



# Ewolucja prawa prywatnego

## Evolution of Private Law

pod redakcją  
Ewy Zielińskiej i Piotra Pinióra

Wojciech Wyrzykowski	
Modyfikacje odpowiedzialności kontraktowej zawarte w warunkach umownych Srebrnej Księgi FIDIC (EPC/„pod klucz”). Wybrane zagadnienia . . . . .	113
Alla Zelisko	
The entrepreneurial legal entity of Private Law: processes of the integration and the differentiation . . . . .	123
Summary . . . . .	129
Zusammenfassung . . . . .	130

Jakub Dolný  
Palacký University in Olomouc

## Some topical issues of commercial obligation relationships in the Czech Republic

### 1. Changes in the concept of the Law of Obligations in 2014

Czech Legal Order, and thus the area of the commercial obligation was influenced by important changes in 2014. These were caused by coming of Act No. 89/2012 Sb. (Coll.), Civil Code (hereinafter referred to as NOZ) and Act No. 90/2012 Sb. (Coll.), Act on Business Corporations (hereinafter referred to as ZOK), into effect. This year there have been completely cancelled the original Civil Code which was in force for almost fifty years and the Commercial Code<sup>1</sup>.

This change naturally influenced the area of commercial obligation relationships which were affected for a long time by dichotomy when they were divided partly into the Civil and partly into the Commercial Code(s). From the most disputable ones there may be mentioned for instance a different regulation of a contract of a future contract in selling (a) real property where it was not clear for a long time by which of the above-mentioned Codes their legal regime is governed. Practice of the courts (e.g. older decision of the Supreme Court of the CR sp. zn. /file ref./ 11 Cmo 1/96 from 20.12.1996) asserted that the legal regime is governed by the Civil Code, however the doctrine reached quite the opposite view. That was that the contract of a future purchase contract is governed in business relations by the provision of S. 289 and subseq. of the Commercial Code even though it concerned

<sup>1</sup> Act No. 40/1964 Sb. (Coll.), Civil Code, Act No. 513/1991 Sb. (Coll.), Commercial Code

Alla Zelisko

Vasyl Stefanyk Precarpathian National University in Ivano-Frankivsk

## **The entrepreneurial legal entity of Private Law: processes of the integration and the differentiation**

The legal basis of activity of the entrepreneurial legal entities of Private Law was forming, when the general concept of the development of these legal entities was absent. This situation was natural for those the soviet period, because the entrepreneurial legal entities of Private Law didn't function. The needs of market economy required the immediate creation of the legal basis for these legal entities. It has become the reason of the differences between the practice and science. The feature of the legal adjusting of these legal entities can be characterized by different systems of the entrepreneurial legal entities in the Civil code and the Commercial code of Ukraine. This is a problem of the legal technique. O.A. Serova specified, that development of legal entities must be characterized by processes of the integration and the differentiation. The differentiation is the distributing of this institute on groups. The integration is the synthesis of different methods of the legal adjusting<sup>1</sup>. It is established, that current Ukrainian legislation is the result of the process of the differentiation, because it has got many special laws. The norms of the special laws often contradict general norms of the institute of legal entities. The reason of integration's problems is the absence of the general concept of these legal entities in the general norms of the Civil and the Commercial codes of Ukraine. The main task of the systematization of legislation is the scientific development of conception of the legal adjusting of the entrepreneurial legal entities of Private Law. This conception will become an effective basis for the differentiation of the legal adjusting in the special legal acts.

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<sup>1</sup> О.А. Серова: *К вопросу о классификации юридических лиц*. „Нотариус” 2010, № 2, р. 12.

The institute of entrepreneurial legal entities is very dynamic. The changes of legal acts don't have a conceptual grounds and contradict to doctrine positions of institute of entrepreneurial legal entities.

V.A. Vasyljeva establishes, that a scientific efforts are directed on forming of the theoretical basis of current legislation<sup>2</sup>. The science has got a leading role for modern social and economic processes. The science must develop the legal facilities for accordance legal acts and modern market requirements. The goal of my research is the forming of the legal model of the status of entrepreneurial legal entities of Private Law. Such model will unite main descriptions of these legal entities and will become a "tracing paper" for new legal forms of entrepreneurial legal entities. This concept may be used for standardization of all forms of the legal entities of Private Law, which are aimed to get the income.

The peculiarity of the legal adjusting of the entrepreneurial legal entities of Private Law is characterized by the presence of three classifications of the legal entities. It must be pointed out, that it is necessary to present the list of legal entities in Ukrainian law, which are aimed to get the income. The attempt of solve this issue was made by the Constitutional Court of Ukraine, but analysis of this decision shows us the absence of the clear answer<sup>3</sup>.

