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Mechanisms and Technologies of Distribution of Risks of Participants in Civil Legal Relations

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Abstract: ***The article considers the distribution of risks among participants in civil relations. In order to do this, the authors analyze the basic concepts of "risk" of both domestic and foreign scientists. As a result, the work substantiates the legal nature of risk, as well as the lack of a regulatory framework, which creates problems of legal regulation of the distribution of risks among participants in civil relations. It is established that risk studies are presented in the general theory of state and law, civil, criminal law and other branches of Russian legal science, covering mainly very specific issues arising from the subject matter of the relevant branches of law. The methods of risk management at the level of both existing legal structures and newly emerging ones are considered. Finally, the authors conclude that there is no legal definition of risk, which results in a lack of uniform application of rules that directly or indirectly include the category of risk. Since risk is an integral part of the developed civil turnover and any private law relations, it is necessary to provide a legislative framework for this legal category.***

Keywords : risk, insurance, civil liability, losses.

I. INTRODUCTION

In Russia, as in any other society, there are no areas that would be free from diverse risks. This causes the formation of knowledge that not only covers general views on the concept of risks and their nature but also includes ideas about their sources, assessment and the most effective ways to minimize them. Today, the theory of risk is successfully developed not only in the economic doctrine, in the field of prevention of anthropogenic disasters, political science, and other areas of scientific knowledge, but also in domestic law. Risk studies are presented in the general theory of state and law, civil, criminal law and other branches of Russian legal science, covering mainly very specific issues arising from the subject matter of the relevant branches of law.

Despite the frequent use of the term "risk" in civil law, the study of this category receives insufficient attention in civil law.

In the context of entrepreneurship and economic freedom, the topic of risk has acquired a complex character. The number of works devoted to this subject in nonlegal areas is rapidly increasing. In the legal context, the features of risks and ways to minimize them are not analyzed enough. Therefore, in civil law, the same problems of risk are subject to discussion for a long time (objective and subjective features of risk; the legal nature of business risk; issues of legal regulation of business risk insurance).

In the framework of the study, three theories will be considered that have developed in civil law science, explaining the phenomenon of risk:

- subjective theory, represented by Oigenzikht [1]; Grant [2];
- objective theory, represented by Omelchenko [3], Krasavchikov (1966), Khaskelberg [4], Sobchak [5];
- combined (dualistic) theory, represented by Mezrin [6], Greiner and Metzger (1983).

According to the subjective theory of risk, presented in the late 1960s – early 1970s by Oigenzikht, the risk category is assessed from the subjective, psychological points of view.

II. METHODS

A. General description

The methodological basis of the present study is represented by the dialectical method, the method of studying legal processes and phenomena that allow seeing them in the interaction and development; general and special methods of knowledge (systemic, complex, comparative-legal, normative-logical, and concrete-historical methods).

The historical and systemic method has allowed revealing the essence of the legal category of risk, as well as the variety of its interpretations, which often does not allow determining the true consequences of risk circumstances and the subject which they burden.

The comparative legal method has formed the basis for the allocation of two groups of opinions on the legal nature of risk. As a result, the authors have concluded that minor linguistic differences (it should be admitted that most scientists are united in their definitions) are largely determined by the multidimensionality of such a phenomenon as risk.

The normative-logical method has shown the absence of a legal definition of the concept of "risk" in modern civil legislation.

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B. Algorithm

Research of mechanisms and technologies of distribution of risks of participants in the civil legal relationship was based on the forking algorithm.

During the stages of the study, the authors processed and analyzed the rules of various branches of legislation, especially civil legislation (Fig. 1).

Risk factors aimed at minimizing legal risks within the undisputed jurisdiction were identified.

As a result, the authors justified that it was necessary to establish a system of internal control, which would help to consider all the factors leading to the emergence of risks.

In conclusion, the concept of the "risk" category was defined.

