Regulation of Entrepreneurship in the Russian Federation

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The *Civil Code of the Russian Federation* ("C.C.R.F.") stands in stark contrast with the set of rules that previously governed the U.S.S.R. The innovative and revolutionary quality of the C.C.R.F. is especially revealed in its treatment of entrepreneurial activity. In particular, buttressed by the *Constitution of the Russian Federation* and statutory laws, the C.C.R.F. establishes a wide spectrum of possibilities for entrepreneurial activity with the new Russia.

The author begins his analysis with a historical overview of the relationship between civil and commercial law in Russia from the pre-revolutionary draft code through to its current incarnation. The pervasive influence of the notion of "monism" (the unity of civil and commercial law) is emphasized. Next, the author moves on to a discussion of who qualifies as an entrepreneur under the C.C.R.F. as well as an exploration of who may engage in entrepreneurial activity. This discussion highlights the advantages and disadvantages for foreigners wishing to pursue entrepreneurial activities in Russia. The author then focuses on the C.C.R.F.'s regulation of issues related to bankruptcy and insolvency including breach of contract, liability of the debtor, protection of creditor interests, and special norms for the protection of third parties. The author concludes with a consideration of a range of rights enjoyed by entrepreneurs under the C.C.R.F. Of particular importance are the rights of ownership of land, property, economic management, and operative administration. Also, an identification of the various kinds of entrepreneurial contracts available under the C.C.R.F. is provided.

With reference to particular codal provisions and the significance of those provisions for entrepreneurs, the author demonstrates that the C.C.R.F. provides the bedrock of freedom of contract for entrepreneurial relations.

Il existe une différence flagrante entre le *Code civil de la Fédération russe* et les lois qui ont gouverné l'U.R.S.S. Le caractère innovateur et révolutionnaire du Code civil est surtout apparent lorsque l'on observe son approche aux activités animées de l'esprit d'entreprise. Le Code civil, soutenu par la *Constitution de la Fédération Russe* et les lois statutaires, établit une importante gamme de possibilités pour ces activités au sein de la nouvelle Russie.

L'auteur démarre son analyse avec un survol historique de la relation entre le droit civil et le droit commercial en Russie, du projet de code prérévolutionnaire à sa forme actuelle. L'accent est placé sur l'influence répandue de la notion du «monisme» (l'unité des droits civil et commercial). L'auteur poursuit ensuite avec une discussion sur ce qui constitue un entrepreneur sous le Code civil ainsi qu'une étude des personnes éligibles pour s'engager dans des activités animées de l'esprit d'entreprise. Cette discussion souligne les avantages ainsi que les inconvénients pour les étrangers qui désirent poursuivre de telles activités en Russie. L'auteur se concentre ensuite sur la réglementation dans le Code civil des problèmes concernant la faillite et l'insolvabilité, incluant la violation d'obligations contractuelles, la responsabilité du débiteur, la protection des intérêts du créditeur et des normes spéciales pour la protection de tierces parties. L'auteur conclut en considérant l'étendue des droits dont peuvent profiter les entrepreneurs sous le Code civil. Sont d'importance particulière les droits de propriété de terrains, d'administration économique, d'administration en vigueur et le droit des biens. Est aussi fournie une identification des différents types de contrats d'entreprise offerts sous le Code civil.

En se référant à des articles spécifiques du Code et à leur importance pour les entrepreneurs, l'auteur démontre que le Code civil fournit la base de liberté pour les relations d'entreprise.

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Introduction: Pre-Revolutionary Visions of Commercial Law

In pre-revolutionary Russia, civil law literature was dominated by the idea of "monism", that is, the unity of civil and commercial law. This idea was most consistently expressed in the works of G.F. Shershenevich. He clearly distinguished public commercial law—which involves regulating the relations between the State and persons who are engaged in trade—from private commercial law—which governs the relationship between private persons engaged in commerce. According to Shershenevich, this area of law is "nothing more than a monographic development of a civil law section resulting from practical interest."[1]

Shershenevich strongly criticized those who considered commercial law as a complex of norms which were applied only in trade relations.[2] He believed that

> such kinds of norms ... are very few, and they are too fragmentary to create something integral on that basis. [He asked] what ideas could one get on a commercial purchase under the French law on the basis of a single article (article 109) in the French Commercial Code devoted to this key commercial transaction?[3]

The development of the first draft of Russia's Civil Code—which appeared in the last quarter of the 19th century—was also influenced by monism. Unlike the model seen in Germany, France, and a number of other countries which used to have parallel civil and commercial codes, the draft version of Russia's Civil Code (including the last version submitted to the State Duma) was created with the aim of regulating civil relationships in broad terms. Under this draft, most norms were uniformally applicable whether or not the relationships involved entrepreneurs. One of the basic sections of the draft—in particular, Book 5 on the "Law of Obligations"—included chapters that focused on contracts in which at least one of the parties was an entrepreneur, for example, in the transportation of goods, insurance, etc. The same section contained chapters on the legal status of the entrepreneur, including various kinds of companies, partnerships, and labour cartels (*i.e.*, cooperatives).

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[1] G.F. Shershenevich, *Course in Commercial Law*, vol. 1 (Moscow: Spark, 1907) at 10.

[2] A.F. Fyodorov referred to, *inter alia*, the cosmopolitan nature of commercial law which allows one to more easily overcome the national particularities of the civil law of a certain country. See A.F. Fyodorov, *Commercial Law* (Odessa, 1911) at 14-15 citing civil law jurists such as Gierke, Cosack, Goldschmidt, Molinier, Valabregue and Thallr.

[3] *Supra* note 1. Views similar to those of Shershenevich are also expressed by other authors in their research works on commercial law. See especially V.S. Udintsev, *Russian Civil Commercial and Industrial Law* (St. Petersburg, 1917); L.S. Tal, *Essays on Industrial Law* (St.Petersburg, 1917); and A.I. Kaminka in the book *The Basics of Business Law* (Petrograd, 1917) who limited the subject of this area of law to entrepreneurship without having mentioned a certain special "entrepreneurial law". For him, the total concept boiled down to the necessity to distinguish a special figure of law: the entrepreneur. He found the roots for such a necessity in a famous instruction of Katon to his son: "It is pardonable for a widow not to multiply the property she inherited, but the son should pass on to his children twice as much than he himself inherited."

