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**The concept  
of the entrepreneurial  
agreement under the law  
of the Republic of Kazakhstan**

The article deals with the problem of the definition of an entrepreneurial agreement, his relationship with the contract. It defines specific subject structure of the entrepreneurial agreement – one of the sides of it must be the subject of law, endowed with the status of entrepreneur and engaged in entrepreneurial activity.

**Key words:** entrepreneurial agreement, a contract, entrepreneurship, entrepreneurial revolution, relations with the participation of an entrepreneur.

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**Қазақстан Республикасының  
заңнамасы бойынша  
кәсіпкерлік шартының ұғымы  
туралы мәселесі**

Бұл мақалада кәсіпкерлік шарттың ұғымы және азаматтық-құқықтық шарттың арақатынасын анықтау мәселесі қарастырылады. Кәсіпкерлік шарттың субъектілік құрамы ерекше анықталған – кәсіпкерлік мәртебесі және кәсіпкерлік қызметтің жүзеге асыратын, кәсіпкерлік шарттың бір тарабы ретінде құқық субъектісі болуы шарт.

**Түйін сөздер:** кәсіпкерлік шарт, азаматтық-құқықтық шарт, кәсіпкерлік қызмет, кәсіпкермен қатысуымен арақатынасы.

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**К вопросу о понятии  
предпринимательского  
договора по законодательству  
Республики Казахстан**

В статье рассматриваются проблемы определения понятия предпринимательского договора, его соотношение с гражданско-правовым договором. Определен особый субъектный состав предпринимательского договора – одной из сторон предпринимательского договора должен быть субъект права, наделенный статусом предпринимателя и осуществляющий предпринимательскую деятельность.

**Ключевые слова:** предпринимательский договор, гражданско-правовой договор, предпринимательская деятельность, предпринимательский оборот, отношения с участием предпринимателей.

**THE CONCEPT OF  
THE ENTREPRENEURIAL  
AGREEMENT UNDER THE  
LAW OF THE REPUBLIC  
OF KAZAKHSTAN**

With change of system and the principles of management of economy, emergence of new subjects of entrepreneurial activity also the system of contracts significantly changes. Subjects of entrepreneurial activity in the course of entrepreneurial implementation almost daily enter the contractual relations with other subjects – entrepreneurs and persons who are not entrepreneurs. Therefore, in the conditions of market economy the main instrument of regulation of relationship of subjects of entrepreneurial activity is the contract. It is the main legal form of an economic turn, defines the rights and obligations of the parties, their responsibility.

In the definition of entrepreneurial activity fixed in Art. 10 of the Civil Code of the Republic of Kazakhstan (further in the text – CC of RK) [1], it is defined that the main purpose of entrepreneurial activity is a net income by satisfaction of demand for goods (works, services). In this case, we consider necessary to note that fact that satisfaction of this demand possibly only by the conclusion of the civil contract. Thus, the Special part of CC of RK contains contracts which main aim directed on satisfaction of this demand. For example, the contract of purchase consist one party (seller) undertakes to transfer property (goods) to the possession to other party, and the buyer undertakes to accept this property (goods) and to pay it (Art. 406 of CC of RK).

Further, the contract of delivery the supplier who is the entrepreneur undertakes to report to the agreed time produced or procured their goods to the buyer for use in entrepreneurial activities (Art. 458 of CC of RK).

The contract of the consumer work (Art. 640 of CC of RK) the contractor who is carrying out entrepreneurial activity undertakes to perform a certain work on the citizen customer's task, and the customer undertakes to accept results of work and to pay it.

Thus, it is possible to establish that fact that the legislator linked possible directions of entrepreneur activities with its social value. Receiving net income perhaps not in any ways, not by all means, but only through the performance of the obligations for satisfaction of demand for goods (works, services) other subjects of an economic turn by the conclusion of contracts in the process of implementation of entrepreneur activity.

It should be noticed that in the existing civil legislation the concept of «the enterprise contract» is not adopted.

The concept of the enterprise contract and its place of system of the law in the literature defined variously depending on a view of the legal system and a place in it the business law.

