринасы ұзақ даму тарихына ие болса да, ол жеткіліксіз өңделумен сипатталады. Бұл мәселеге заң ғылымында қызығушылық әлі де сақталған.

Бастапқыда адамдар шарттың құрылуы туралы мифтерден, алғашқы діндерден және этикалық көзқарастардан мәлімет алды. Азаматтық-құқықтық келісім-шарт отандық және шетелдік азаматтық құқықтың, сондай-ақ жалпы құқық теориясының зерттеу нысаны болып табылады.

Ғылыми, монографиялық, оқу және әдістемелік әдебиеттерді, заңнаманы талдау «келісімшарт» ұғымын анықтауда зерттеушілердің көзқарастары біркелкі емес екендігін көрсетеді. Атап айтқанда, мақалада келісім-шарттық құқықты дамытуда римдік заңгерлер маңызды рөл атқаратындығы баса айтылған.

Алайда, 12 кестеден тұратын және Юстиниан кодексіндегі заңдарда бар келісім-шарттардың әр түрлі түрлерін талдау рим заңгерлері келісімшарт туралы біртұтас түсінік қалыптастырмаған деген қорытынды жасауға мүмкіндік береді.

Римдік келісім-шарттар жүйесі шарттардың екі түрін бөліп көрсетті: келісімшарттар мен пактілер.

Шетелдік азаматтық заңнаманы зерделеу және зерттеу әр түрлі мемлекеттердің азаматтық заңнамаларында «келісім» түсінігінің әртүрлі тұжырымдамалары бар екендігін көрсетеді.

Түйін сөздер: мемлекет, заң шарты, құқықтық жүйе, құқықтық институт, азаматтық құқық, құқықтық факт, құқықтық қатынастар.

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К вопросу об эволюции понятия гражданско-правового договора

Статья посвящена анализу развития понятия гражданско-правового договора. Несмотря на то, что учение о гражданско-правовом договоре имеет длительную историю развития, оно характеризуется недостаточной разработанностью. Интерес к данной проблематике в правовой науке до сих пор сохраняется.

Первоначально сведения об институте договора люди получали из мифов, ранних религий, этических установок. Гражданско-правовой договор является предметом исследований как отечественной и зарубежной цивилистики, так и общей теории права.

Анализ научной, монографической, учебной и методической литературы, законодательства показывает, насколько неоднозначны взгляды исследователей на определение понятия «договор». Особо в статье подчеркивается, что значительная роль в развитии договорного права принадлежит римским юристам.

Однако анализ различных видов договоров, существовавших как в Законах 12 таблиц, так и в Кодексе Юстиниана, позволяет сделать вывод о том, что римские юристы не выработали единого понимания договора.

Римская договорная система выделяла два вида договоров: контракты и пакты.

Изучение и исследование зарубежного гражданского законодательства показывает, что гражданское законодательство различных государств также имеет отличающиеся между собой формулировки значения понятия «договор».

Ключевые слова: государство, право контракт, правовая система, правовой институт, гражданское право, юридический факт, правоотношения.

Introduction

One of the central institutions of civil law is the treaty. The contract is the core of the entire system of private law relations.

It is no secret to anyone that contracts play a significant role in the economic life of society.

The civil law Institute, having a thousand-year history, continues to go into the subject of civil law science and today continues to be one of the most pressing problems.

Initially, information about the institute was agreed upon and people received from myths, early religions, and ethical attitudes.

As for the French educator and ideologue of the petty bourgeoisie, Jean Jacques Rousseau, first of all, we can consider his civic concept. The main problem of his political theory is the sovereignty of the people. In G. G. Rousseau recognizes the people as an "integral moral body" or "social person", supports its integrity and voluntary nature. But, due to the development of life, the population gradually becomes an inequality in society, thanks to integration into a large community. The problem underlying inequality explains that it depends on property, stands for public property, and the way to equality is to achieve social consent. In addition, Rousseau supported direct democracy, an ancient

form of democracy in government. It is only in direct democracy the population becomes a subject of power.