I. Strengths and Weaknesses of Post-Revolutionary Codification

In the early 1900s, a draft Civil Code was prepared by Russian legislators. However, it was never approved, primarily because of the outbreak of World War I and the subsequent October Revolution. Immediately following the Revolution, numerous acts were adopted aimed at the nationalization of banks and major enterprises, as well as establishing government control over small businesses. It was no mere coincidence that one of the decrees published at the time was titled "On Legal Restrictions Established for Commercial and Commercial-Industrial Enterprises."[4]

At the time, however, the situation in industry, commerce, and particularly in agriculture led the State to initiate a transition to a "new economic policy". Its essence was reflected in the "revival of capitalism" which implied the creation of small private enterprises, the development of which was rigidly limited to private commerce. At the same time, the need to open the way for foreign capital in the form of concessions was recognized. To this end, stable legislation was ensured for the benefit of foreign investors, and guarantees were provided against the encroachment of the State on their property. All of this led to an urgent necessity to codify legal principles with respect to the whole body of property relations that arose in the newly forming market. For this purpose, the first *Civil Code of the Russian Soviet Federated Socialist Republic* was adopted on December 31, 1922.[5]

To a certain extent, the 1922 Civil Code reproduced the norms of the pre-revolutionary draft Civil Code. Several new provisions also appeared that established the unconditional priority of state ownership—including state enterprises—and thereby introduced various kinds of restrictions on private capital. For example, although article 5 of the 1922 Civil Code granted each citizen the right to "organize industrial and commercial enterprises," article 54 stipulated that commercial and industrial enterprises may only be the object of private ownership where the number of employees did not exceed the maximum established by law (*i.e.*, twenty employees). To achieve the State's goals, the 1922 Civil Code declared civil rights—and consequently the rights of entrepreneurs—to be "protected by the law with the exception of instances when their execution runs contrary to their social and economic purpose." This formula gave the courts a broad discretion to limit the civil rights of private entrepreneurs.

Under direct pressure from the State, private capital gradually retreated. The further development of the country led to a situation where private entrepreneurship was ultimately not permitted to develop. As a result, most of the nation's production revenues—up to 90%—fell into state ownership. Apart from the State, only cooperatives were engaged in production and commercial activity. The 1936 *Constitution of the Russian Federation* did not include private ownership in the list of permitted forms of ownership. Thus, apart from the cooperatives, it was evident that only one entrepre-

[4] Presidential Decree No. 47 (1918), item 561.

[5] Hereinafter 1922 Civil Code.

neur remained in the country—the State itself. As such, commercial relations were mainly restricted to those between organizations—each of which belonged to the State—and between these organizations and individuals.

A direct consequence of joining, in a single person, the sovereign and the owner of the greater bulk of property in the commercial transaction was that vertical relations typical of public law extended to the realm of private law. The area of contracts provides such an example. The legislator recognized that the basis for contract could be a plan approved by an agency superior to the State organization (*i.e.*, a legal entity). Such planned arrangements would necessarily specify who was obliged, or at least received the right to conclude the contract and prescribe its contents.

Under such conditions, the 1922 Civil Code lost its significance. It turned into a Code exclusively for the protection of individuals. In this regard, the 1936 *Constitution of the Russian Federation* recognized the right of individuals to "private personal ownership" which only meant the possibility to own a residential home the size of which could not exceed sixty square meters, a secondary home, household items, and items of personal use and convenience.

The decline of the 1922 Civil Code's regulatory role in the relations between organizations was particularly reflected in the fact that judgments of the court of arbitration on disputes between socialist organizations made no reference to it and effectively refused to be guided by it. Instead, relations between socialist organizations became specially regulated by "normative" acts. Such acts took the form of separate laws, government resolutions, and thousands of instructions from ministries and departments. For example, in only one area of construction, over 1,600 legal acts were issued.

Accordingly, there was an urgent need to change the 1922 Civil Code. Meanwhile, the opposition between the "dualists" (those who recognized two independent fields of civil and business law) and the "monists" continued.

II. The Dualist/Monist Opposition and its Influence on Reform

A. Dualism

The dualist camp became known as the "school of business law." Its representatives believed that planned and statutory relations between enterprises and state bodies—as well as property relations as between enterprises—made up an integral system. With respect to contracts, therefore, a firm belief was expressed that there was an apparently inseparable bond between planned, statutory, and property elements, since all contributed to the core of undivided economic relations.[6] The recognition of the integrity of vertical relations—*i.e.*, between enterprises and the overarching state body—and horizontal ones—*i.e.*, at the level of enterprises—led to the inevitable

[6] V.V. Laptev, *Subject and System of Economic Law* (Moscow, 1969).

conclusion that it was necessary to create, along with the 1922 Civil Code, a separate commercial code.

Some of the commercial code supporters maintain their convictions to this day. In a recently published work, V.I. Martemyanov advocated the independence of commercial law and described it as

> an aggregate of norms regulating entrepreneurial relations, other relations firmly bound thereto, including non-commercial relations, as well as relations in the area of state regulation of the economy aimed at securing the interests of the State and society.[7]

The same book proposed the inclusion in economic law of both vertical and horizontal relations which arise, for instance, between two workshops in the same plant. It is noteworthy that a number of works appearing today speak not only of economic law, but also of commercial law, business law, or entrepreneurial law. This does not diminish the fact that some of these texts consistently follow the idea of preserving the integrity of the civil law relating to entrepreneurial activity (*i.e.*, commercial, business, and economic).[8]

B. Monism

In contrast, representatives of the monist school—among them prominent civil lawyers S.N. Bratus, V.P. Gribanov, O.S. Ioffe, G.K. Matveyyev, E.A. Fleishits, R.O. Khalfina, and their numerous followers—proceeded from the necessity to clearly distinguish vertical and horizontal relations, regulating the former by way of administrative law and the latter by way of civil law. Therefore, the idea developed to create a single civil code aimed at the regulation of complex horizontal property relations, *i.e.*, relations based on the principle of equality regardless of whether individuals or enterprises participate therein. Comparing both these trends, one could finally conclude that the co-existence of a command-style administrative system and a planned economy would aim to perfect certain legal structures. At the same time, the followers of the civil law trend strove to revive basic traditional civil law principles with respect to relations that could be called "entrepreneurial".[9]

III. Freedom of Entrepreneurship and Supremacy of the Civil Code

The second *Civil Code of the Russian Soviet Federated Socialist Republic*,[10] effective in 1964, like its predecessor was based on the idea of preserving the integrity

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[7] V.I. Martemyanov, *Commercial Law—Course Lectures*, vol. 1 (Moscow, 1994) at 1.

[8] See *e.g.* V.F. Popondopulo & V.F. Yakovleva, *Commercial Law* (St. Petersburg, 1997) at 4ff.

[9] See S. Ioffe, *Development of Civil Law Thinking in the U.S.S.R.* (Milano: Dott A. Giuffrae, 1989). This book is to a considerable degree devoted to the difficult struggle between the supporters of "commercial law" (economic law) and their opponents.