There are three main points of view on the business law:

1. The business law is an independent branch of law. Proponents of this point of view are followers so-called the «concept of the economic law» developed under the direction of V. V. Laptev [2, s.53] and V. K. Mamutov [3, s.34]. Proponents of this point of view based on the fact that the business (economic) law is a set of the norms governing the economic relations.

2. The business law is part of civil law. This concept is directly opposite to the concept of the economic law as an independent branch of law and is widespread in educational [4, s.22; 5, s.19-20]. and in scientific literature [6, s.28; 7, s.20]. 3. The business (economic, trade, commercial) law is a complex branch of law [8, s.11]. According to the first concept of the entrepreneurial contract is one of institutes of the business law as independent branch of law and has nothing common with the civil contract.

According to the second concept of the entrepreneurial contract is institution of civil law.

A number of representatives of the third concept consider it the complex institution that combines elements of public and private law.

In this regard, the point of view V. S. Belykh, according to which «The entrepreneurial contract – the complex legal institution which combines norms of private law and public beginnings is represented interesting. Therefore, it is possible to approve that the entrepreneurial contract represents cross-industry (complex) concept» [9, s.344]. This concept has been criticized by M. K. Suleymenov who defined that «.. business law recognizing as the complex branch of law, it is impossible to agree with recognition of the entrepreneurial contract by the complex institution including the public and private beginnings: especially it is unclear that means cross-industry (complex) concept. ... The entrepreneurial contract, as well as any contract (for example, applied in family, labor, land, mountain and other branches of the right) it always the civil contract based on the beginnings of equality of the parties and the principles of private law. After all, the contract is an agreement of the parties, and it can be the agreement only when the parties are independent

from each other and equal» [10, s. 9]. Civil approach to understanding and essence of the entrepreneurial contract based on denial of independence of the entrepreneurial contract and on recognition of its specifics as kinds of the civil contract. In this regard M. I. Braginsky, V. V. Vitryansky specify that «... from 610 Civil Code of the Russian Federation devoted to separate types of contracts, 262 articles are calculated entirely on participation of entrepreneurs, but also other contractual articles are calculated by the general rule on the relations which at least, do not exclude participation of entrepreneurs» [11, s. 99].

The similar situation can be observed and in the CC of RK. The analysis of norms of Special part of CC of RK leads to a conclusion that the main part of contractual obligations are the share of entrepreneurial contracts. The certificate to that are the contracts governing the relations not only between participants of a usual civil turn but also in an enterprise turn (civil legal relationship with participation of the entrepreneur). So, separate types of contracts indicate obligatory participation of the entrepreneur as the parties of this contract. For instance, contract of retail purchase and sale, delivery, leasing, lease contract of the enterprise, contract of hire, etc.

Thus, the legislator operates with such concepts as the person, «carrying out entrepreneurial activity» (the Art. of Art. 445, 573, 640 of CC of RK, etc.), «the seller (supplier) who is an entrepreneur» (Art. 458 of CC of RK), «granting to the lessee, the property specified by it in temporary possession and use for the enterprise purposes for a payment» (Art. 565 of CC of RK), etc.

The civilians recognizing existence of the entrepreneurial contract cannot define its place in system of civil law. Consequently, there is a question as the institute of the entrepreneurial contract with division of contractual institutes on contractual types corresponds: purchase and sale, row, transportation, employment, etc. These contractual institutes are included also by purely entrepreneurial contracts (delivery), and purely usual civil contracts (donation), and mixed (hiring).

The special attention is deserved by M. K. Suleymenov's opinion that «The entrepreneurial contract is substitute of institute of the civil contract into which enter, besides enterprise and consumer, the usual civil contract. In turn, the entrepreneurial contract is the institute including institutes: contracts of delivery, construction contract, hiring of the enterprise, transportation of goods and others.

This system of the entrepreneurial contract is secondary in relation to the system of contractual institutes fixed companies in the GC of RK: purchase

and sale, hiring, performance of work, rendering services, etc. Therefore, the entrepreneurial contract is complex institute of civil law».

Therefore, the entrepreneurial contract is a civil contract and anything other it cannot be. Yes, it is included into complex branch of the business law, but is included, remaining thus entirely within the framework of civil law.