C. Flow Chart

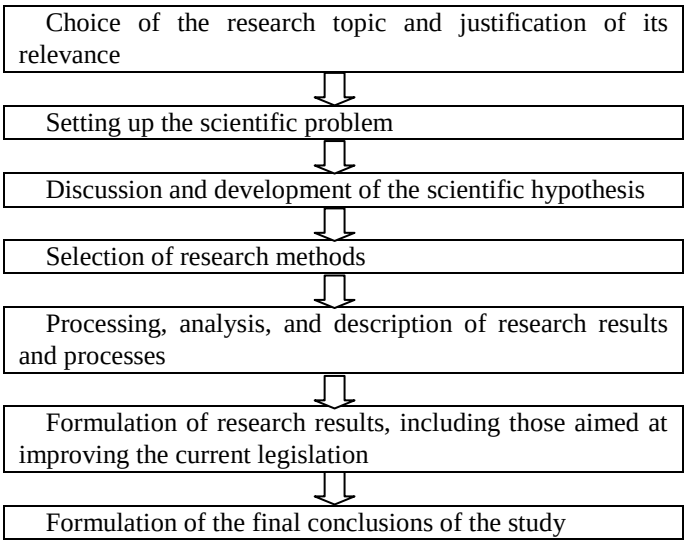

Fig. 1: Stages of the study

III. RESULTS

In the process of study, the following conclusions should be made. First, risk is an integral part of the developed civil turnover and any private law relations; the main purpose of civil law regulation should be a competent legislative distribution of civil law risks, as well as the creation of appropriate mechanisms and the use of the potential of existing legal institutions, which should be aimed not only at eliminating the negative consequences of risk factors but also at minimizing legal risks within the undisputed jurisdiction. In order to do this, it is necessary to establish a system of internal control, which would help to consider all the factors leading to the emergence of risks. The classification of risk as a fundamental category of social sciences has its reasons. It is largely due to the needs of society to minimize the factors that undermine the stability of social life in all its areas. At the same time, despite its importance, the category of risk is among the least developed in the civil law system. It is established that the category of "risk" is an objective universal form of being and thinking, which reflects in the historical, political, economic and intersubject aspects a probable danger recognized by the subject or a favorable opportunity for risk behavior and, in this context, the meaningfulness of actions in the pragmatic aspect represented in the adequate identification and assessment of the risk situation under uncertainty in which the individual actually is when choosing rational behavior leading to the achievement of goals and fulfillment of intentions, i.e. to success.

IV. DISCUSSION

In terms of the universality of the spread to subjects of civil relations, all risks are divided into general and special. General risks include those faced by all or most of the subjects of civil legal relations (incapacity of the counterparty, invalidity of the transaction, expiration, etc.) and special risks associated with participation in a certain type of civil relations (hereditary, contractual, proprietary, etc.). So, Khizirieva [7] classifies as special risks associated with the choice of the leased asset, with problems with suppliers of the leased asset, with the loss of the lessee's solvency during the execution of the lease agreement, with the liquidity of the leased asset and the collateral of the leasing transaction, with the formation of the portfolio of contracts of the leasing company. In terms of connection with the peculiarities of legal regulation, the risks associated and not associated with the peculiarities of legal regulation are highlighted. Risks that are not associated with the features of legal regulation are the result of events and actions of actual, economic, political and institutional nature [8]. The risks associated with the features of legal regulation of certain public relations are referred to the risks arising from the conclusion of aleatory transactions and other actions with which the legislation associates a certain risk in the future. For example, at the conclusion of a deposit agreement, the person who accepted the deposit bears the risk of paying double the amount of the deposit in the case of the impossibility of the transaction [5]. According to the structure of civil legal relations, all risks can be divided into subject risks and object risks. Subject risks are risks associated with the subjects of legal relations: risk of recognition of a person incapable, limited legal capacity, risk of bankruptcy of a person, loss of special legal capacity (for individual entrepreneurs and legal entities), risk of reorganization (liquidation, death) of the entity, risk of revocation of the power of attorney of the representative, risk of restriction of powers and other risks connected with defects in the subject of legal relationship [4]. Object risks are risks associated with a defect in the object (subject) of the legal relationship. These include the risk of loss (destruction) of property to be transferred, the risk of acquisition (transfer) of things of inadequate quality, the risk of using things for other purposes, the risk of damage to property, etc.

By the number of persons bearing the risk, unilateral, bilateral and multilateral risks are distinguished.

By the source of the risk situation, there are risks arising from events, actions, and conditions.

By types of civil legal relations, there are binding (including contractual), hereditary, proprietary risks, risks associated with the state registration of rights and protection of rights, corporate risks, etc. These risks can be attributed to all those risks borne by the legal subjects in connection with participation in these legal relations (Krasavchikov, 1966).

Liability risks:

- risk of nonperformance (improper performance) of obligations;
- risk of liability for the obligation or other negative consequences as a result of a failure to perform it;
- risk of performance of the obligation (payment of funds) to the improper person.

Contractual risks:

- risk of unilateral refusal to perform the contract;
- risk of termination of a contract;
- risk of default of obligations by the counterparty (dishonesty, unreliability of contractors) or credit risk of the counterparty;
- risk of invalidation of an agreement;
- risk of entering into a different type of contract (the contract does not fully reflect the agreement of the parties and their interests);
- risk of recognition of a contract as not concluded;
- risk of losses arising as a result of the performance of a contract;
- risk of loss of things purchased under a contract, due to the seizure of goods from the buyer by a third party.

It should be mentioned that for certain types of contracts there can be identified types of risks associated with the peculiarities of the legal regulation of certain contractual relations. Thus, the rent contract is characterized by the risk of the presentation by the recipient of the rent of requirements for the redemption of rent by the payer (single payment), mandatory for the latter.

Hereditary risks:

- risk of invalidation of the will;
- risk of nonconfirmation of the right of ownership of the testator to the property included in the estate;
- risk of non-acceptance of application for inheritance;
- risk of loss of the title agreement;
- risk of the expiry of the period for acceptance of inheritance;
- risk of nonreceipt of inheritance;
- other risks.

