PROFESSIONALISM AS A FEATURE OF BUSINESS ACTIVITY

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ABSTRACT

The article deals with the issues of special legal regulation of civil legal relations, the participants of which are entrepreneurs-professional participants of property turnover. The article analyzes the legislative provisions that provide for special rules on stricter civil liability of entrepreneurs and maximum freedom in forming and changing the conditions in a contractual obligation to which entrepreneurs are a party or participants. At the same time, it is concluded that the special rules for entrepreneurs established by the legislator are justified.

Keywords: Obligations related to the implementation of business activities by the parties. The professionalism of the entrepreneur. The civil liability of the entrepreneur. The maximum freedom of the entrepreneur in the formation. Change of conditions in the contractual obligation.

PROFESSIONALISM COMO CARACTERÍSTICA DA ATIVIDADE DE NEGÓCIOS

PROFISSIONALISMO COMO CARACTERÍSTICA DA ACTIVIDADE EMPRESARIAL

RESUMO

O artigo trata das questões da regulação jurídica especial das relações jurídicas civis, cujos participantes são empresários-profissionais participantes da rotação de bens. O artigo analisa as disposições legislativas que preveem regras especiais sobre a responsabilidade civil mais estrita dos empresários e a liberdade máxima na constituição e alteração das condições de uma obrigação contratual da qual os empresários sejam parte ou participantes. Ao mesmo tempo, conclui-se que as regras especiais para empresários estabelecidas pelo legislador se justificam.


RESUMEN

El artículo trata las cuestiones de la regulación jurídica especial de las relaciones jurídicas civiles, cuyos participantes son empresarios-profesionales participantes de la rotación de la propiedad. El artículo analiza las disposiciones legislativas que establecen normas especiales sobre la responsabilidad civil más estricta de los empresarios y la máxima libertad para formar y modificar las condiciones de una obligación contractual de la que los empresarios son parte o participes. Al mismo tiempo, se concluye que se justifican las reglas especiales para emprendedores establecidas por el legislador.

Palabras-clave: Obligaciones relacionadas con la implementación de actividades comerciales por las partes. La profesionalidad del emprendedor. La responsabilidad civil del empresario. La máxima libertad del emprendedor en la formación. Cambio de condiciones en la obligación contractual.

INTRODUCTION

The Constitution of the Russian Federation enshrined that everyone has the right to engage in entrepreneurial activity, provided that it is not prohibited by law and is not aimed at monopolization and unfair competition (Article 34). In the system of contractual obligations, there are obligations related to the implementation of their business activities by the parties, that is, such obligations have a strictly defined circle of participants and these are entrepreneurs who have a special civil status and who must be professional participants in property turnover, therefore, must be professionally engaged in business activities (professionalism is a good knowledge of your profession (DZHGOV; SHVEDOVA, 1994, p. 615). Professionalism is not considered by the legislator as a mandatory feature of entrepreneurial activities, although other activities of the legislative provisions on professionalism include, for example, in the Federal law "On securities market" (hereinafter–FL "On securities market"). There were set out the types of professional activities on the securities market: broker, dealer, Forex dealer. Brokers, dealers, Forex dealers carrying out the relevant activities are referred to as professional participants of the securities market (Federal law No. 39, 1996).
Despite the fact that the professionalism of the entrepreneur is not set by law as a mandatory feature of entrepreneurial activity, the legislator refers to the owner as a professional member of the civil turnover, because it provides special rules in the legal regulation of civil relations, members or a member of which is an entrepreneur, and a special legal regulation of provisions on civil liability of the entrepreneur was established, as well as provisions on the formation and change of content of a contractual obligation related to the implementation of business activities. The above-mentioned special rules are an exception of the principle of legal equality of participants in civil legal relations, which characterizes their legal state: all participants in civil legal relations do not have any forcing power in relation to each other, they have the same legal opportunities and the same civil legal norms which are generally applied to them.

The special rules mentioned earlier are necessary, since in this way the legislator makes it clear that entrepreneurs, since they are professional participants in civil turnover, are primarily subject to increased requirements in matters of civil liability (hence, additional legal guarantees are provided to a weaker participant in civil turnover – a citizen-consumer), and maximum freedom is allowed in the formation and modification of conditions in a contractual obligation (Netishinskaya, 2006, pp. 108-112; Netishinskaya, 2006, p. 242-252), including the conditions for unilateral refusal to perform a contractual obligation, its early performance, since the legislator defined business activity as independent, carried out at his own risk and aimed at systematically getting profit from the use of property, sale of goods, performance of works, provision of services.

