International Journal For Research In Business, Management And Accounting
ISSN (Online): 2455-6114
Volume 06 Issue 02 June 2020
Available on-line at: https://ijrbma.com/index.php/bma
DOI: https://doi.org/10.53555/bma.v6i2.1326
Received: 02-March-2020| Accepted: 12-May-2020

Evolution of Entrepreneurial Contracts Development: Brief Historical Digression

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The scientific assumptions about this or that legal phenomenon are optimally based on the law or, at least, on bylaw normative material, which gives them a definite starting point for these or those conclusions. However, such a support is absent as related to entrepreneurial contracts: the term "entrepreneurial contract", not to mention its definition, does not appear at all in the modern normal legal acts, and its predecessor, i.e. "economic contract", is only occasionally present in the latter[1]. The situation is the same in the acts of the superior court instances[2].

Appeal to the Civil Code of the Russian Federation (hereinafter "the CC RF") will not help much. In the CC RF the Contract means an agreement of two or more persons on the establishment, amendment or termination of civil rights and obligations[3]. The same definition is given in the CC of the Republic of Armenia, where the Contract means the agreement oftwo or more persons on the establishment, amendment or termination of civil rights andobligations.

It should be noted that the legal definition of entrepreneurial relations in one form or another has been given back in the times of the 1765 Astrakhan Code of Laws, where the civil regulation of entrepreneurial relations had a peculiar definition: entrepreneurial relations have been divided into 4 main groups. It should be also noted that commercial activities have been considered as the main activities of citizens[4] .

1 See: Subpoint. 16 of point 3 of Article 149 of the second part of the Tax Code of the Russian Federation; point 2 of article 59 of the RF Law of July 6, 1991 No. 1550-1 "On Local Self-Government in the Russian Federation" in edition of October 6, 2003 (given according to the Consultant Plus Reference Legal System); point 1 of the Decree of the RF President of February 16, 1992 No. 144 "On the Commercialization of the Activities of Consumer Cooperative Enterprises in the Russian Federation", in edition of October 21, 2002 ("RossiyskayaGazeta", No. 41, 20.02.1992); subpoint 17 of point 83 of the Charter of the Russian Railways Open Joint Stock Company, approved by the Decree of the Government of the Russian Federation of September 18, 2003 No. 585 (the RF Collected Legislation, 2003, No. 39, Article 3786), etc..

[2]See: the Resolution of the Presidium of the Supreme Court of the Russian Federation of November 24, 1999 // Bulletin of the Supreme Court of the Russian Federation, No. 7,2000; the Resolution of the same body of June 28, 2000 No. 59pv-2000 (given according to the Consultant Plus Reference Legal System); appendix to the Information letter of the Supreme Arbitration Court of the Russian Federation of June 21, 1999 No. 42 "Review of the practice of consideration of disputes related to the collection of income tax" // Economy and Law. No. 9.1999; the Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation of August 10, 1999 .V "1863/99. L. Vestnik B of the AS RF. No. 11, 1999, etc.

[3] See. Point 1 of article 420 of the Civil Code of the Russian Federation.

[4] See Haykiants A.M. The development of private law in Armenia in the 15th-18th centuries // Journal of Russian law, M., 2007 (3), p. 107.

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In the English law one may also find other definitions of the Contract, where the Contract means groups of public relations, where the law is guaranteed by certain sanctions[5]. In more modern sources, the Contract was defined as an agreement due to which participants were interconnected with certain rights and obligations[6]. As it became obvious, in the doctrinal studies we did not meet the definition of commercial contract. In our opinion, the concept of the commercial contract can be introduced into the law through expanding the entrepreneurial relations. Such a necessity may arise in the light of changes that have occurred in the economic structure of the society.[7]