[10] *Vedomosti S"ezda Narodnykh Deputatov R.F. i Verkhovnogo Soveta R.F.* (1964) No. 24, item 406 [hereinafter 1964 Civil Code].

of civil law. On its face, the 1964 Civil Code's adoption could be understood as the victory of monism. There were, however, special articles that dealt with obligations arising from the acts of planning, fixed the priority of the plan to contract, and recognized the concept of a legal entity only with respect to "socialist organizations". Solutions of this sort were predetermined by the respective norms of the 1936 *Constitution of the Russian Federation* effective at the time. There were quite a number of provisions in the 1964 Civil Code based on the principle of equality of participants in business transactions, thus eliminating the absolute priority of socialist ownership previously known. For example, a single regime was established for the protection of privately owned property by all participants. Having indicated the existence of contracts based on plans, the 1964 Civil Code granted enterprises the right to conclude contracts (beyond the sphere of the plans) at their own discretion, including independently selected contract models—*i.e.*, models listed in the 1964 Civil Code and other laws—as well as innominate contracts. The expansion of the law of obligations and, within its framework, of the law of contracts equally applicable to planned and non-planned contracts was of considerable importance.

Though the 1964 Civil Code included typically entrepreneurial relations (*e.g.* supply contracts, building construction contracts, etc.), the concepts of "entrepreneurial law" or "entrepreneurs" were absolutely foreign to it. Indeed, one of these concepts was used for the first time in the Federal law *On Enterprises and Entrepreneurial Activity*[11] of December 25, 1990. This, in particular, recognized that independent activity of individuals and their associations based on the initiative thereof and aimed at receiving profit should be deemed entrepreneurial activity. The literature of that time distinguished four characteristic features of such activity: "initiative and independence, personal risk and liability, profit maximization, and ... mandatory registration."[12]

Article 34 of the 1993 *Constitution of the Russian Federation*, adopted on December 12, 1993 ("Russian Constitution") was expected to play a special role in the development of the legislation. The provision states that "[e]veryone shall have the right to freely use his or her abilities and property for entrepreneurial and any other economic activity not prohibited by the law." At the same time, the Russian Constitution specifically provides for only one restriction in article 34(2), namely, the prohibition of "economic activity aimed at monopolization or unfair competition." If, for instance, the European Court of Justice considers the principle of freedom of entrepreneurship to be a general principle of law implying (i) freedom to choose one's occupation or profession; (ii) freedom from illegal competition; and (iii) the general freedom to perform anything not prohibited by the law, then the "above articles from the

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[11] *Vedomosti S"ezda Narodnykh Deputatov R.S.F.S.R. i Verkhovnogo Soveta R.S.F.S.R.* (1990) No. 30, item 418.

[12] A.F. Popondopulo, *Legal Regime of Entrepreneurship* (St. Petersburg, 1991) at 15-20.

Russian Constitution and the [new] Civil Code allow, without any reservations, the principle of freedom of entrepreneurship."[13]

The concept of entrepreneurial activity, which presupposes the creation—if necessary—of a special legal regime, is broadly applied with respect to new economic conditions. Having recognized that civil legislation covers contractual and other obligations, as well as other property and personal relations based on equality, freedom of will, and private property rights of economic actors, article 2(1)(iii) of the new *Civil Code of the Russian Federation*[14] specifically states that "[c]ivil legislation regulates the relations between persons engaging in entrepreneurial activity." This means, among other things, that the fundamental principles of civil legislation are fixed by the C.C.R.F., such as recognizing the equality of the participants in the relations regulated by it, respect for private ownership, freedom of contract, the impermissibility of arbitrary interference with anyone in private affairs, the necessity of the unhindered realization of civil rights, and the insurance of judicial protection and rehabilitation of rights that have been infringed.[15]

The importance of the C.C.R.F. in the regulation of entrepreneurial relations is confirmed by reference to statistical data. Two of the three parts, which have already been adopted, contain 1,109 articles, and most provisions, with few exceptions, state general norms to be applied equally to relations involving any subjects of civil law, including those engaging in entrepreneurial activity. The above approach supports the conclusion that the "Civil Code is the Code of Entrepreneurs to the same degree as of the citizens."[16] It is also noteworthy that the C.C.R.F. itself refers to dozens of statutes that mainly apply to entrepreneurial activity.

While defining the role of the C.C.R.F. as a source of law, it is important to remember that while it is a regular federal law, it enjoys the status of *primus inter pares* vis-à-vis other federal statutes. According to article 3(5) C.C.R.F., this means that in case of contradictions between the norms contained in the C.C.R.F. and those found in any other law, the norms of the C.C.R.F. are given priority. If a dispute arises, the courts must apply the relevant article. That is the reason why the President of the Russian Federation repeatedly refused to sign the law adopted by the Duma—as required by the Russian Constitution—claiming that the law was inconsistent with C.C.R.F. principles. The only exceptions are instances where the C.C.R.F. itself makes special indication of giving priority to a certain statute. For example, article 970 C.C.R.F. in-

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[13] G.A. Gadjiyev, *Protection of Fundamental Economic Rights and Freedoms of Entrepreneurs Abroad and in the Russian Federation* (Moscow, 1995) at 65.

[14] Part 1 was enacted in 1994: *Sobranie zakonodatelstva R.F.* (1994) No. 32, item 3301; and Part 2 was enacted in 1995: *Sobranie zakonodatelstva R.F.* (1996) No. 5, item 410 [hereinafter C.C.R.F.]. For the English-language translation, see P.B. Maggs & A.N. Zhiltsov, eds., *The Civil Code of the Russian Federation*, trans. P.B. Maggs & A.N. Zhiltsov (Armonk, N.Y.:, M.E. Sharpe, 1997).

[15] Art. 1(1) C.C.R.F.

[16] M.I. Braginsky & V.V. Vitryansky, *Law of Contracts: General Provisions* (Moscow: Statut, 1997) at 99.

dicates that the rules of the C.C.R.F. relating to types of insurance stated therein are applicable only to the extent that statutes on these types of insurance do not provide otherwise.

IV. Recognition of Natural and Legal Persons as Entrepreneurs

The C.C.R.F. created the prerequisite for establishing a special regime for the purpose of entrepreneurial activity. Attaching special significance to creating such special norms, the drafters considered it necessary to first and foremost identify the concept in question. Article 2(1)(iii) C.C.R.F. proceeds from the position that entrepreneurial activity is independent activity done at one's own risk "directed at the systematic receipt of profit from use of property, sale of goods, performance of work, or rendering of service by persons registered in this capacity by the procedure established by a statute."

Under the C.C.R.F. both natural and legal persons may engage in entrepreneurial activity. In this regard, the concept "entrepreneur" is used with respect to citizens in appropriate cases. Thus, "entrepreneur" and "entrepreneurial activity" are connected concepts. This means that natural persons may engage in entrepreneurial activity only if they are recognized as entrepreneurs in accordance with the procedure established by law—*i.e.*, that they have undergone the necessary registration procedure.

