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The features of entrepreneurial risk's distribution between the participants of contractual relations

The concept and foundations for contractual liability, correlation of guilty and unguilty liability in entrepreneurial sphere are considered in the article. The definition of entrepreneurial risk as the foundation for civil legal liability of an entrepreneur is given. The author made a conclusion that impossibility of fulfillment of obligation is the foundation for distribution of entrepreneurial risk between the parties of contractual obligation.
Key words: contractual liability, guilt, entrepreneurial risk, damage, impossibility of fulfillment of obligation.

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Особенности распределения предпринимательского риска между участниками договорных отношений

В статье рассмотрено понятие и основания договорной ответственности, соотношение виновной и безвиновной ответственности в предпринимательской сфере. Дано определение предпринимательского риска как основания гражданско-правовой ответственности предпринимателя. Невозможность исполнения обязательства является основанием для распределения предпринимательского риска между сторонами договорного обязательства.
Ключевые слова: договорная ответственность, вина, предпринимательский риск, убытки, невозможность исполнения обязательства.

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Шарттық қатынастар қатысушылары арасындағы кәсіпкерлік тәуекелді бөлісу ерекшеліктері

Мақалада шарттық жауапкершілік түсінігі мен негіздері, кінәлі және кінәсіз жауапкершілік арақатынастары қарастырылған. Азаматтық құқықтық жауапкершілік негізі ретіндегі кәсіпкерлік тәуекелдің түсінігі берілген. Автор міндеттемені орындаудың мүмкін еместігі шарттық міндеттемедегі тараптардың арасындағы кәсіпкерлік тәуекелді болудың негізі деген қорытынды жасайды.
Түйін сөздер: шарттық жауапкершілік, кінә, кәсіпкерлік тәуекел, залал міндеттемені орындаудын мүмкін еместігі.

Nowadaysa radical restructuring of the economic system is taking place in the Republic of Kazakhstan. The main importance for this restructuring was the recognition of private property, the restriction to the required limits of government regulation of the economic sphere, the establishment of freedom of choice of contractors and realization of other foundations of a new civil law.

In such conditions the contractual relations constitute the fundamental basis of both state and private enterprise as by signing various agreements the implemented business plans of any business entity are realized. With the trend of increasing the role of the contract the problem of contractual discipline has become an urgent because without the possibility of bringing offenders to justice to ensure performance of the contract is reduced to nothing and generates the debtor disregard for proper execution.

Contractual liability in the form of application to the debtor non-value-addedconsequences

stimulates the proper performance of the contract and compensates the creditor his loss. Therefore, the effectiveness problems of contractual liability becomes important.

Currently in the civil law a relatively new concept of "business risk" became widely used to designate one of the grounds of contractual liability.

Article 359 of the Civil Code of the Republic of Kazakhstan (hereinafter – the CC RK) sets as possible guilt and responsibility without guilty. Subjective basis of liability is guilt. A greater responsibility is assigned on the employer by virtue of its special status. This conclusion can be drawn from the analysis of Art. 359 of CC RK.

Somewhat different situation here is provided for business areas: businessman violated contractual obligations when carrying out his activities, shall be liable in all cases, unless he proves that the improper performance was impossible due to force majeure. That is the only basis entrepreneur is released from liability are losses caused by force majeure. Consequently, the entrepreneur is responsible not only for the guilty, but also for innocent infringement of the obligation. In the latter case, the entrepreneur's responsibility is based on the principles of risk.

In civil law doctrine risk is defined as "a subjective category that exists in parallel with the guilt, but can co-exist with it as the mental attitude of the subjects to the result of their own actions (events) , which is expressed in a lucid negative approval, including irreplaceable property consequences" [1, p.62]. In general, the feature that determines the risk is conscious assumption of negative consequences, one of which may be taking responsibility. At that the assignment of responsibility is allowed when there is no guilt as well. This indicates that the person is conscious bearing on the possible negative effects, and therefore assumes that in the absence of guilt, he will be subject to civil liability for the damage caused in the course of its activities to third parties.

It can be concluded that the entrepreneurial risk in civil law is used as one of the bases of liability for breach of the entrepreneur contractual obligation. Furthermore, the category of business risk is the foundation objection entrepreneur other possible negative consequences of its activities.

Innovation becomes the enshrined in the Civil Code of RK article "Business risk in the undertaking." In accordance with Art. 360 CC RK, if the obligation provided for execution of any work commissioned by the entrepreneur, the risk of being unable to use or otherwise of the work rests on the entrepreneur. In turn, the person who has duly accomplished the work, the right to receive payment is proportional to the degree of execution, unless the contract provides for a different distribution of entrepreneurial risk.

It should be noted that in this norm it comes to contracts for the performance of work on paid services. The context of the rules of the article customer is designated as an entrepreneur. However, the contractor may also be recognized as an entrepreneur because he usually aims at profit and performs work at its own risk. Thus, in most cases, both sides of the obligation are recognized by entrepreneurs.

From the analysis of art. 360 of the Civil Code of RK, we can conclude that in this norm by default the interests of the entrepreneur as one party to the contract, the executer, is only protected. Reasonable risk of being unable to use the result of work rests solely on the customer, who is also an entrepreneur. Then the question arises, why risk rests with the customer, even though both parties to a contract are entrepreneurs? However, the legislator has provided the possibility of a contractual allocation of entrepreneurial risk that can provide resting a part of risk on the entrepreneur who is the executor.