G. Grotius in his concept of consent wanted to show that the formation of the state and laws are a logical continuation of natural law. It is undeniable that if compliance with contractual obligations begins with natural law, then laws also come from this source. Persons who are members of any community or subordinate to another are bound to comply with the preference of the majority or the wish of the person in authority, by the nature of the agreement. Grotius' writings indicate the emergence of the law, its transition from a natural position to "civil society". After criticizing the utilitarian thesis of the carneaada "the mother of truth and justice is profit", G. Grotius showed that "the nature of a person who encourages communication with others is the mother of natural law, and the mother of law is a situation arising from General consent, and the latter, because it received its powers from natural law, nature will become the main source of state law".

Literature review

The civil law contract is the subject of research of both domestic and foreign civil law and the

general theory of law The works of pre-revolutionary scientists, such as D.I. Meyer, S.A. Muromtsev, V.M. Nechaev, I.A. Pokrovsky, I.N. Trepitsyn, G.F. Shershenevich, as well as the works of Soviet and modern researchers, such as S.S. Alekseev, I.V. Amirkhanova, M.M. Agarkov, M.I. Braginsky, V.V. Vitryansky, B.M. Gongalo, B. C.Em, S.K. Idryshev, O.S. Ioffe, O.A. Krasavchikov, A.B. Omarova, K.I. Sklovsky, P.O. Khalina, B.B. Cherepakhin and etc.

It should be noted that by the modern period in civilian science there was no uniform understanding of the legal nature of the civil law contract (Kazantsev, 2002: 257).

The analysis of scientific, monographic, educational and methodological literature and legislation shows how ambiguous the views of researchers are on the definition of the term “contract”. As a rule, an agreement means:

- Agreement (contract);
- deal;
- legal fact;
- legal relationship (obligation);
- a document.

So, through the agreement, Roman lawyers, Western European civilists, as well as Russian pre-revolutionary jurists determined the agreement. For example, Savigny F.K. wrote: “An agreement, in general, is an agreement of several persons defining their legal relations in the form of expression of common will” (Savigny, 1876: 360). According to Baron A. Yu. “A clause is an agreement of two or more parties on the emergence, termination, preservation, change of any right” (Baron, 1989: 106-107).

The most famous representative of the Russian pre-revolutionary legal science G.F. Shershenevich has the following definition: “An agreement is an agreement on two or more persons aimed at establishing, changing or terminating legal relations” (Shershenevich, 1912: 502).

Methodology

This article uses both general scientific methods and approaches, and special legal methods.

As general scientific methods in this work, we use the dialectical and historical methods, as well as a systematic approach. Special legal methods include dogmatic, technical and legal, comparative legal.

Results

An analysis of the various types of contracts that existed in the Laws of 12 tables and in the Justinian Code allows us to conclude that Roman lawyers did not develop a unified understanding of the contract.

Used by one of the most ancient legal constructions, the contract has been known since the inception in society of the need to establish specific relations regarding the movement of material goods based on the agreed will of their subjects. It is quite natural that at the same moment they acquire practical relevance and, in connection with this, draw attention to issues of concluding an agreement (Gruzdev, 2005: 43).

Roman law researcher V. Khvostov notes that “in Roman private law, a doctrine was developed on the composition of contractual terms, including essentialia negotii (conditions that must be established by the parties), naturalia negotii (conditions that are usually present in the transaction, but are not necessary), as well as accidentalia negotii (conditions introduced into the transaction by the parties themselves)” (Khvostov, 2019: 147).

If we talk about the oldest treaties, it should be noted that they were characterized by strict formalism. The main thing, in our opinion, in the contract was not the intention of the parties, but the form in which their agreement was clothed. As a rule, the ritual took place in the presence of the parties, five witnesses, a weigher, using copper and scales. According to many sources, the will of the parties was accompanied by the performance of symbolic actions and ritual verbal phrases. These phrases were strictly defined and expressed the essence of the contract, which could not be violated. Compliance with these formalities gave the agreement legitimacy (<https://lawbook.online/rimskoe-pravo/evolyutsiya-dogovornogo-prava-osnovnyie-36061.html>).

