Lecture 1. Civil law as a branch of law and its sources.

Since the time of Roman law, the legal norms governing public relations have been conditionally divided into public and private. Therefore, the division of the entire set of legal norms into public and private law (jus publicum u jus civile or jus privatum) is accepted. In many States, this division is still used today.

Public law regulates relations affecting State or public interests. This right is characterized by the method of writ and prohibitive regulation of relations, as well as the possibility of interference in the private affairs of the state in the person of administrative, law enforcement or other authorities.

Private law, on the contrary, covers relations affecting private separate interests, the possibilities and the need to protect which are determined by their bearers without state intervention.

The civil law of the Republic of Kazakhstan is fully based on the basic principles of private law, although it differs in its features reflecting the current social and economic state of the country, its historical experience and national traditions.

In the existing legal system (the totality of all legal norms) of the Republic of Kazakhstan, civil law is one of the main and leading links, called branches of law. Like other branches, civil law is based on the Constitution of the Republic of Kazakhstan, Article 1 of which proclaims that the highest values of our state are a person, his life, rights and freedoms.

The importance of civil law in the system of all branches of law of the republic is determined, firstly, by the key role of those relations that are the subject of its regulation; secondly, by the wide scope of its application; thirdly, by its inextricable connection with the protection of property and non-property rights and interests of the individual.

The general system of law of the Republic of Kazakhstan includes, in addition to civil, other branches of law — state, criminal, administrative and others. Civil law differs from them in its special features characterizing the subject and method of regulation, as well as fundamental principles.

The subject of civil law refers to the range of public relations regulated by civil law norms1. The first paragraph of Article 1 of the Civil Code of the Republic of Kazakhstan defines: "The civil legislation regulates commodity-monetary and other property relations based on equality of participants, as well as personal non-property relations related to property." And p . 2 of the same article: "Personal non-property relations not related to property relations are regulated by civil legislation, since otherwise is not provided for by legislative acts or does not follow from the essence of personal non-property relations."

Civil property relations regulated by civil law are characterized by the fact that they arise between property-separated entities that are not bound by mutual rights and obligations of a power-subordinate nature, each of which has its own private interests (the so-called horizontal property relations).

Property relations are understood as relations for the acquisition and use of property: things, rights and obligations regarding things and other material goods. As a rule, the subject of property relations can be given a monetary assessment.

The first among property relations, the Civil Code names commodity-money relations, which form the basis of a market economy, the basis of entrepreneurial activity, because a market economy without civil law is impossible; civil law without a market economy is largely pointless. Even in the Soviet years, when the economy was managed in a command-and-order vertical order, civil law covered only the commodity-money relations allowed in those years (i.e. those groups of market relations that were allowed in Soviet society). It is not for nothing that a concept was actively introduced into the theory and practice of regulating the economy, which excluded even the use of the term "civil law" for a planned economy. Even a special legal branch was invented - "economic law", which will be discussed later.

But the subject of civil law is also those horizontal property relations that are not inherently commodity-monetary, for example, inheritance, the provision of disinterested property household services and some others. Their volume in comparison with commodity-money relations is insignificant, but in everyday life they are very noticeable.

Article 1 of the Civil Code also calls personal non-property relations related to property. First of all, these are relations arising from the creation of intellectual property objects — works of science, art, technical creativity, means of individualization of participants in civil turnover, etc. By themselves, these objects and rights to them do not have direct property content and monetary valuation. But they, these personal non-property relations, are closely related to property relations and therefore fall into the sphere of civil law regulation, protected by means of civil rights protection.

For example, one of the two authors of a published book re-published it in another publishing house under a different name, and another person was designated as a co-author. The former co-author sued for recognition of his co-author of the republished book and for the deprivation of copyright of the newly appeared co-author. The case has been repeatedly considered in court with the involvement of several examinations. The claim was satisfied. It should be noted that neither the statement of claim, nor the expert opinions, nor any of the court decisions said a word about the violation of the plaintiff's property rights. The subject of the dispute was one: who is the author (co-author) of the book. This right of authorship has been confirmed and protected. However, there is no doubt that the plaintiff, who has received judicial confirmation of his copyright, can also reasonably demand from the publisher his share of the fee for the second edition of the book, and the publisher has the right to demand from the false co-author a refund of the money paid to him. After all, the connection between the right to be considered an author and the right to royalties is inseparable.