**METHODS**

When writing the article, the following methods were used: a) general scientific methods (formal-logical, system, structural-functional); b) general logical methods of theoretical analysis; c) private scientific methods including technical and legal analysis.

**ANALYSIS**

We should consider the special rules that provide for increased requirements for entrepreneurs in matters of their civil liability for non-performance or improper performance of contractual obligations. As a general rule, a prerequisite for the approach of civil liability of a person is his fault, this provision is established in the section 1 of the Article 401 of the Civil Code of the Russian Federation (further – CC of the Russian Federation). The section 1 of the Article 401 of the Civil Code contains the definition of "guilt", which is expressed as follows: "A person is innocent, if the degree of care and diligence, what was required of him by the nature of the obligation and the terms of turnover, he took all means for the proper performance of the obligation," that is, according to V. V. Vitryansky, the measures that a person should have taken for the proper performance of the obligation now correspond to the degree of care and prudence that was required of him by the nature of the obligation and the terms of turnover (BRAGINSKY; VITRYANSKY, 2001, p.751).

According to E. A. Sukhanov, "fault" in civil law is generally considered not as a subjective, mental attitude of a person to his own behavior, but as a failure to take objectively possible measures to eliminate or prevent the negative results of his own actions dictated by the circumstances of a particular situation. In other words, according to E. A. Sukhanov, "fault" is transferred from the area of difficult to prove subjective mental sensations of a particular person to the area of objectively possible behavior of participants in property relations, where their real behavior is compared with a certain scale of proper behavior (SUKHANOVA, 2010, p.464).

As for the civil liability of an entrepreneur, in accordance with the section 3 of the Article 401 of the Civil Code of the Russian Federation in the obligations that arise in the course of entrepreneurial activity, a person who has not fulfilled or improperly fulfilled an obligation is liable regardless of fault. The sole basis for the release of an entrepreneur from liability for non-performance or improper performance of an obligation in the course of entrepreneurial activity is the impossibility of its performance due to force majeure, that is, extraordinary and unavoidable circumstances under these conditions. Such circumstances may include various exceptional and objectively overmastering (under these conditions) events and phenomena: floods, earthquakes, etc.

The law or contract may provide other grounds for civil liability or exemption from it in the case that it is a question of non-performance or improper performance of obligations in the course of business activities. However, it is prohibited to enter into an agreement in advance in order to eliminate or limit liability for intentional breach of an obligation. Such an agreement is considered as a void contract. Considering the above, it is possible to offer the participants of a property turnover - entrepreneurs at the conclusion of contracts that arise from the liabilities associated with business activities, to provide the conditions regulating civil liability of the parties for failure to perform or improper performance of a contractual obligation (for example, to provide for the presence of fault as a condition for the onset of civil liability for non-performance or improper performance of an obligation).
including the conditions on the grounds of exemption from liability. The law may provide for cases where entrepreneurs bear civil liability for the fault, in particular, in the section 2 of the Article 547 of the Civil Code there was established the position that the power supplying organization was responsible for failure to perform or improper performance of contractual obligations in the presence of its fault, if the regulation of energy consumption, which was carried out on the basis of the law or other legal acts allowed a break in the flow of energy to the subscriber.

The position when the agricultural producer which is responsible found guilty, if he doesn't perform or performs the obligation of contracting improperly, was shown in the Article 538 of the Civil Code of the RF. As for the grounds for exemption from liability, the law may establish other grounds for exemption an entrepreneur from civil liability, other than the act of force majeure. Thus, the section 5 of the Article 23.1 of the Civil Code of the Russian Federation "On Consumer Rights Protection" establishes a provision that the seller is exempt from civil liability to the consumer if he proves that the violation of the terms of transfer of the pre-paid goods to the consumer occurred due to force majeure or through the fault of the consumer (LAW OF THE RUSSIAN FEDERATION No. 2300-1, 1992). In the section 1 of the Article 798 of the Civil Code there were established the grounds for exemption from civil liability of the shipper for loss, shortage and damage: the presence of force majeure and circumstances which the shipper could not prevent the removal of which is not dependent on him.