It is believed that the most ancient were barter transactions in which two persons simultaneously exchanged things. There were no obligations between them. Mancipatio in ancient times, in fact, did not differ from the barter, since here too things and metal were transferred at the same time. Although with the introduction of the minted coin, the role of emancipation changes, neither before nor after emancipation do obligations arise between the parties? The seller was liable in the amount of double value of the sold item in the event of a third

party contesting its ownership (eviction). In ancient Roman law, long before the Laws of the XII Tables, such treaties as sponsio and nexum were known (<https://lawbook.online/rimskoe-pravo/evolyutsiya-dogovornogo-prava-osnovnyie-36061.html>).

Sponsio – is a type of oral contract. Nexum – is a personal loan agreement. It consisted in the same form as mancipatio. Only here things were not transferred, but the agreed amount of metal was weighed before the introduction of the minted coin, later – a coin symbolizing genuine money. A definite verbal formula was uttered, giving the transaction the character of a loan.

In the period after the publication of the Laws of the XII Tables, new forms of contracts appear: stipulatio, expensilatio and mutuum.

Stipulatio – an oral agreement in the form of a question and answer; expensilatio – a written contract; mutuum – an informal loan agreement that appears at the end of the republican period.

It should be noted that formalities are gradually being removed from the most common transactions. They begin to be concluded in the form of a simple agreement.

Thus, the formalism of ancient law is gradually weakening. Begin to take into account, firstly, compliance with the agreement form; secondly, the intentions of the parties.

In our opinion, a significant role in the development of contract law belongs to Roman lawyers. Since the main source of obligations was contracts that is why they were studied in such detail by Roman lawyers.

It should be noted that contract law developed mainly in two directions. First – this is when the circle of agreements benefiting enforceable expanded as how to develop and complicated economic life. The second – there was a gradual weakening of the ancient formalism and recognition of the claim for certain types of informal agreements" (<https://lawbook.online/rimskoe-pravo/evolyutsiya-dogovornogo-prava-osnovnyie-36061.html>).

Exposing the systematization of different types of contracts, Guy notes, and four types of obligations arose levels of the contracts. Namely: firstly, obligations arising through the transfer of things; secondly, obligations arising through the utterance of words; thirdly, written obligations; fourthly, obligations arising from agreements.

Thus, four types of contracts can be distinguished: real (i.e., establishing the obligation to transfer things, res), verbal (or verbal, oral), literal (i.e. written) and consensual (in which the obligation

arises as a result of one consensus, agreement, even regardless of the transfer of things)

The system of various contracts developed by Roman jurists made it possible to provide legal consequences for various relations that developed on the basis of large-scale agriculture (on latifundia); the developed system of contracts met the interests of Roman merchants in both domestic and overseas trade. In contract law, more than in any other branch of private law, the ability of Roman lawyers, without formally departing from the conservatism that characterized national Roman law, to give recognition to new interests and new needs and, thus, not only not to hinder the further development of economic life, but also to stimulate and promote it (<https://lawbook.online/rimskoe-pravo/evolyutsiya-dogovornogo-prava-osnovnyie36061.html>).

Assessing the role of Roman law in the development of the institution of a treaty, F. Engels wrote that "Roman private law is characterized by the finest development of all the essential legal relations of simple commodity owners (buyer and seller, creditor and debtor, contract, obligation, etc.)" (Marx, 1955-1974: 672).

The Roman treaty system distinguished two types of contracts: contracts and pacts. Contracts are contracts recognized by civil law and secured by claims, which include only a certain range of contracts. Covenants are informal agreements of the most diverse content. They did not use the claim, but over time some of them nevertheless received it (the claim).