It should be noted that the concept and definition of the commercial contract have always been of great importance in the scientific doctrine. If we turn to the Russian legal resources, we can see that the definition of the commercial contract played a great role at the beginning of the 20th century, where the regulation of commercial relations have been given due to the commercial codes[8]. The above norms have been repeated in relation to the government contracts and supplies more general position stipulated in article 1537 of the Civil Laws, in which the motive of such a strict attitude to the execution of contracts was indicated, i.e. the preservation of public confidence in the government places or persons. And although the categorical nature of this provision was weakened by the comment of famous Russian lawyers V.L. Isachenko and V.V. Isachenko, according to whom the strength of the contract with the treasury, as well as its nullity, depended on its correct conclusion, i.e. the participation of a body or person legally authorized by the government in it; the position of the legislator in itself testified about its special approach to trade contract of this type.

At the same time, trade transactions, as at present, have been strongly influenced by the public and legal norms. K. Pobedonostsev in his course of civil law wrote about the legislative division of trade into wholesale, retail and small-scale, indicating the types of trade requiring certificates and so called tickets. Trade certificates certified trade rights and were issued according to the first or second guild, which meant, respectively, the right to trade and take contracts throughout the empire and at any amount, or to perform the same actions within one county with a transaction limit of 15 000 rubles; as for the ticket, it was a prerequisite for the maintenance of each commercial or industrial institution[9]. G. F. Shershenevich at the very beginning of the last century defined the contract in the same way

5See. Chitty.On contracts, general editor H. G. BEALE. The 26th edition, Vol. 1, Sweeet&Maxwell, ThamsonRauters , 1989, p. 9.

6See. Chitty on Contracts (Common Law Library) book by Joseph Chitty, Sweet & Maxwell, 1989, pp. 1-2.

7See Marukyan G.S. The contract in the mechanism of regulation of business relations.Dissertation for the degree of candidate of legal sciences, Yerevan, 2010, p. 14.

8 See Civil Laws, Code of Laws of the Russian Federation, Volume 10, Part, 1911, see also Zankovsky S. S., "Entrepreneurial Contracts in Russia. Problems in the Legislation". Dissertation for the degree of the doctor of the legal sciences, M, 2004, p. 17.

9 See: G.F. Shershenevich believed that the imagination on the Russian civil laws, as on a product of centuries-old national development is exaggerated, because a significant part of the civil legal material is borrowed from the French sample, sometimes just a translation, sometimes very unsuccessful. See: Shershenevich G.F. Indicated collection. p. 42. The influence of German civilistic thought cannot be denied either.

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as it is being done now, not to mention earlier sources[10]. The deficiency as a continuation of dignity is that this survivability is explained by too common nature of the given definition of the contract. Agreement is any contract, wherever it occurs, between an employer and an employee in the field of the labor law[11], between marrying persons, in the family sphere, etc. The only thing that makes it possible to detect traces of civilistics in this definition is an indication of civil rights and obligations that arise, change or cease in accordance with an agreement between persons.

The absence of the legal definition of the entrepreneurial contract makes its doctrinal understanding especially topical. But before passing to the modern scientific imaginations about such a contract, it is advisable to trace their origins, historical background, which ultimately served as a basis for such imaginations.

In this connection it should be noted that the distinction between obligations mediating economic activities and the contracts aimed at satisfying the needs of citizens has not been left without the legislator's attention and has always been felt by lawyers, despite the presence or absence of special legal regulation of these obligations, for example, in the form of commercial law.

The same G.F. Shershenevich wrote that there is no special system of commercial law in Russia, unlike in the West, where the trade laws make up the special law contained in separate codes, Russia has only separate laws setting exceptions to general rules for commercial transactions. [12]

But these exceptions, which lay in the mainstream of civilistics, were so extensive that they made it possible to talk about the existence of two legal regimes in the civil legislation of that time: consumer (if it is possible to say so) and economic. In Article 1531 of the Civil Laws, for example, it was found that a special procedure for concluding commercial contracts was set out in the Charter of Commerce[13]; in addition, there was a Provision on governmental contracts and deliveries, incomparably more detailed and thought out than its modern Russian legislative analogues.[14] It, in particular, indicated that the contracts concluded with the treasury should be preserved as firmly as if they were under the handwritten signature of the Imperial Majesty (Article 178). Even more remarkable is the rule that the contracts concluded by the treasury, whatever the place (i.e. the authority) or the person it is, even with the government damage, and above the amount to which it is entitled, should remain in its force, and if there is a loss for the treasury, the perpetrator will take responsibility for this (Article 179).