The Civil Code of the Russian Federation has provided another special rule for entrepreneurs as professional participants in civil legal relations and it establishes increased requirements for them in matters of their civil liability. The rule is that obligations of several debtors in the liability associated with entrepreneurial activities, are assumed to be joint (section 2 of the Article 322 of the Civil Code of the RF), and it means that the creditor is entitled to demand performance from all the debtors jointly and from any of them individually, for the full or part of the debt (section 1 of the Article 323 of the Civil Code of the RF).

So, the section 2 of the Article 670 of the Civil Code of the RF provides for the provision that if the responsibility for the choice of the seller is on the landlord (we are talking about the contract of lease), the tenant has the right to submit claims arising from the contract of sale, the seller of the property or the landlord, as they bear before him jointly and severally liable. As the other example, you can specify the position of the Article 1034 of the Civil Code of the RF that the legal owner shall be liable jointly with the user according to the requirements of the user as the manufacturer of products (goods) of the legal owner. Joint liability of entrepreneurs is also established by other federal laws. So, the Article 3 of the Federal Law "On Investment Partnerships" contains a provision that if two or more managing partners participate in an investment partnership agreement, all legal and practical actions of each of the managing partners related to the execution of the investment partnership agreement and the implementation of joint investment activities are considered joint actions of all managing partners and all managing partners are jointly and severally liable for the consequences of their actions (inaction) (FEDERAL LAW No. 335-FL, 2011).

For business legal relations, the legislator establishes special rules related to the formation and modification of conditions in contractual obligations. So, the Civil Code provides for the possibility of the unilateral change in the terms of the obligation or of the unilateral refusal to perform the obligations or early performance of obligations related to the implementation by the parties of entrepreneurship not only in cases set by the law, but by the contract (Articles 310, 315 of the Civil Code of the RF). The obligation arising from the contract, associated with the implementation of business by the parties, can provide a condition supplying with the accrual of interests on interests (section 2 of the Article 317.1 of the Civil Code of the RF).

The section 2 of the Article 350.1 of the Civil Code of the Russian Federation provides for the provision that, if the pledgee is a person engaged in entrepreneurial activity, an agreement between the pledgee and the pledgeree may provide that the sale of the pledged property is carried out by: 1) the pledgeree retains the pledged item for himself, including through the receipt of the pledged item in the property of the pledgeree, at the price and under other conditions specified in the above agreement, but not below the market value; 2) the sale of the pledged item by the pledgeree to another person at a price not lower than the market value with the deduction of the amount of money of the pledged obligation. In obligations related to the implementation of business activities by the parties, the transfer of the debt may be made by agreement between the creditor and the new debtor, according to which the new debtor assumes the obligation of the original debtor. An agreement between the original debtor and a new debtor who has fulfilled an obligation related to the implementation of business activities by its parties may provide for the condition that the rights of the creditor under this obligation do not pass to the new debtor (sections 1.3 of the Article 391 of the Civil Code of the Russian Federation). The contract may provide for the application of compound interest (accrual of interest on interest) for obligations performed in the course of the parties' business activities in the case of unlawful withholding of funds, evasion of their return, or other delay in
their payment (section 5 of the Article 375 of the Civil Code of the Russian Federation).

The provision of the section 3 of the Article 401 of the Civil Code of the Russian Federation gives the right to persons engaged in entrepreneurial activity to provide in the contract conditions for their civil liability in the case of non-performance or improper performance of a contractual obligation, as well as the grounds for exemption from such liability. Parties to the obligation acting in the exercise of business activities, may provide for the obligation to one side to compensate property losses of the other party by agreement (the agreement shall specify the amount of compensation for such losses or procedure of its determination) arising in the case defined in the agreement circumstances and are not related to a breach of obligation (the loss caused by the inability to perform obligations, etc.), (section 1 of the Article 406.1 of the Civil Code of the RF).

**SUGGESTIONS, DISCUSSION AND CONCLUSIONS**

The attitude of the legislator to the entrepreneur (individual entrepreneur, commercial organization) as a professional participant in civil legal relations, which is expressed in the establishment of special rules, applied in the implementation of business activities, in our opinion, is justified. We believe that business activity by its very nature assumes the dominant role of private law regulation, since the section 1 of the Article 2 of the Civil Code of the Russian Federation directly establishes the provision that relations between entrepreneurs or with their participation are regulated by civil law.

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