A citizen attains civil law dispositive capacity and, consequently, becomes an entrepreneur at the age of eighteen.[17] The C.C.R.F., however, actually introduced the concept of "emancipation" with the sole purpose of lowering the age of persons eligible to engage in entrepreneurial activity.[18] It is implied that the right to engage in this activity is granted to those who reach the age of sixteen, and the consent of both parents is required; but where there is none, a judgment of the court is necessary. An emancipated person becomes a rightful entrepreneur which imports, among other things, personal liability for transactions performed. Creditors have no right to file any claims on the debts of emancipated persons against their parents.

The situation is different with respect to legal entities. First of all, the term "entrepreneur" is rarely applied to them. For example, article 929(3) C.C.R.F. allows the insurance of entrepreneurial activity only if "entrepreneurs" act as insurers.

Citizens are given an opportunity to engage in entrepreneurial activity both with and without the formation of a legal entity. Article 23 C.C.R.F. indicates that a registrar may refuse to register a citizen as an entrepreneur only if the person does not have the necessary civil law dispositive capacity—*i.e.*, minor age, poor health, mental disorder, and abuse of alcohol or drugs are all regarded as impairing civil law dispositive capacity or having limited dispositive capacity—or if the entrepreneurial activity in question is prohibited by law—*e.g.* due to a state monopoly. Therefore, a citizen

[17] Art. 21(1) C.C.R.F.
[18] Art. 27 C.C.R.F.

willing to engage in entrepreneurial activity has the option either to create a legal entity—*e.g.* to organize a full partnership—or to exercise the same kind of activity without forming a legal entity. In the latter instance, citizens act on their own behalf and are personally liable for any debts.

As an alternative to the personal model, the C.C.R.F. provides for a special legal entity designed for participation in entrepreneurial activity. These are "commercial organizations" which, according to article 50(1) C.C.R.F., are "[o]rganizations seeking to make profit as the basic purpose of their activity." Commercial organizations may be created only in the specified forms. There are seven such forms: (i) full partnership; (ii) limited partnership (its equivalent in other countries is "commandit" partnership);[19] (iii) joint stock company; (iv) limited liability company; (v) supplementary liability company; (vi) state and municipal enterprise; and (vii) a production cooperative. One could point to another difference in entrepreneurial activity by citizens on the one hand, and legal entities on the other. In contrast to citizens, the C.C.R.F. allows legal entities to participate in entrepreneurial activity where such entities are not actually commercial organizations. These organizations are those that the C.C.R.F. itself included in the category of "non-commercial organizations". There are, however, some important restrictions. For example, it is necessary that such activity serves the purpose for which the organization was created, and accurately corresponds to this purpose.[20]

The C.C.R.F. names five types of non-commercial organizations: (i) consumer cooperative; (ii) societal and religious; (iii) funds; (iv) institutions; and (v) associations and unions. In contrast to commercial organizations, the list of non-commercial organizations could be expanded, but only by statute. An example of the statutory extension of non-commercial organizations is seen in the Federal law *On Non-Commercial Organizations*[21] of January 12, 1996 which named two more types of non-commercial organizations: (i) non-commercial partnerships; and (ii) autonomous commercial organizations.

When the C.C.R.F. means both commercial and non-commercial organizations, in all instances it uses the term "persons engaging in entrepreneurial activity." Whenever the aim is to apply the norm to legal entities which are commercial organizations, the term "entrepreneur" may be used; specifically, in instances of special regimes established for the commission agent in article 995 C.C.R.F., the contractor in article 721(2), and participants in the contract on joint activity in article 1041(2) C.C.R.F.

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[19] For some of the listed types of non-commercial organizations, the issue of how to exercise entrepreneurial activity is resolved in a special way. For instance, associations and alliances as such cannot engage in entrepreneurial activity, and an institution may receive the respective right only on condition that there is a direct indication to it in its constituting documents.

[20] Art. 50(3)(iii) C.C.R.F.

[21] *Sobranie zakonodatelstva R.F.* (1996) No. 3, item 145.

V. The Role of the Foreign Entrepreneur

Along with residents, non-residents—both legal and natural persons—may engage in entrepreneurial activity. The general rule is formulated in article 2 C.C.R.F. It is recognized that the national regime, which is rather conventional, applies to foreign persons. It is effective regardless of the start of mutuality. Restrictions for foreigners—as compared to the general regime established for citizens and legal entities of the Russian Federation—are deemed valid only if they are introduced by a law of the Russian Federation. This means that neither the President of the Russian Federation, the Government, Ministry, department, or similar bodies of power and administration have the right to introduce restrictions. In addition, restrictive norms applicable to entrepreneurial activity are exceptional in nature, and are not subject to broad interpretation.

Certain articles of the *Air Code of the Russian Federation*[22] serve as an example of such restrictive norms. These norms provide that the creation of an aviation enterprise in the territory of the Russian Federation with the participation of foreign capital is allowed on condition that the foreign participatory share does not exceed 49% of the charter capital. In addition, according to article 16 of the Air Code, the top manager of the enterprise must be a citizen of the Russian Federation, and the proportion of foreign citizens in the management body of the joint enterprise must not exceed one-third of the total. Article 63(5) of the Air Code indicates the kinds of activity in which a foreign enterprise—whether an international agency or a foreign individual entrepreneur—is prohibited from pursuing in the territory of the Russian Federation.

In certain instances, restrictions on entrepreneurial activity with respect to foreigners may be based on international acts. For example, the agreement between the Russian Federation and the United States "On Encouragement and Mutual Protection of Capital Investments" (not yet ratified) provides that each party is entitled to establish or retain exemptions of a restrictive nature from the national treatment of foreigners in certain fields or areas of activity. The list of such kinds of restrictions included seventeen and sixteen items for the Russian Federation and the United States, respectively.

Exemptions from the national treatment of foreigners may not only be restrictive, but also beneficial. The Federal law *On Foreign Investment*[23] of July 4, 1991 stipulates that such foreign investments are not subject to nationalization and cannot be subject to seizure or confiscation, with the exception of those rare instances where such measures are taken for the public benefit. It is specifically mentioned, in article 7 of

[22] *Sobranie zakonodatelstva R.F.* (1997) No. 12, item 1383 [hereinafter Air Code].
[23] *Sobranie zakonodatelstva R.F.* (1991) No. 29, item 1008.

the Federal law *On Foreign Investment*, that in the event of nationalization or seizure, the foreign investors shall be entitled to fair and sufficient compensation.[24]

As distinct from restrictions, benefits for foreign participants in entrepreneurial activity may be established not only by statute, but also by other means. There is, for instance, the Edict of the President of the Russian Federation "On Benefits on the Payment of Import Customs Duty,"[25] as well as the value added tax with respect to goods imported by foreign investors as a contribution to the charter capital of enterprises with foreign investments.