The main legal act of the adjusting of the legal entities of Private Law is the Civil code. The Civil code establishes, that legal entities may be create in forms of companies, establishments and other forms, established by legal acts (article 83). I.M. Kucherenko wrote about such general conceptual definition as "company" and "establishment". The legal entities cannot exist in the form of company, because companies can be divided into entrepreneurial and non entrepreneurial companies. There is a situation, when one general conceptual form unites other forms of legal entities<sup>4</sup>. The establishments are not included into our scientific research, because they are a non entrepreneurial legal entities.

"Company" as the general conceptual form of legal entities of the Civil code of Ukraine cannot solve all the problems of the legal adjusting of legal entities. Norms of the Civil code of Ukraine regulate the legal status only of the entrepreneurial companies. The article 84 of the Civil code determines

<sup>2</sup> В.А. Васильєва: *Корпоративні правовідносини як вид суспільних відносин*. Ін: *Методологія приватного права: збірник наук. праць (за матеріалами наук-теорет. Конференції, м. Київ, 30 травня 2003 р.)*. Ред. В.А. Васильєва. Київ 2003, р. 282.

<sup>3</sup> Рішення Конституційного Суду України у справі № 1—14/2012 за конституційним поданням 53 народних депутатів України щодо відповідності Конституції України (конституційності) пункту 2 частини першої статті 7, пункту 2 розділу VIII «Прикінцеві та перехідні положення» Закону України «Про засади запобігання і протидії корупції» від 13 березня 2012 р. № 6-рп/2012.

<sup>4</sup> І.М. Кучеренко: *Організаційно-правові форми юридичних осіб приватного права*. Київ 2004, р. 23.

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At the same time of the creation of the special legal act contain exhaustive of such legal entities. A basis of these forms author supports to termine an exhaustive forms, established applied to the creation

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The corporate and other enterprises definitions of "company" identical, but still the commercial code has includes. This form include property. At the same the entrepreneurial

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<sup>5</sup> *Науково-практична відповід.* Ред. О.В. Д. 2005, р. 138.

the exhaustive list of the entrepreneurial companies (commercial companies, productive cooperative).

At the same time, the article 83 of the Civil code is installing the ability of the creation of legal entity in other forms. These forms are installed by the special legal acts. It can be stated, that norms of the Civil code don't contain exhaustive list of the entrepreneurial legal entities. The other forms of such legal entities are created by the initiative expression of founders. A basis of these forms of legal entities is the constituent documents. The author supports those scientists, who claim, that the Civil code doesn't determine an exhaustive list of the legal entities. It can be created in other forms, established by special legal acts. The norms of the Civil code can be applied to the creation of the legal entities subsidiarily<sup>5</sup>.

The other forms that are installed by the special legal acts are called enterprises. This form of the legal entities is installed by the Commercial code of Ukraine. This code is the one of the reasons of the presence of different systems of the legal entities in Ukraine.

The article 63 of the Commercial code is installing such forms of the entrepreneurial legal entities of Private Law as corporate and unitary enterprises. The corporate enterprise is created by two or more founders. The basis of this legal entity is the union of property and/or business or labor activities. The founders jointly rule, control and distribute profits of this enterprise.

The corporate enterprises include cooperatives, commercial companies and other enterprises, which are created by two or more founders. The definitions of "corporate enterprise" and "entrepreneurial company" are identical, but still there is one significant difference between them. The Commercial code has installed a non-exhaustive list of the corporate enterprises. This form includes also other enterprises, which are created by private property. At the same time, the Civil code has installed exhaustive list of the entrepreneurial companies.

The Civil code singled out only two forms of legal entities — "company" and "establishment". The author asserts that the waiver of form of enterprise cannot solve the problem of the legal regulation of entrepreneurial legal entities of Private Law. This situation is the result of exhaustive list of entrepreneurial companies of the Civil code of Ukraine.

It is established, that entrepreneurial legal entities of Private Law can functionate in other forms, than those established in other special legislation. Such legal entities have intended to profit. They usually operate in a certain specific areas. The Civil code doesn't include these types of

<sup>5</sup> *Науково-практичний коментар Цивільного кодексу України: у 2 т. Т. 1., за відповід. Ред. О.В. Дзери (кер. авт. кол.), Н.С. Кузнєцової, В.В. Луця. Київ 2005, р. 138.*

legal entities. It should be mentioned, that the Commercial code establishes purely declarative positions. Majority of norms of the Commercial code have not got a legal maintenance. For example, farms. Norms of the Civil code don't establish this form of legal entities. The chapter 11 of the Commercial code establishes, that farms are the form of private enterprise. The article 114 of the Commercial code installs that farm is the form of entrepreneurial activity of citizens, aimed to production and realization of agricultural produces. The author asserts that the Commercial code hasn't establish a civil legal status of farms. The special legal act "On the farms" doesn't solve the problems of civil legal status of the farms. The norms of this legal act are contradicting to the institute of legal entities. The farm is installed both as the subject and the object of law. For example, the article 22 establishes, that farm is an object of property — integral property complex. The article 1 establishes, that farm is a legal entity — the subject of legal relationships. The special act on farms has not got a general conception of civil status of farms<sup>6</sup>. The legal status of farm is not the unique example of the legal collisions on the status of entrepreneurial legal entities.