[10] See: Shershenevich G.F. Manual of Russian civil law (published in 1907). M., 1995, p. 304 .

[11]See. Article 40 of the RF Family Code

[12] See: Shershenevich G.F. Indicated collection, p. 44. See also: Bashilov A.P. Russian commercial law. SPb. 1887, article У; Udintsev V.G. Russian commercial and industrial law. Kiev. 1907. p. 1-2; Kaminka A.I. Essays on commercial law.SPb. 1912. p. 1-2; Arkhipov I.V. Commercial law of Russia in the XIX century: the stages of modernization. // State and law. No. 2. 2004; Zholobova G.A. Change in the commercial legal capacity of physical persons in post-reform Russia at the end of X1X-beginning of XX centuries. // State and law. No. 5. 2004.

[13] See: Civil Laws (Code of Laws, vol. X, part 1). St. Petersburg, 1911.

[14] See ibid, pp. 498-583

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P.O. Khalfina, departing from the precondition accepted at that time that under the conditions of socialist economy in the field of economic turnover within the country, the means of production lose the properties of goods, preserving only their outward form, and for the distribution of these means it is possible to preserve the legal form mediating the movement of goods, came to the conclusion that entering into civil-legal relations, the legal person, expressing his own will, expresses also the will of the state in the given concrete issue and in the given concrete area. In his turn F.I. Gavze excluded from the concept of a commercial contract any definition related to the contract as a basis for cessation of relations, referring to the fact that in the context of the Soviet economic system, it is absolutely inadmissible to define a contract as a basis for cessation of something, especially if it concerns the public relations[15].

Further changes in the doctrine of economic contracts were conditioned by the changes in the economic ideology of the party-state leaders. They were legally stipulated in the Bases of Civil Legislation of the USSR and the Union Republics in 1961, the preamble of which contained a number of key provisions that had a serious impact on the formation of the updated concept of such contracts.

The essence of the changes was an attempt to combine the comprehensive planned management of the economy with the material interest of citizens, enterprises and other economic organizations. For this, it was necessary to refuse from the construction of the "external form" of commodity-money relations and declare about their full use in accordance with the new content that they have in the planned socialist economy[16].

The gradual process of economic development, in view of the tendencies of the development of economic relations also led to a new concept of "economic contract" within the framework of the doctrinal literature. These so-called contracts have been the subject of wide discussion within the framework of the juridical doctrine. Some scholars were called upon to separate civil agreements, and economic contracts are classified as intermediate factors of economic turnover. Another group of scientists was prone to the separation of commercial and civil-legal contracts, justifying their position by the fact that this is a direct line of development of economic relations. However, it should be noted that in this format the point of view of O.S. Joffe, who notes precisely those basic features that economic contracts should contain as a reflection of the development of economic society, greatly differs from others' viewpoint[17]. Among them, there was an author who singled out contracts for the supply, capital construction and by contract. Interesting definitions and discussions of this phenomenon can also be found in the works of M.I. Braginsky, who, defining the economic contract, tried to divide the generic characteristics that this type of contract was endowed with, and defined this type as a method of determination of the ordinary civil-legal contract[18]. However, as you can notice, in the definitions of contracts, various features are considered only as the methods of support to more clearly define the nature of the contracts as the methods of regulating civil-legal contracts, and in this case also the economic relations.