VI. The Legislative Treatment of Entrepreneurship

The norms comprising entrepreneurial legislation primarily cover issues related to legal entities, the right of ownership, and contracts. Before the new civil legislation was adopted, the principle of special legal capacity was applied to all types of legal entities. The essence was that legal entities could complete only those transactions which would conform to the purposes set out in the legal entity's constituting documents. The C.C.R.F. retained this principle with respect to non-commercial organizations, and state and municipal enterprises. In contrast, commercial organization-type legal entities enjoy "general legal capacity" which means that they may engage in any kind of activity not prohibited by law—including entrepreneurial activity—unless their constituting documents impose certain limitations. According to article 174 C.C.R.F., contracts concluded without taking account of such limitations—*e.g.* when the charter contains a prohibition to perform these particular kinds of transactions—may be deemed invalid only if it is proven that the other party to the transaction knew, or clearly should have known, about these limitations. Otherwise, deviation from the constituting documents in this sense does not invalidate the transaction.

There is another exception to the rule of "general legal capacity". This is that certain types of activity require a license that gives the legal entity the right to exercise entrepreneurial activity. The specification of the C.C.R.F. is that only the law may establish the kinds of activity which require a license. Instructions on introducing licensing for certain kinds of activity contained in decrees of the Russian Federation have no legal validity and must not be enforced by courts. According to article 173 C.C.R.F., a contract executed in violation of the requirement for mandatory licensing is deemed to be beyond the legal capacity of the unlicensed legal person, and may be deemed invalid on the suit of counter-agents themselves, as well as by the state body whose functions include control and supervision of the activity of the legal entity in question.

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[24] See M. Boguslavsky, *Foreign Investments: Legal Regulation* (Moscow, 1996) at 77ff.; and N.G. Doronina & N.G. Semilyutina, *Legal Regulation of Foreign Investments in Russia and Abroad* (Moscow, 1993).

[25] Presidential Edict No. 40 (27 September 1993) *Sobranie Aktov R.F.* (1993), item 3740.

Another C.C.R.F. innovation is to render irrelevant the previous limitation on levying execution on the debts of a legal entity against certain types of property belonging to it. Specifically, the *Code of Civil Procedure of the Russian Federation*[26] prohibited levying execution against real estate belonging to "socialist organizations". For enterprises, this limitation was expanded by a prohibition on levying execution against the property that was necessary for the normal operation of the enterprise—*e.g.* raw materials or equipment belonging to a debtor plant. The C.C.R.F.—following the laws *On Ownership* of the U.S.S.R. of March 6, 1990,[27] and of the Russian Federation of December 24, 1990[28]—ensured the interests of creditors by granting them the possibility of levying execution against any property belonging to a legal entity. The Federal law *On the Execution Procedure*[29] of July 21, 1997 established the process for levying execution against the property of a debtor to execute the judgment of a court. In particular, it provides that execution must be levied as first priority against the monetary funds of the debtor (in rubles and foreign currency) and, if these are insufficient, against the rest of the debtor's property with the exception of the property withdrawn from commerce which cannot be sold, exchanged, mortgaged, etc. The debtor is granted the right to specify which property should be sold first, and the sale is carried out through an auction.

The Russian Federation, subjects of the Russian Federation, and municipal entities act in relations regulated by civil law on an equal footing with citizens and legal entities. In all such cases, norms are applied to them which determine the procedure for participation in the civil law relations of legal entities, unless the law provides otherwise. One such law refers to liability for the debts of the aforementioned actors. Article 126 C.C.R.F. provides that levying execution on land and other natural resources belonging to the Russian Federation, subjects of the Russian Federation, and municipal entities is allowed only if it is specifically provided for by law. There is no such provision in the current legislation, therefore, there should be no possibility of levying execution against natural resources belonging to the aforementioned subjects.

VII. Liability

The liability of a legal entity is, according to the general rule, exclusive.[30] This means that the legal entity is liable for its own obligations. Yet the C.C.R.F. allows for certain situations where the liability of a legal entity may be subsidiarily placed on

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[26] *Vedomosti S"ezda Narodnykh Deputatov R.F. i Verkhovnogo Soveta R.F.* (1964) No. 24, item 407, as am. by *Sobranie zakonodatelstva R.F.* (1995) No. 49, item 4696.

[27] *Vedomosti S"ezda Narodnykh Deputatov S.S.S.R. i Verkhovnogo Soveta S.S.S.R.* (1990) No. 11, item 164.

[28] *Vedomosti S"ezda Narodnykh Deputatov R.S.F.S.R. i Verkhovnogo Soveta R.S.F.S.R.* (1991) No. 30, item 418. See also M.I. Braginski & A.A. Rubanov, *The Law on Ownership in the U.S.S.R.* (Moscow, 1991) at 69-75.

[29] *Sobranie zakonodatelstva R.F.* (1997) No. 30, item 3591.

[30] Art. 56 C.C.R.F.

other persons. Such liability usually arises from the specific nature of the legal entity. For instance, the participants in full partnership and full partners in the limited liability partnership (*i.e.*, commandit partnership) bear unlimited liability for all their property in instances when the partnership itself does not have sufficient funds to settle its accounts with creditors.[31] Similarly, the owner of the institution is liable for the debts of the institution lacking monetary funds.

The C.C.R.F. establishes a general rule whereby principal and subsidiary companies bear joint and several liability when the subsidiary has executed mandatory instructions on behalf of the principal.[32] In the event of insolvency due to the directives of the parent company (or partnership), the latter shall be liable for the debts of the subsidiary company.[33] However, article 6 of the Federal law *On Joint Stock Companies*[34] establishes a somewhat different rule. It provides that insolvency shall be deemed to have occurred through the fault of the parent company only if the latter exercised its power to instruct the subsidiary to act in a certain manner, "having been clearly aware that the insolvency of the subsidiary would arise from these actions."

There is a considerable difference between these two regimes. The law recognizes as a condition for liability of the principal not just culpability, but culpability with ill intent. Given the priority of the C.C.R.F., when considering the claims of creditors a court would have to go beyond the boundaries stated in the law. In other words, it will have to impose liability for the debts of the subsidiary on the principal company even when the fault of the principal company takes the form of mere negligence.

The Federal law *On Insolvency (Bankruptcy)*[35] of January 8, 1998 contains numerous innovations which aim to assist a legal entity in a difficult financial situation; and if bankruptcy proves to be inevitable, to provide maximum protection to the creditors of the bankrupt entity. The new law generalized the applicable practices under the previous Federal law *On Insolvency (Bankruptcy) of Enterprises*[36] of November 19, 1992.

VIII. Private Ownership

Article 8(2) of the Russian Constitution declares that in the Russian Federation, private, state, municipal, and other forms of ownership are recognized and equally protected. It is significant that this norm not only mentions private ownership which

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[31] Arts. 75, 82(5) C.C.R.F.

[32] Art. 105(2)(ii) C.C.R.F.

[33] Art. 105(2)(iii) C.C.R.F.

[34] *Sobranie zakonodatelstva R.F.* (1992) No. 10, item 133.