The process of concluding a contract in Rome depended on the type of contract. When verbally concluding a contract, the initiative should come from the creditor in the form of a question to the debtor: "Do you promise to pay me so much?" The contract was considered concluded after the appropriate response of the debtor. In other contracts, the process of concluding a contract could also begin on the part of the debtor. One way or another, one of the parties made an offer to conclude an agreement (offers), while the other accepted this offer (acceptance). If the contract was not consensual, then in addition to the agreement of the parties, it was necessary to observe the required form – a written contract or before things in a real contract (<https://works.doklad.ru/view/V6kGq0KHbNw/2.html>).

Great interest in the XI-XV centuries. Western European lawyers showed contract law. They formed the theory of the contract as a holistic set of ideas, ideas, but the concept of the contract was never formed (Beklenishcheva, 2006: 30-32). They recognized that both formal and informal

agreements give rise to obligatory relations, while Roman lawyers assigned this function only to the first type of agreement (Ioffe, 200: 58).

According to F. Nietzsche: "There is no right without a contract" (Nietzsche 1990: 54). According to F. Nietzsche, law is born where a person is able to bind himself with a promise or obligation. For this, a "memory of the will" is necessary (Nietzsche, 1990: 55-56), since henceforth a person learns to manage not only his present, but also his future. And the contract (Beklenishcheva, 2006: 30-32).

At different times, civil scientists gave a different definition to the contract. So, Meyer D.I. believed that the contract is an agreement of the will of two or more persons, which generates the right to someone else's action, having property interest (Meyer, 1997: 156). In and. Sinai defined the contract as a legal act of the free and conscious will of the parties, aimed at the emergence of an obligation (Sinai, 2003: 309).

The analysis of foreign civil legislation shows that the civil legislation of different states also has different formulations of the meaning of the concept of "contract". So in the Civil Code of Ukraine on January 16, 2003 contains the following definition of the contract of the concept: "The contract is an agreement of two or more parties, aimed at the establishment, modification or termination civil rights and obligations" (https://online.zakon.kz/document/?doc_id=30418568). The Civil Code of Azerbaijan of December 28, 1999 adheres to a similar definition (https://online.zakon.kz/document/?doc_id=30420111).

According to the German Civil Code of 1896, a contract means an offer of one person to another person to bind themselves with the terms of this proposal (<http://www.uristys.ru/Zakonodatclstvo/Istoria.htm>). In accordance with the General Provisions of Civil Law of the People's Republic of China, adopted in 1986, "a contract is an agreement establishing, modifying or terminating civil relations between the parties. An agreement concluded in accordance with the law shall be protected by law" (http://chinalawinfo.ru/civil_law/general_principles_civil_law_p5_ch2). In Art. 1793 of the Civil Code of Mexico, contracts are understood to mean agreements that give rise or modify rights (http://artlibrary2007.narod.ru/gk_meksiki.doc). However, an agreements, to terminate the rights of contract for Mexico legislation is not.

A separate point of view is shared by individual Russian jurists. In particular, Sh.V. Kalabekov on this occasion writes the following: "Agreements aimed at terminating an existing contractual relationship because of their insignificance are not contracts ...

The contract aims to establish a legal relationship" (Kalabekov, 2003: 55). Assessing this position, I.V. Beklenishcheva writes the following: "At the same time, it is not clear why the legal facts that entail the establishment of rights and obligations are more significant than the ones that cause their termination" (Beklenishcheva, 2006). T.A. Bryuchko generally recognizes the agreement as an agreement aimed at the emergence or change of civil legal relations, noting that he does not knowingly use the word "termination", since the termination of civil legal relations refers to one of the forms of their change (Bryuchko, 2008: 34).

In the civil law of Latin American countries, a contract is defined either as "a contract – an act by virtue of which one party undertakes to give something to the other party, to do something or not to do something" (<https://www.twirpx.com/file/409022/>); or does not contain a legislative definition of a contract at all, while fixing types of contracts: a contract is a promise and a contract in favor of a third party (<http://adilet.zan.kz/rus/docs/K940001000>).