The modern system of forms of entrepreneurial legal entities of Private Law has not got a single scientific conception of it's civil status in it's basis. It is a main reason of the existing problem of legal adjusting of these legal entities in Ukraine.

It is established, that the Civil code and the Commercial code don't install a compatible conception of legal adjusting of legal entities of Private Law, which aimed to income. As a result, norms of special acts on forms of entrepreneurial legal entities of Private Law have got a rejections, because general norms of legal acts must be specified in the hypothesis and disposition of a special legal norms<sup>7</sup>.

These problems need a proper scientific development of general legal model of the entrepreneurial legal entities of Private Law. Such legal model should unite different systems of legal entities and should become a basis for creation of new forms of entrepreneurial legal entities.

The definition of the "entrepreneurial legal entities of Private Law" should be based on the forming of the list of it's legal descriptions of such subjects of legal relationships. The first distinguishing feature of these legal entities should become the goal of its activity, which is to get an income. All these legal entities are created by initiative of founders. Its basis is the union of property of founders. It is a second feature. These both features

<sup>6</sup> А.В. Зеліско: *Правовий статус фермерських господарств як юридичних осіб приватного*. „Право України” 2010, №5, р. 149.

<sup>7</sup> В.І. Риндюк: *Проблеми законодавчої техніки в Україні: теорія та практика* [відп. ред. О.І. Ющик]. Київ 2012, р. 62.

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<sup>8</sup> І.В. Спаси  
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<sup>9</sup> В.А. Васи  
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Ред. В.В. Луця. Ки

need investigation of the mechanism of the creation of property future legal entity. The property of entrepreneurial legal entities is formed by property holdings of founders. Feature of this mechanism was investigated by I.V. Spasibo-Fatyeyeva, who established "modification of objects" in processes of creation of entrepreneurial legal entities. The founder forfeits the right of property, but he gets an aggregate of property and unproperty rights — corporate rights<sup>8</sup>. The special legal property connection is created between entrepreneurial legal entities and their founders (participants). The legal property connection is a main feature of all the entrepreneurial legal entities of Private Law. In the theory of corporate law this legal property connection is determined as a description of corporate legal entities. V.A. Vasilyeva establishes, that legal entity is created by the realization of founder's rights. A legal entity is dependent upon a founder. At the same time, a legal entity and a founder are independent subjects of legal relationships. The author asserts about a presence of special public connection, which named a corporate rights. The form of legal entity does not influence to corporate connection, but will be determine contents of corporate rights of subjects of legal relationships<sup>9</sup>.

The expounded positions allow forming a list of the main descriptions of the entrepreneurial legal entities of Private Law. These descriptions are the basis of authentication of form of legal entity as an entrepreneurial legal entity of Private Law. The main descriptions of entrepreneurial legal entities are as follows: a goal of these legal entities — to get an income; creation by initiative of founders; it's basis is the union of property of founders; the property of the entrepreneurial legal entities is formed by property holdings of founders; the special legal property connection between entrepreneurial legal entities and their founders (participants); the basis of functioning is constituent documents.

The positions of this scientific article allow to form an aggregate of descriptions, which is the basis of standardization of all different system of the entrepreneurial legal entities: an entrepreneurial companies by the Civil code, enterprises by the Commercial code, other forms of legal entities by special legal acts. These positions determine a possibility to develop a general legal model of the entrepreneurial legal entities of Private Law. Such legal model is to become an effective mechanism for systematization of current legislation in this specific area.

<sup>8</sup> I.V. Спасибо-Фатеева: *Правовий аспект корпоративної власності*. In: I.V. Спасибо-Фатеева, О. Кібенко, В. Борисова [За ред. проф. I.V. Спасибо-Фатеевої]: *Корпоративне управління: Монографія*. Харків 2007, р. 250.

<sup>9</sup> В.А. Васильєва: *Поняття та юридична природа корпоративних відносин і корпоративних прав*. In: *Охорона прав суб'єктів корпоративних відносин: монографія*. Ред. В.В. Луця. Київ 2012, р. 11