[35] *Sobranie zakonodatelstva R.F.* (1998) No. 2, item 222.

[36] *Vedomosti S"ezda Narodnykh Deputatov R.F. i Verkhovnogo Soveta R.F.* (1993) No. 1, item 6. This law takes into account contemporary legislation dealing with bankruptcy proceedings, both continental and Anglo-American. See V.V. Vitryansky, "Insolvency and Bankruptcy Law Reform in the Russian Federation" (1999) 44 McGill L.J. 409 (in this same issue).

was rejected by the 1936 *Constitution of the Russian Federation*, but also places it first on the list of forms of ownership—ahead of state and municipal ownership. Article 212 C.C.R.F. adopts the same order of priority. In addition, article 213 C.C.R.F. explains the content of private ownership as the ownership by natural and legal persons. The latter are understood to be economic companies and partnerships, as well as cooperatives, *i.e.*, those who are the key participants in entrepreneurial relations. One of the conditions for the development of commercial relations established by the C.C.R.F. is the presumption that both natural and legal persons are equally entitled to own any object and in any quantity. Exceptions to this rule may be established only by law.

The C.C.R.F. specifically singles out land among the objects of the right of private ownership, which since the Revolution fell within exclusive state ownership. Chapter 17 of the C.C.R.F.—which deals with the regulation of the procedure for acquisition, execution, and termination of property rights to land—will become effective only after the new *Land Code of the Russian Federation*[37] is put into effect. The Land Code has not yet gone through the adoption procedure due to differences in opinion on a number of issues fundamental to the regulation of land rights.

One should bear in mind, however, that prior to the C.C.R.F., article 9 of the Russian Constitution recognized that land and other natural resources may be privately owned. In connection with this, a number of special acts were issued which—in accordance with the Russian Constitution—determined the procedure for the execution of respective rights by their holders. Some examples are the Edict by the Russian Federation President of November 26, 1997 "On the Sale to Citizens and Legal Entities of Land Plots Designated for Development of Land Plots Located in the Territories of Urban and Rural Residential Centers or Rights to Lease Them."[38] There is also the Decree of the Russian Federation President of January 5, 1998, which approved the "Procedure for Holding Sales (Auctions and Tenders) on Sale to Citizens and Legal Entities of Land Parcels Located in the Territories of Urban and Rural Residential Centers, or Rights of their Lease."[39] Moreover, in conformity with article 72 of the Russian Constitution, the jurisdiction to regulate possession, use, and disposition of land, sub-soil, water, and other natural resources is held concurrently by the Russian Federation and subjects of the Russian Federation. Subjects of the Russian Federation are entitled to issue any acts which do not run contrary to Federal laws. Taking advantage of the right granted to them, some subjects of the Russian Federation independently adopted land codes primarily regulating issues related to the private ownership of land.

Fundamental property rights to land are fixed in article 260 C.C.R.F., which establishes that persons owning land are entitled to sell it, make a gift of it, mortgage or

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[37] *Vedomosti S"ezda Narodnykh Deputatov R.S.F.S.R. i Verkhovnogo Soveta R.S.F.S.R.* (1991) No. 22, item 768 [hereinafter Land Code].

[38] *Sobranie zakonodatelstva R.F.* (1997) No. 48, item 5546.

[39] *Sobranie zakonodatelstva R.F.* (1998) No. 2, item 262.

lease it, or dispose of it in any other way. Article 260(1) C.C.R.F. specifically points out that the owner has such rights "to the extent that the respective land is not excluded from alienability or limited in alienability on the basis of a statute."

The norms to be adopted—which are aimed at determining who will possess land, which lands specifically, in what amounts, and by what right—are the subject of ongoing discussions. The unresolved issues relating to the right of ownership of land has been one of the obstacles to adopting the Federal law *On Pledge*,[40] despite the fact that articles 334 to 358 C.C.R.F. recognize the possibility of using this kind of pledge.

Regardless of how these issues related to land possession will be resolved, the Federal law *On State Registration of Rights to Immovables and Transactions Therewith*,[41] adopted on June 21, 1997 plays an important role in normalizing land relations from the aspect of entrepreneurial law. This law provides, among other things, for the creation of a single state register for the whole federation.

IX. State Ownership

The Federal law *On Subsoil*[42] of March 3, 1995 recognizes the subsoil within the territorial borders of Russia as exclusively state-owned property. At the same time, the C.C.R.F. provides for the possibility of alienating rights of use in subsoil. The right in question includes the possibility of prospecting and extracting mineral resources. Persons receiving a license for this purpose, including subjects of entrepreneurial activity whether legal or natural foreign persons, become owners of the raw materials they extract.

The federal law *On Product Sharing Agreements*[43] of December 30, 1995 regulates relations which arise in the process of investing—including investment of foreign capital—in areas related to the use of subsoil. This covers searching, prospecting, and extraction of mineral resources in the territory of the Russian Federation, the continental shelf and/or within the exclusive economic zone of the Russian Federation. The agreement envisioned by the statute serves as a legal basis for forming relations in the process of this activity, and is signed by the Russian Federation represented by its Government, or an executive body of a subject of the Russian Federation in whose territory the respective subsoil is located. The other party to the agreement is either a citizen or legal entity, and is Russian or foreign. The idea of the agreement is to designate a part of the subsoil for search, prospecting, and extraction of mineral resources, and to determine the proportion in which the extracted product will be divided between the parties. The share of production owed to the investor belongs to it by right of ownership and, in compliance with the terms of the agreement and the established procedure, may be taken by the investor beyond the customs territory of the

[40] Federal law No. 2872-1 of 29 May 1992.
[41] *Sobranie zakonodatelstva R.F.* (1997) No. 30, item 3594.
[42] *Sobranie zakonodatelstva R.F.* (1995) No. 10, item 823.
[43] *Sobranie zakonodatelstva R.F.* (1995) No. 1, item 18.

Russian Federation. A special regime is established with respect to information received by the investor. Such information belongs entirely to the State, but may be used freely and without compensation by the investors only in compliance with confidentiality rules. Such information is deemed a commercial secret, therefore the investor is charged with the obligation to compensate for damages sustained by the State through the leakage of information.[44]

X. Rights of Economic Management and Operative Administration

In the list of recognized property rights, the C.C.R.F. names, along with those common to the legislation of all countries (*i.e.*, servitude, rights of possession and use of land) and in addition to those which are specific to current Russian legislation, a "right of economic management" and a "right of operative administration."[45] In the first instance, the Russian Federation, subjects of the Federation, or municipal entities transfer part of their property into the possession, use, and disposition of unitary enterprises established by them while retaining the right of ownership. Such enterprises act in their own name and bear independent liability for their actions. Creditors of a unitary enterprise so managed are deprived of the possibility to file claims against the enterprise's owner. Therefore, an important guarantee for creditors is the provision that the owner cannot withdraw the property belonging to the unitary enterprise by right of economic management. Those who enter into entrepreneurial relations with a unitary enterprise should bear in mind that such an enterprise is limited in its actions only with respect to the disposition of the property belonging to it by right of economic management. The enterprise may sell such property, make a contribution to the charter capital (*i.e.*, participatory share), or pass the property into pledge only with the consent of the owner. Concluding a contract with respect to real estate without having received the consent of the owner is sufficient grounds for deeming the contract invalid with all the unfavourable consequences.