Proprietary risks:

- risk of the encumbrance of things;
- risk of claims by third parties;
- risk of a defect in the title to the thing;
- vindication or restorative risk;
- risks of foreclosure on the debts of previous owners (mortgage, pledge risks);
- risk of seizure (encumbrance) of things (for example, seizure of land for state needs, the establishment of wayleave); risk of loss of title document; risk of recognition of a construction as unauthorized;
- risk of refusal of state registration of ownership of real estate;
- risk of destruction (damage) of a thing; risk of acquiring a thing from an unauthorized person; risk of encumbrances or restrictions of a right; other risks.

Risks associated with state registration: risk of refusal of state registration;

- risk of loss of the title document for the purposes of state registration.

Risks associated with the protection of civil rights:

- risk of impossibility to make claims to contractors (one-day firms, loss of communication with the counterparty, liquidation of a legal entity, etc.);
- risk of loss of documents confirming the competence of a person;
- risk of unqualified legal aid;
- risk of failure in the protection of the right.

Corporate risks:

- risk of raider attacks;
- risk of unauthorized withdrawal of assets or reorganization; risk of violation of the ratio of net assets and authorized capital.

According to the form of bearing adverse consequences, risks are divided into the risk of imposing an additional obligation on the person, the risk of losses, the risk of liability, etc.

Risks can be divided into recoverable and nonrecoverable. In the literature, it is stated that most of the risks are disposable, especially at the stage of conclusion of a contract. Meanwhile, there are risks that cannot be eliminated (for example, the risk of default in connection with the forced liquidation of a legal entity due to gross violations of the law or the risk of death of the counterparty).

With regard to the diversity and complexity of the existing civil law risks, it seems that the participant in civil law relations can hardly assess all possible risks, and even more so take the necessary actions to eliminate them. Therefore, the support of significant legal relations of subjects of law should be performed by institutions whose activities are aimed at providing qualified legal support (advocacy, notary, insurance companies, etc.) in order to minimize civil risks.

In the literature, risk minimization is understood as "a system of measures capable of transferring risks to the area of acceptable" [9], "reducing the likelihood of infringement of intangible interests of the legal subject", "adoption of a set of various measures aimed, on the one hand, at eliminating and (or) reducing to an economically acceptable level the impact of adverse circumstances preventing the satisfaction of the property interest, and, on the other hand, at using favorable circumstances (opportunities) for the most effective and full satisfaction of interest" [1]. The main way to minimize risks in civil turnover is legislative regulation. The implementation of the distributive function of private law is manifested in the distribution of risks from participation in civil turnover [10].

It is possible to minimize legal risks in civil legal relations with the help of the so-called legal audit. It refers to the study of legal documents and intentions of the parties for compliance with their legislation and the purpose of a transaction. The quality of such legal audit and, consequently, the degree of minimization of legal risks depend on many factors: the subject of such an audit (legal expert), the degree of its independence from the parties to the transaction and qualifications in a particular area, the provision by the parties of the transaction of all necessary documents for such an audit. In modern civil legislation, there is no legal definition of "risk". In different rules, this term is filled with different content, eventually covering a very broad conceptual horizon,

which not only makes it difficult to understand the essence of this legal phenomenon but also leads to a lack of uniform application of rules that directly or indirectly involve the category of risk.

As a result, in practice, the category of "risk" has a huge number of interpretations, which often does not allow determining the true consequences of risk circumstances and the entity which they burden [11].

The analysis allows for distinguishing two groups of opinions. Supporters of the first one tend to identify risk as an event that has negative impact on the property sphere of the parties to the legal relationship. This approach can hardly be accepted, since in this case, the concept of risk intersects in its scope with other legal categories, such as chance, force majeure. Because of this, the risk loses its specificity as an independent phenomenon. The second group of opinions, which has the largest number of adherents, identifies risk with the danger (possibility) of occurrence of adverse property consequences (losses, expenses, inability to perform a contract, etc.). The latter approach should be supported. In this case, minor linguistic differences (it should be admitted that most scientists are united in their definitions) are largely determined by the multidimensionality of such a phenomenon as risk. It is obvious that each author focuses on any of its sides.

Summarizing, it is possible distinguish those signs of risk that reflect its essence: 1) since civil law regulates property relations, the risk is expressed in adverse property effects; 2) the occurrence of such consequences is probabilistic, that is, with respect to them it is not known whether they will occur or not; 3) the cause of adverse property consequences is not the debtor's guilty actions, since in this case, the risk factor of liability would be replaced by fault.

V. CONCLUSION

In modern civil legislation, there is no legal definition of "risk". In different rules, this term is filled with different content, eventually covering a very broad conceptual horizon, which not only makes it difficult to understand the essence of this legal phenomenon but also leads to a lack of uniform application of rules that directly or indirectly involve the category of risk. In practice, the category of "risk" has a huge number of interpretations, which often does not allow determining the true consequences of risk circumstances and the entity which they burden.

As a result of the analysis, it can be concluded that, since risk is an integral part of the developed civil turnover and any private law relations, the main purpose of civil law regulation should be a competent legislative distribution of civil law risks, as well as the creation of appropriate mechanisms and the use of the potential of existing legal institutions, which should be aimed not only at eliminating the negative consequences of risk factors but also at minimizing legal risks within the undisputed jurisdiction.

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