An analysis of the civil laws of the countries of the Anglo-American system of law allows us to say that an agreement refers to a promise or a series of promises, the violation of which the law recognizes as a basis for action and the fulfillment of which in one way or another the law recognizes as an obligation.

Conclusion

Thus, the existence of a modern society is inconceivable without a civil law contract, which is the most important instrument for coordinating expression of will.

An agreement is an agreement of two or more persons on the implementation of certain actions and the establishment of mutual rights and obligations regulating such actions. The execution of the agreement is ensured by measures of state coercion. This indicates the great importance of the institution of the treaty. For example, if a person does not fulfill contractual obligations, his contractors have the right to resort to measures of state coercion through the institutions of the judicial system and force the violator to comply with the contract.

The content of the contract is the totality of the rights and obligations of the parties. The rights and obligations of the parties must comply with certain principles. These are the principles of equality, autonomy of will, property responsibility and independence of participants in contractual relations.

The functions of a civil law contract are the main areas of legal influence, reflecting its role in streamlining public relations. The fundamental function of a civil contract is the regulatory function, since the contract is a way of regulating relations between private individuals. Regulation is carried out in accordance with the individual interests and needs of the parties.

The contract performs the following functions:

- The contract is a form of establishing economic relations between participants in the economic turnover;

- The contract is the basis for the emergence of mutual rights and obligations of the parties;

- The contract must ensure the responsibility of the parties for failure to fulfill the obligations assumed;

- The agreement allows its participants to determine and agree on their mutual rights and obligations;

- The conclusion of the contract creates important legal guarantees for the parties. This is expressed in the fact that the contract is subject to mandatory fulfillment; unilateral change of its conditions is allowed only in certain cases, and violation of the obligations assumed under the contract entails the obligation to compensate for the losses caused thereby. The parties may provide in the contract other legal means of ensuring its execution: a condition of a penalty, a guarantee, a guarantee.

In addition, the contract performs the function of evaluating the results of business activities.

If we talk about the value of the contract, it is necessary to note the following:

- 1 contract is the basis for the emergence of civil rights and obligations;

- 2 contract – the main way to formalize the relations of participants in civil turnover;

- 3 the contract mediates the movement of civil rights from one entity to another;

- 4 the contract determines the scope of the rights and obligations of participants in civil relations, the procedure and conditions for the performance of obligations, liability for non-performance or improper performance of obligations;

- 5 contracts make it possible to identify the true needs of participants in civil turnover in certain goods, works, and services.

An indicator of the maturity of civil society is the level of voluntary execution of the contract by its participants.

One of the most important conditions for the implementation of the contract is its freedom, as well as the freedom of the persons concluding it. The importance of freedom of contract is evidenced by the fact that the legislator recognizes it as one of the basic principles (principles) of civil law. So, clause 1 of article 2 of the Civil Code of the Republic of Kazakhstan states: “Civil law is based on the recognition of equality of participants in the relations regulated by it, inviolability of property, freedom of contract ...” (<http://adilet.zan.kz/rus/docs/K940001000>)

The freedom of contract reflects the dispositive orientation of civil law and is one of the forms of freedom of expression of subjects of civil turnover.

Revealing the content of the concept of “freedom of contract”, you must pay attention to the following points.

First, it is understood that the subjects of civil turnover independently decide the question of whether to enter into contractual relations with each other. Coercion to conclude a contract is not allowed.

Secondly, the freedom of contract is manifested in the right of the parties to determine the content of the terms of the contract at their discretion, unless otherwise expressly provided by law or other legal acts.

However, freedom of contract is not unlimited.

Thus, the existence of a modern society is unthinkable without a civil contract, which is the most important tool for coordinating the expression of will. With the help of a contract, the subjects of legal relations establish their own rights and obligations, specify and detail legal norms, fill in gaps in legislation and establish a legal link between them. This relationship becomes legally significant due to the fact that the state authorizes it through various measures of state influence, including and measures of state coercion (Satina 2014). Despite the fact that the doctrine of civil contract has a long history of development, it is characterized by insufficient development. Interest in this issue in legal science is still maintained.

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