This question is closely connected with the contractual allocation of losses arising, in particular, if you can not perform an obligation in the absence of fault on both sides.

Business risk is associated with the sphere of economic relations. The party is to concede and to avoid certain consequences in case of impossibility of performance. Impossibility of performance – this provision subjects related circumstances, which excludes the actual performance of actions in respect of the subject obligation [2, p.36]. In accordance with art. 364, 371 Civil Code RK impossibility of performance is the foundation of the extinguishment of debt, the debtor is discharged from further performance of the obligation. Termination of Obligation means the liberation of the debtor to pay the damages caused by improper (incomplete) performance of the obligation.

One of the grounds of impossibility of performance commitments is force majeure. Force

majeure is a fortuitous qualified circumstance. In accordance with art.182 CC RK its symptoms are the following: extraordinary and unavoidable under some conditions. As a rule, such circumstances can be attributed as natural disasters, acts of war, etc. In this case, the list of these circumstances is not exhaustive and may be extended by agreement of the parties. In the business sphere it is necessary to prove that the proper performance became impossible due to force majeure (p.2 art.359 CC RK).

In recent years, more and more widespread is the basis of the termination of obligations referred to force majeure. However, such a concept is not legally enshrined. Usually the list contains what we call force majeure (earthquakes, floods, hurricanes, fires, etc.). However, the list of force majeure can be switched on and other circumstances that are not associated with natural disasters, but at the same time it does not depend on the will of the contracting parties to the contract.

In the legal literature there were debates about whether there is a need to divide the category of "impossibility of performance" on different types. Different classification of impossibility of performance obligations were developed.

The division of the circumstances of the impossibility of performance into absolute and relative is of greatest interest. In particular Oygenziht V.A. include physical, political, legal impossibility of performance to the circumstances of absolute impossibility, and economically feasible as it determines the relative impossibility [1p. p.154, 167-169].

In countries with developed market economies, the theory of economic impossibility or extreme difficulty of execution is developed, which is used in contract law as grounds for exemption from contractual liability. At the same time, it is extremely difficult to define at the presence of events that occur after the conclusion of the contract which the parties anticipated couldn't foresee at the conclusion of the contract.

On the basis of the jurisprudence in English law has developed the theory of "futility" or "falling sense" of the contract. This is a very broad and vague concept that encompasses impossibility of performance is extremely difficult, as well as falling purpose, even if it does not lead to the physical impossibility of performance [3, p.290 -291]. Doctrine of impossibility of performance of the contractual obligations also gives the concept of futile treaty which includes the concept of impossibility of performance and the dropping out of a target [4, p.30]. In general provisions of contract law contains Japanese recognition for party to the contract rights to terminate or modify the appropriate conditions certain types of contracts in case of "unforeseen changes dramatically the economic situation after the conclusion of the contract ." Conditions determine the impossibility for the U.S. civil law represented as: 1) impossibility of performance must occur after the conclusion of the contract and 2) the impossibility of performance must be objective [3, p.301]. From the above it follows that the payment is accepted only "absolutely objective" impossibility of performance. This is a situation in which the desired result is only possible when disparate cost. In this defeats the purpose of performance of obligation. A certain degree of probability of occurrence of these results should be conscious to the owner and is related to entrepreneurial risk.

Kazakh legislation enshrined such signs contract futile as: 1) "performance became impossible", i.e. after the conclusion of the contract, 2) "the circumstances for which neither party are responsible," that is no fault of counterparties to the contract. In addition, it is necessary, in our opinion, securing another defining characteristic of futile contract (grounds for termination of the contract) – the condition that none of the parties did not know and should not have been aware of the circumstances of impossibility of performance obligations at the time of concluding the contract. Also, the law must be secured grounds that the contract voids with respect to the economic conditions of the contract.

Designation is not possible or not appropriate to use the result of work has already taken place in art.360 CC RK, which implies falling objective of concluding the contract for the customer, the availability of disparate costs for him in the execution process in the exercise or performance loss of sense of obligation.

All this refers specifically to the definition of the economic impossibility of performance discussed above.

From the analysis above we can conclude that the economic impossibility of performance of the obligation in the business sphere is subject to any

legal regulation than other types of impossibility of performance, namely: the physical, political, social impossibility of performance of the debtor is discharged from further performance, from liability for damage due to that the other party damages, liability shall be terminated. When economic impossibility debtor cannot refuse to perform an obligation. Economic impossibility our legislation so not designated as grounds for termination of the obligation and the risk incurring the consequences of the economic impossibility imposed under Article 361of CC RK only way – customer – entrepreneur.

In practice there are often situations in which there is an increase in cost, changes in consumer demand, declining purchasing power, objectively independent of the will of the parties. The fulfillment of the customer (buyer) becomes economically unfeasible and he cannot terminate the contract on that basis.

It is needed to legislate unified conditions for all kinds of impossibility of performance, as well as for all types of contracts. This is possible through a clear legislative recognition of the conditions of the contract futile, as was mentioned above.

Currently, the economic impossibility of performance of the obligation side can only be defined as a ground for termination of the contract obligations.

Thus, we examined the distribution characteristics of entrepreneurial risk between the parties contractual relationship embodied in the legislation. Questions topic of great practical significance and require a study. A brief overview of the regulations governing the distribution of entrepreneurial risk suggests that significant changes and additions CC RK norms in order to improve economic turnover.

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