15 See: Gavze F.I. Socialist civil-legal contract. M., ed. Legal. lit., 1963, p. 9.

16 See: Khalfina R.O. Right and Self-Supporting System. M., 1975, pp. 72-73.

17See: Joffe O.S. Contracts in a socialist economy. Ed "Legal.Lit. ", Chapter 1, M., 1964, p. 5

18 See: Braginsky M.I., General doctrine on economic contracts. Minsk, 1967, p. 20.

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However, in our opinion, this division is conditional. Here it is important to determine only one point: the only goal is to set contractual relations. In addition, the conditional division is connected with the fact that it did not know the practical application of economic and non-economic features of the contract as a whole. Contractual relations aimed at specific goals were set. At the same time it is important to note that the ratio of the plan and the contract in the given case were the most important topics that were discussed in the scientific doctrine, and discussions took place in 3 main directions:

- The Institute of Relationship of Plan and Administrative Agreement
- Law on planning and coordination of administrative relations
- Contract, plan, contractual relations.

The quasi-commodity relations based on the so-called self-supporting system underlay the new economic policy in relation to contracts; which was understood as a method of planned socialist management based on the public ownership at the funds of production. Its meaning was that state-owned enterprises, in accordance with the plan, independently carried out the activities prescribed to them, using the property assigned to them, under the condition of compensation of expenses due to the results of these activities and the material liability or, accordingly, incentives for the same results.[19]

In the Civil Code of the RSFSR of 1922 it was indicated that state-owned enterprises which were transferred to the self-supporting system, perform in circulation as independent and not connected with the treasury of a legal person, and only property that is in their free disposal is responsible for their debts (Article 19). Such a broad approach to the status of state-owned enterprises did not meet the realities; in addition, the civilistics has been generally perceived as the law of that part of the economy that was in contact with the previous economic formations, and the Civil Code itself has been interpreted rather as a code of concessions than of the socialist achievements."

In fact, the Civil Code of 1922 was much more suitable for the regulation of the private sector of the economy, but not for the regulation of the state one for the reason that some instructions and rules regarding the planned management of enterprises in its interaction with economic contracts were absent in it by obvious reasons.

The introduction of self-supporting system, which supposed the combination of planned principles with the simultaneous use of contractual forms in relations between the enterprises, created a difficult legal situation and caused some confusion in the legal science. Indeed, if in their external, formal aspect the mutual relations between state-owned enterprises often did not go beyond the limits of the civilistics, in fact a completely different type of legal relations developed here, when not only the contract itself arose according to the instructions of the planning bodies, but in the future its content could vary by the same instructions regarding the price changes, order size, stoppage of its action, etc. An earlier unknown and intractable problem of restriction of the authorities of planning bodies by the certain “rights” of enterprises arose from here[20].

Therefore, the opinion of A.V. Dozortseva on the preservation of the outstanding value of the contract as a form of the execution of economic relations clashed his own

[2.] See: Economic law. Manual //edited by Lapteva V.V. M., 1970, p. 140.

[20]See ibid. p. 17, 22.

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judgment that the contract becomes redundant in the situations when the subject of the obligation and the conditions of fulfillment are completely determined by the plan.[21]

Nevertheless, it was the innovations in the legal regulation of economic contracts during the period of the NEP and their initial understanding by the legal science that laid the foundations for the constructions that, gradually enriching, led to the emergence of full concepts of such contracts. The issues of correlation of the plan and the contract, the protection of the rights of the enterprise in its relations with the bodies of economic management, and responsibilities for the violation of obligations were developed in them.

Besides the NEP inevitably had to create an incentive for the emergence of theories which, far beyond the scope of the contract law, set out a task to explain the situation as a whole. These included the theory of economic and administrative law put forward by P.I.Stuchka, according to which the latter regulated relations in the socialist sector of the economy on the basis of plannedness and subordination, meanwhile the civil law was accounted for the regulation of relations within the framework of the private sector and inter-sectoral relations, and there was an irreconcilable struggle between these areas of law.