S. A. Parashchuk calls the following features of the entrepreneurial contract: 1) it consists for implementation of entrepreneurial activity; 2) the parties or one of its parties are subjects of entrepreneurial activity; 3) compensatory character; 4) it combines the maximum freedom and increased requirements for entrepreneurs in contractual obligations [12, s.379-382].

We do not agree with opinion V. S. Belykh who as an essential sign of the entrepreneurial contract allocates such sign, as «a combination of the maximum freedom and increased requirements for entrepreneur in contractual obligations» [9, s. 343] as it is characteristic not for enterprise contracts as those, and for entrepreneurial activity in general. In this case we consider that here it is about the principle of the legislation, but not about a contract sign.

In the legal literature is possible to find such sign of the entrepreneurial contract as onerous character of this contract. In our opinion this sign has no essential value as and defining the sign – the enterprise purpose of the contract which predetermines both paid character and other signs of the entrepreneurial contract for which implementation these contracts and consist will be main.

Thus, the main and defining signs of the entrepreneurial contract are two: 1) special subject structure (the parties or one of the parties of the contract subjects are entrepreneurial activity); 2) the purpose of the conclusion of the contract – implementation of entrepreneurial activity for the goal of receiving net income.

The Kazakhstan civil legislation contains the mass of the norms governing the relations with participation of entrepreneurs, fixing special rules for the participants of an enterprise turn different from the provisions intended for a civil turn.

The civil legislation does not contain concept of the entrepreneurial contract (transaction), but in it there are norms allowing to mark out features of legal regulation of the enterprise transaction (item 1 of Art. 152, item 2 of Art. 279, item 2 of Art. 359, Art. 360 of CC of RK and others).

As a result, the carried-out analysis of the current legislation of RK, we made conclusion that the concept of the enterprise transaction can be deduced

from contents of Art. 10 of CC of RK where the concept of entrepreneurial activity is enshrined; Art. 147 of CC of RK where under transactions the actions of citizens and legal entities directed on establishment, alter or the termination of legal relationship admit; item 1 of Art. 378 of CC of RK according to which the contract the agreement of two or more parties on establishment, change or the termination of the civil rights and duties.

As transactions are the basis of emergence of a large number of the civil, including enterprise relations and legal regulation of transactions contains nuances of regulation of an enterprise turn, it is necessary to find out, what criteria of definition of the transaction is carried out in the course of entrepreneurial activity.

In the course of this or other activity the subject makes legitimate, strong-willed legally significant actions, that is transactions. Accurate definition of enterprise, commercial transaction in the theory of the civil, enterprise law, in the current legislation is not present.

In the absence of fixed concept of the enterprise transaction, the legislator in necessary, determine the features of legal regime of business every opportunity emphasize communication of transactions, obligations, contracts with implementation of entrepreneurial activity. The norms regulating can be an example of that: «the transactions which are carried out in the course of entrepreneurial activity» (Art. 152 of CC of RK); «the obligations connected with entrepreneurial activity» (the Art. of Art. 279, 359 of CC of RK). It occurs when for a usual civil turn one mode, and for an enterprise turn – other legal regime various from the first.

We hold I.V. Amirkhanova and V.A. Romanova's opinion that «definition of the enterprise transaction possibly only through establishment of communication of the made transaction with process of implementation of entrepreneurial activity» [13, s. 209; 14, s. 26].

In this case, the question arises – whether for recognition of the transaction enterprise it is obligatory, that both sides of the transaction are entrepreneurs or enough to even one of the parties was an entrepreneur, and another user?

Being guided by «a law letter», namely a parcel: «carried out in the course of entrepreneurial activity», it is possible to draw a conclusion that with participation at least on one party of the transaction of the person who is engaged in entrepreneurial activity, the transaction has to be considered as the enterprise.

Thus, implementation of entrepreneurial activity defines its subject as the entrepreneur. It

is necessary to tell that in practice situations when enterprise transactions are made by the subject which is not registered as the entrepreneur, that is carrying on business without the legitimate reason. The legislation consolidates responsibility for implementation of entrepreneurial activity without registration concerning the subject, however concerning commission of enterprise transactions by «the illegal entrepreneur» of accurately certain legal consequences is not established.

In our opinion, it is necessary legislative consolidation base of recognition of invalid enterprise transaction, which made by the person for whom acquisition of the enterprise status is impossible. Introduction of such basis can play a positive role as one of legal obstacles of implementation of entrepreneurial activity with violation of requirements of the legislation.