The right of operative administration—held by institutions and treasury enterprises—proves to be more limited than that of economic management. For instance, those holding the former right are not able to independently dispose of property—whether movable or immovable—transferred to them.[46] A treasury enterprise, as an exceptional case, is not allowed to dispose of the materials it produces. Apart from that, the owner is able to withdraw the property fixed to the institution and treasury enterprises in instances when the owner finds this property excessive for them, they do not use this property, or they do not use it in accordance with its designated purpose. In granting such a right to the owner, the interests of creditors would not suffer, since their recognized right is to file a claim with respect to the obligations not satisfied either by an institution or a treasury enterprise against the owner itself.

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[44] S.A. Sosna, *Commentaries to the Federal law On Product Sharing Agreements* (Moscow, 1997); and A.A. Konoplyanik & M.A. Subbotin, *Litigation on Sharing* (Moscow, 1996).

[45] C. 19 of the C.C.R.F.

[46] Art. 297(1)(i) C.C.R.F.

The institution's or treasury enterprise's founding documents may grant them the right to engage in entrepreneurial activity as an ancillary undertaking. All of the property which the institution acquires with the profits received from such an activity is subject to a more beneficial regime identical to economic management. For that reason, when entering into a relationship with the founders—such as purchasing property from them—it is necessary to first and foremost establish the source of its purchase. If it turns out that the property was purchased at the expense of the owner itself (*i.e.*, the funds having been taken from the budget), the transaction shall be deemed invalid, unless the owner expresses its consent in advance or approves the transaction retroactively.

XI. Specific Features of the Entrepreneurial Contract

The C.C.R.F. creates the necessary conditions for the development of freedom of contract for entrepreneurial relations. Article 421 C.C.R.F. provides for the freedom of participants to resolve issues with respect to concluding a contract, choosing the form of a contract, and setting the terms of the contract at their own discretion. Appropriate conditions were established by limiting the effect of imperative norms and broadening the use of dispositive and optional regulations.

The 1964 Civil Code—within the framework of the general contractual regime—distinguished a special regime aimed at entrepreneurs or others who conclude a contract in connection with their engagement in industry. Such differentiation reflects the specifics of entrepreneurial activity as determined by contracts.

Certain norms relate to the risky nature of the activity. For instance, the grounds for ensuring the liability of the debtor for the failure to execute or the improper execution of obligations deserves special mention. The Russian legislation traditionally follows the Roman principles of liability, recognizing the fault of the debtor as one of the inherent grounds of liability for violating one's obligations. The fault principle is reflected in Article 68 of the *Collection of Laws of the Russian Empire.* Formulated in a more expanded manner, the principle was included in article 123 of the pre-revolutionary Civil Code. There were also similar norms included in article 118 of the 1922 Civil Code and article 222 of the 1964 Civil Code. This general principle was also preserved in article 401 C.C.R.F. The dispositive norm of the C.C.R.F. provides that "[a] person who has not performed an obligation or who has performed it in an improper manner shall bear liability in case of fault." This formulation is significant since the risk of accidental violation of an obligation by the debtor falls on the creditor.

However, upon further analysis of article 401 C.C.R.F., it becomes clear the result is a solution directly opposite to that described. The norm in article 401 C.C.R.F. is applied to a situation where a person is to execute an obligation related to his engagement in entrepreneurial activity. Such a person shall bear responsibility not only for being at fault, but also when there is no fault of his own. The situation described only contemplates relieving the debtor of the liability for the failure to execute or for the improper execution of the obligation due to superior force which—under the circumstances—was extraordinary and unpreventable. The legislator specified that ab-

sence of goods in the market necessary for the execution of the obligations, lack of money, as well as failed obligations by one's counter agents—*e.g.* malfunction of equipment of the contracting supplier of raw materials who exercises the construction, or of an enterprise or transport organization that was to deliver the cargo, etc.—cannot be considered superior force.[47] Thus, the risk of accidental default or improper execution of the obligation is shifted from the creditor to the debtor who concluded the contract in connection with the entrepreneurial activity exercised by it.

Another norm which leads to the special protection of creditor interests relates to the nature of liability. Of all possible kinds of debtor liability—*i.e.*, subsidiary, joint and several, and proportionate share—joint and several liability best responds to the interests of the creditor since there is a possibility to file claims against any debtor and for any amount up to the total amount of the debt. However, article 322 C.C.R.F. is an exception. As a general rule, liability of co-debtors is expected to be joint and several only when established by law or by contract. Nevertheless, if the obligation relates to their entrepreneurial activity, co-debtors are expected to bear joint and several liability.

Some of the principles which apply to any activity regulated by the civil law become particularly significant to entrepreneurial contracts. This serves as an incentive to make the regime for this category of contracts more rigid.

One of these principles is the protection of the weaker contracting party. The effect of such a principle can be illustrated, for instance, by the norms which invalidate contracts concluded by way of fraud, threat, violence, etc. With respect to entrepreneurial relations, the protection of the weaker party is provided for by a number of special norms, *i.e.*, article 426 C.C.R.F.: "Public Contracts" which appeared for the first time in the C.C.R.F. These differ from all other types of contracts in that a party to the contract is a commercial organization which by the very nature of its activity is designated to sell goods, execute works, and render services to anyone who applies for them—*e.g.* a drug store, hotel, hospital, power company, railway, etc. For the benefit of the consumer of such goods, works, and services, article 421 C.C.R.F. establishes significant exceptions dealing with freedom of contract. The consumer is recognized as having the right to file claims in court in the event that the commercial organization deviates from this rule, and to oblige it to carry out a contract. Since the price of goods and other terms of the public contract should be standardized (exemptions are established either by statute or any other legal act), terms which are of a discriminatory nature are deemed void. A broader variety of measures aimed at the protection of the weaker party are provided for by the Federal law *On Protection of the Rights of Consumers*[48] of December 5, 1995 for cases when a citizen acts as a consumer.

Another example is compensation for obligations performed under a contract. Though article 423 C.C.R.F. presumes the compensatory nature of concluded con-

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[47] Art. 401(3) C.C.R.F.