Thus, we can bravely say that at that time the planned act was the main method of planning of public life, which regulated the relations concerning also the public life and economic relations in general. The main methods of the organization of the public life became the so-called trusts, which determined all the basic information regarding all the branches of life in the economic format.

Further changes in the doctrine of economic contracts were conditioned by the changes in the economic ideology of the party-state leaders. They were legally stipulated in the Bases of Civil Legislation of the USSR and the Union Republics in 1961, the preamble of which contained a number of key provisions that had a serious impact on the formation of the updated concept of such contracts.

The essence of the changes was an attempt to combine the comprehensive planned management of the economy with the material interest of citizens, enterprises and other economic organizations. For this, it was necessary to refuse from the construction of the “external form” of commodity-money relations and declare about their full use in accordance with the new content that they have in the planned socialist economy[22]

The consequence of the application of these relations, along with such tools as self-supporting system, money, price, self-cost, profit, etc. should have become the development of operational and property independence and initiative of enterprises and the expansion of their rights within the framework of the plan, but under the condition that the content of the contract concluded on the basis of the planned assignment must comply with this assignment (Article 34 of the Bases).

All this did not go further the definition of common approaches and would not have a noticeable effect on the practice of economic contracts, if there was not the economic reform of 1965, carried out on the basis of decree of the Central Committee of the CPSU and the Council of Ministers of the USSR of October 4, 1965 No. 729 "On the Improvement of Planning and Strengthening of Economic Incitement of Industrial Production “[4Л]

[21]See Dozortsev A.V. Ind. Col, p. 86, 107.

[22] See: Khalfina R.O. Law and self-supporting system, M., 1975, p. 72-73.

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Its meaning in relation to the considered problems was the inclusion of an economic contract in the planning sphere, which supposed the endowment of enterprises with a number of additional rights and aimed at increasing incentives for the productive work oriented to the real needs of the national economy. In accordance with this general direction, it was set that the five-year and annual plans of enterprises are developed by them on the basis of control figures determined by a higher organization. Proceeding from them, the enterprises-manufacturers of products had to agree with the enterprises-consumers on the volume, assortment, quality and delivery terms and form on this basis a portfolio of orders. The role of the latter, however, should not be exaggerated, because the plans of enterprises under all the conditions were approved by their higher bodies.

At the same time, the number of plan indicators was reduced to six, including, in particular, the total volume of products sold at current wholesale prices and the volume of deliveries to the enterprise of the raw materials and materials necessary for its operation and equipment distributed by a higher organization. The enterprises received the right to independently resolve issues of their production and economic activities, including planning of the volume of production, detailed nomenclature and assortment of products on the basis of planned tasks and orders accepted by enterprises in direct contact with consumers brought to them by the same organizations or with the domestic organizations of the USSR State Provision System.

Such relations, mostly long-term, did not at all act as an impromptu for the reason that they were predicted in the plans of material and technical supply.

The responsibility of the planning bodies was charged with ensuring the sustainability of the planned tasks, which objectively contributed to the stability of the economic contracts arising from them. The contract was declared as the main document defining the rights and obligations of the parties for the supply of all the types of products, including the part that was distributed in a centralized order. But the reform went even further: contracts for the supply of products were to be concluded mainly in accordance with the economic relations, which could not be broken by the enterprise- manufacturer without the consent of the customer, and new relations on centrally distributed products were set with the sanction of the supply and sales bodies.

The sanctions applied to enterprises for the violation of contracts were to be attributed to the results of their economic activities, which ultimately narrowed their ability to materially stimulate their employees, since the amount of profit left at the disposal of the enterprises depended on the state of this activity, as well as the wages of employees or at least its part, which was linked to the overall results of the work of the enterprise. A fund for the development of production, a fund for material encouragement intended for bonuses, and a fund for social and cultural events and housing construction have been formed at the expense of the profit. All the living space built at the expense of this fund was used in the interests of the employees of the enterprise and was distributed by itself with the subsequent report to the relevant executive committee.