Analyzing the history of emergence of the concept «enterprise transaction», we understand that it, in fact, is close to the concept «commercial transaction» opened at the beginning of the XX century. So, G.F. Shershenevich about commercial transaction wrote that «the most suitable general concept corresponding to the Russian legislation would be mediation with the speculative purpose» [15, s. 109].

When determining concept of commercial transaction the western legislation and practice proceed from two criteria: the objective – admission of the most commercial contents of the transaction (France, Belgium, Spain, the countries of Latin America) and subjective – definition of the transaction as trade on the basis of fulfillment of its merchant (Germany, Japan). It is noted that for national legal systems existence special rules of activity of entrepreneurs as the independent entrepreneurs acting on the trade basis, and special rules of the conclusion and execution of the transactions qualified as commercial or commercial transactions is characteristic [16, s.108]. In the modern Russian theory commercial transactions are treated as the transactions made between entrepreneur or with their participation for the purpose of implementation of entrepreneurial activity by them.

It should be noted, that in CC of RK the term «commercial transactions» is used in Art. 166 in relation to activity of the commercial representative. The analysis of this article allows to draw a conclusion that under commercial transactions enterprise contracts mean. Besides, the term «commercial transactions» is applied to enterprise transactions. As a rule these terms are used as synonyms.

On the basis of the carried-out analysis of the current legislation of the Republic of Kazakhstan

it is conditionally possible to allocate enterprise contracts (transactions), using the following criteria:

1) Connection with entrepreneurial activity, that is application of these or those contracts for satisfaction of economic needs of entrepreneurs in the course of implementation of entrepreneurial activity;

2) Existence at least on the one hand the subject allocated with the status of the entrepreneurs acting in the sphere of business in any organizational and legal form established by the law;

3) Establishment of more tough rules to the entrepreneur, including the increased responsibility for violation of contractual obligations and restriction in some cases free wills of the subject therefore, the parties signing the contract are limited in manifestation of the basic civil principles: legal equality, discretionary behavior.

Taking into account the specified signs it is possible to give the following preliminary definition of the enterprise transaction. The enterprise transaction is the civil bargain concluded by the entrepreneur in the course of implementation of entrepreneurial activity with participants of a trade turnover (entrepreneur, consumers or the state) for the risk, under the property responsibility in order to obtain net income.

Recognition of this or that contract the enterprise has basic legal value not only in connection with a specific mode of regulation of such contracts, but also in connection with a special order of consideration of the disputes arising at the conclusion, change or cancellation of contracts and with special rules of the taxation of entrepreneurial activity.

Considering characteristic signs of enterprise transactions, we reveal the most important differences of enterprise transactions from civil transactions in their social ratio.

All set of the precepts of law governing the enterprise relations, arising in connection with commission of enterprise transactions can be defined as one of the main institutes of business law, as subsectors of civil law. The legal institute represents set of the precepts of law governing certain relations, the legal institute covers concrete group of the public relations and belongs to concrete branch of law, making its certain part.

So, M. K. Suleymenov defines legal institute as rather isolated and steady group of norms governing the uniform public relations. The author considers that the legal category is not set of norms, it is not considered as broader and more abstract concept, it just lies in other system of concepts, than institute [17, c.57]. The institute of the enterprise transaction

acts as secondary education in relation to basic civil institute of the transaction. That is the precepts of law governing the enterprise relations are norms of civil law, and at the same time are norms of business law.

The special subject structure of the enterprise transaction also testifies to secondary of institute of the enterprise transaction. At the same time, not at each institute of the right the subject structure can be a sign of some independence. Concerning institute of the enterprise transaction the special subject structure definitely influences independence of this type of the relations.

To sum up, the results of the concept of the enterprise transaction (the entrepreneurial contract) considered by us it is possible to tell that it is the civil bargain concluded during implementation of entrepreneurial activity on the risk by the entrepreneur with other participants of a civil turn for the purpose of receiving net income, and differing in the cases provided by the legislation or the agreement of the parties, restrictions of will of the entrepreneur regarding freedom of transaction, definition of the rights and obligations of the parties, the basis and nature of its responsibility before contractors.

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