[48] *Sobranie zakonodatelstva R.F.* (1996) No. 3, item 140.

tracts, it is permissible to conclude uncompensated contracts in instances governed by statute, other legal acts, or the content and the nature of contracts. The parties to the contract may determine between themselves whether the obligations under the contract will be compensated or uncompensated. In this respect, the law allows the parties to choose between the purchase and sale contract and the contract of gift, between compensated and uncompensated obligations, between an interest-bearing and interest-free loans, etc. A different procedure is established for entrepreneurial contracts.

In contrast to ordinary contracts—where the compensatory or non-compensatory nature of relations influences only the interests of counter-agents—in entrepreneurial contacts, the uncompensated provision of goods and services may considerably influence the interests of third parties (*e.g.* shareholders, in the case of a joint stock company where they are participants, creditors, and parties to the contract). The C.C.R.F. specifically prohibits the performance of uncompensated transactions in an entrepreneurial context. For instance, article 574(4) C.C.R.F. excludes the possibility of a gift (with the exception of ordinary gifts not exceeding the maximum value established by the C.C.R.F.) in relation to commercial organizations. Article 690(2) C.C.R.F. does not allow the transfer by a commercial organization of property into uncompensated use to persons who are its founders, participants, top managers, and members of its management or controlling bodies. Article 809(3) C.C.R.F. contains an assumption that an interest-free loan contract is not valid in cases where at least one of the parties is engaged in entrepreneurial activity.

Special norms relate to another inherent feature of entrepreneurial activity: profit maximization. By way of illustration, consider the possibility of executing an obligation ahead of time. Obligations beyond the boundaries of entrepreneurial activity arise by common law for the benefit of the debtor. This gives grounds to believe that the creditor is interested in the earliest termination of the obligation. This assumption is the basis for article 315 C.C.R.F. which fixes the right of the debtor to execute the obligation ahead of time, unless a statute, other legal acts, or the terms of the obligation provide otherwise. The situation differs in the case of an obligation related to the entrepreneurial activity of the parties. There are grounds to believe that the creditor is primarily interested in the performance of the obligation no earlier than a specified time. Any compensated obligation may serve as an example. For instance, an obligation based on the contract of an interest-bearing loan or lease. Early execution of an obligation by the borrower in the first case, and of a lessee in the second case, leads to the situation where a lender—*e.g.* a bank or another credit institution—or a lessor will be losing the interest in the first instance, and the rent in the second instance. For this reason, an opposite principle is effective in entrepreneurial relations: execution of obligations before time is allowed only if provided by law, another legal act, or follows from usual business practices or the nature of the obligation. At the same time, a spe-

cial imperative form allows repayment of debt issued with interest before time only with the consent of the lender.[49]

A second example is also useful. One of the most efficient ways to secure the execution of an obligation is to give the creditor the right to retain a thing belonging to the debtor until the latter executes its obligation. Such a limitation, however, is not effective when the parties act as entrepreneurs.

Another feature specific to entrepreneurial contracts is the unilateral refusal to execute obligations. As a rule, this is allowed only in instances provided for by statute. At the same time, for a contractual obligation related to entrepreneurial activity exercised by counter-agents, the possibility of unilateral refusal may be established in the contract itself according to article 310 C.C.R.F. Alternatively, if the general norm provides that the commission agent should follow the instructions given by the commission principal—and may deviate from them only with the consent of the latter—the commissioner acting as an entrepreneur may be granted a right in the contract itself to deviate from the instructions of the commission principal without any prior approval according to article 995(1) C.C.R.F. Finally, an inherent feature of a representative is the impossibility of a person to perform a transaction simultaneously acting as the representative of both parties to the transaction—it is impossible to act as representative of a seller and a buyer of a thing at the same time. The C.C.R.F., however, has allowed commercial representation for the first time, thereby allowing double representation. This may be possible when a commercial representative is a person who permanently and independently acts as a representative on behalf of entrepreneurs, and the transaction in question is concluded in the sphere of entrepreneurial activity.

The legislator treats differently the use of standard forms when ordinary and entrepreneurial transactions are concluded. In the first instance, guided by the principle of freedom of contract, the adhering party is protected by extending to it—in article 428 C.C.R.F.: "The Contract of Adhesion"—the right to demand that the contract be cancelled or amended. This right is exercisable where the contract deprives the party of those rights which are usually provided by such kinds of contracts, contains a burdensome condition, or excludes or decreases the liability of the non-adhering party. To cancel or amend the contract in such cases, the party will have to prove that if it had an opportunity to participate in the negotiation of the contract, it would not have concluded it (proceeding from its reasonably understood interests). Thus, the legislator treats standard forms with a certain caution. Things change, however, if the party adheres to the contract within the framework of entrepreneurial activity. It is not enough to refer to the violation of interest. Mindful of the fact that for entrepreneurial contracts a standard form is the normal way to conclude contracts, the legislator makes the stability of the contract its top priority. The party adhering to the contract can, in similar cases, attain the cancellation or amendment of the contract only if it proves

[49] Art. 810(2) C.C.R.F.

that it did not know and could not have known the terms on which the contract was signed.[50]

Conclusion: Classification of Entrepreneurial Contracts

Contracts are classified at two levels under the C.C.R.F., and about thirty types of contracts are described. Within the framework of a respective type, a certain number of contracts are regulated and categorized according to their nature.

Two types of entrepreneurial contracts emerge in this system. In certain instances they are independent types of contracts which may be used only when at least one of the parties is a commercial organization, an individual entrepreneur, or a legal entity in general for whom participation in the contract of this type is connected to the execution of entrepreneurial activity. This category includes contracts of factoring, bank deposit, bank account, insurance, trust management, commercial concession, and contracts of agency.

All other types of contracts specified in the C.C.R.F. are of a general nature. There are certain contracts among them which the legislator found possible to categorize as special types. The basic feature is the specific membership of participants—*i.e.*, persons acting in different ways who exercise entrepreneurial activity under the contract. This mainly covers contracts of retail purchase and sale, contracts of supply (particularly supply for state purposes), procurement and power supply, renting and leasing of an enterprise, contracts for everyday services, construction contracts, contractual works for state needs, warehouse storage, storage in a pawnshop, custody in a bank, storage in a coatcheck, storage in a hotel, etc. In such cases, the C.C.R.F., as a rule, contains uniform norms for all types of contracts that are also applied to those kinds of entrepreneurial contracts falling into a particular category. For instance, Chapter 30 of the C.C.R.F.: "Purchase and Sale", contains a special section entitled "General Provisions on Purchase and Sale,"[51] the articles of which may—unless they contradict special articles of supply, retail purchase and sale, etc.—be added to them.

Thus, the special regime of entrepreneurial contracts consists of three layers: the norms which specifically regulate general issues under contracts, the norms dealing with a respective contractual type, and the norms relating to a specific kind of contract. But one thing is for certain, the content and application of these rules must be flexible enough to accommodate the many changes taking effect in the Russian Federation.

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[50] Art. 428(3) C.C.R.F.

[51] Arts. 454-91 C.C.R.F.

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