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Economic reform has brought to life the emergence of the provision on the supplies of the products of industrial and technical importance[23] (hereinafter the Provision on Supplies) and the Provision on supplies of public consumption goods, i.e. normative legal acts that, by the degree of the settlement of the liability relation of their link with the plan, did not know equivalent analogues neither in the preceding nor in the upcoming periods.

The planning acts were qualified in the Provision on Supplies as the planned grounds for concluding supply contracts, which in itself meant a step forward in the issue of the ratio of the plan and the contract. First, the orders for the supply of products annually issued to suppliers and buyers by the supply and sales authorities in accordance with the allocated funds performed in the role of such grounds. The orders should have corresponded to the production plans approved by the enterprises-suppliers, but they were also issued for over-planned products, if they were subject to distribution a planned manner. And if the order contained all the data necessary for the fulfilment of the delivery, it was considered that the contractual relations between the parties arose as a result of the order's acceptance for execution with the exception of cases when one of the parties, despite the exhaustive nature of the order, required the registration of the delivery through the conclusion of a contract signed by the parties.

The contract in this case was fictitious, however, the Provision on Supplies, following the line to increase the role of the contract, required that the parties should introduce amendments into it or terminate it in cases when the order turned out to be changed or canceled by the issuing authority after the conclusion of the contract. This circumstance, at first glance, confirmed the point of view expressed in the literature that the use of the contractual form for regulating the value relations between socialist organizations was not an objective necessity, since value relations can also arise outside the contract under the conditions of the operation of law of the planned development of the national economy.[24]

However, it is also obvious that in that period both non-contracted deliveries and their justification by the tasks of regularity have already been turned more into the past than to the future. The further transformation of views on the economic contract is associated with the ongoing attempts by the party-state authorities to reconcile the global regulation of the economy with the development of the independence of economic bodies in the interests of the increase of production efficiency. The decree of the Central Committee of the CPSU and the Council of Ministers of the USSR of July 12, 1979 No. 695 "On the Improvement of Planning and Strengthening of Impact ofEconomic Mechanism on the Increase of Production Effectiveness and Work Quality"[25] should be considered as the most important one from this point of view. It emphasized the perspective planning: the obligation on the elaboration of the project of the main directions of the economic and social development of the USSR for 10 years by 5-year periods was introduced in the obligations of the USSR State Plan together with a number of other bodies of economic management. For the first five-year period, the indicators of main directions were prepared on an annual basis, and for the second five-year

[23] Approved by Decree of the Council of Ministers of the USSR of April 9, 1969 No. 269 (USSR, 1969, I, p. 64)

[24] See: Braginsky M.I. General doctrine of economic contracts. Minsk, 1967, p. 52, 53.

[25] СП USSR, 1979, № 18, article 118.

period only the most important indicators for the last year were determined. It was supposed that the necessary refinements should be introduced into the main directions every five years, and that they should be compiled in the same order for a new five-year period, which gave the continuous character to the planning process. Then, when the next historical stage associated with the well-known perestroika of the most important public relations in the USSR came, it was high time for the last attempt in its history to combine centrally planned management of the economy with the expansion of the rights of its primary link. A view on the state bureaucracy as a factor restraining the economic growth, but amenable to improvement by limiting the powers of the state apparatus under the judicial control underlay this attempt [26]. This, however, was only one side of the matter, connected with the elimination of excessive regulation of economic turnover. The other side logically connected with it was in the necessity to provide enterprises with as much freedom as it was possible within the framework of the socialist economic system.

[26] Such a view to the Soviet bureaucracy has always existed, although it has not always been openly expressed. During the period of perestroika, it became especially acute due to the fact that in the bureaucracy they have finally saw the factor hindering the manifestation of the advantages of the socialist system.