Article 1 of the Civil Code also names personal relationships that are not related to property among the relations that are the subject of civil law. For example, relations regarding the name of a citizen, his honor and dignity, the possibility of choosing a place of residence, non-disclosure of personal records (diaries, letters), inviolability of the image, bodily integrity, etc. Such relations are regulated by civil law subject to certain conditions: if they are not regulated by other branches of law (for example, criminal law), if this does not contradict the essence of personal non-property relations (for example, in the sphere of intimacy).

The attribution of many personal non-property relations to the subject of civil law regulation is also explained by some additional considerations. Firstly, without the application of civil law to them, a significant part of such relations would be without legal regulation at all. Secondly, the boundary between personal relationships, related or unrelated to property relations, is very conditional (for example, both the right to a name and the right to one's own image are sometimes transferred to other persons for a fee, usually for advertising purposes). Thirdly, finally, personal rights, even those not related to property, in the event of their violation, can, as a rule, be protected by civil law means by providing the victim with the opportunity to claim monetary compensation for the suffering and experiences caused, the termination of violations or the elimination of their consequences. Without this, personal rights not related to property rights would generally remain without legal protection, as it often happened in the past2.

So, the first defining feature of the subject of civil law is the property and (or) non-property nature of the relations that make up this subject.

But similar relations with them may be subject to regulation of other branches of law. Tax relations, for example, are undoubtedly of a property nature, but paragraph 4 of Article 1 of the Civil Code explicitly states that civil legislation does not apply to tax relations. Therefore, for a more precise definition of the subject of civil law, a second defining feature is needed: the degree of power subordination of one subject of the relationship to another. If they are not subordinate to each other and in mutual legal relations cannot, by virtue of the power received from the state, give orders and instructions binding on the other participant, then legal relations are built on a civil law model.

If, on the contrary, the state has given one participant in the relationship the power to issue orders and instructions binding on another participant (other participants), then legal relations are built on the model of other branches of law, primarily administrative, financial, but not civil. This, by the way, concerns not only property, but also some personal non-property relations (for example, the conditions for a citizen to change his name, recognition of the solution of a technical problem as an invention, obtaining permission to engage in certain types of activities).

In the legal literature, the sign of mutual insubordination of participants in civil legal relations to each other is often called their equality. This is not entirely accurate, since mutual rights are not equal (the same), since they differ in content (the buyer under the contract of sale has the right to demand the transfer of the purchased property, and the seller has the right to demand payment for the sold thing) and therefore cannot be equal. It is more accurate to talk about mutual independence, insubordination of participants in a civil legal relationship, but not about equality. However, it should be borne in mind that both terms are interpreted unambiguously.

To characterize the branch of law, it is important to determine not only the subject, but also its own civil law method of regulation. This issue was most deeply investigated by Prof. V. F. Yakovlev in his major work "Civil Law method of regulating public relations" (Sverdlovsk, 1972).

By the method of regulation, it is customary to understand the system of those means and methods by which the state achieves the desired behavior of the participants in these relations. Unlike the methods of prohibitions and obligations, the general characteristic of the method of civil law regulation can be designated as general permissiveness, i.e. state permissiveness of participants in civil turnover to perform any actions they wish, i.e. those that meet their interests, except, of course, actions that violate the prohibitions of the law or the legitimate interests of others persons.

The method is mainly determined by the subject. Everything is allowed except what is prohibited by the state in accordance with the established procedure. Of course, there are exceptions to the general rule, but they relate to individual private issues without destroying the overall system. More specifically, the individual methods that together form the method of civil law regulation can be designated as follows:

A. Since the state does not impose its will on the participants of legal relations, civil legislation widely uses not imperative, but dispositive norms, which are given a complementary value that complements the will of the parties, but does not form it;

B. Since the state applies a generally permissive, but non-binding method of regulation both in terms of the emergence (modification, termination) of legal relations and in terms of their content, and the parties are legally mutually independent, they can enter into legal relations only by their freely expressed will and determine their content by mutual voluntary consent expressed in the contract concluded by them. Therefore, the initiative of the participants is the leading motive for entering into civil legal relations, and a free contract serves as the main way to regulate them;

B. By regulating civil relations, the State ensures the protection of the rights and legitimate interests of their participants from violations by restoring the violated state or property compensation for losses caused by the violation. At the same time, the choice of a possible remedy and its actual application depends on the will of the subject affected by the violation;

D. Since civil law provides protection of private, but not public interest, the method of its protection is aimed at the property of the violator, and not at his personality;

D. Since the parties are not subordinate to each other or to a higher general state structure, and the performance of duties, as well as responsibility for violation, must be enforced, the main body of protection is the court.

These are the elements of the method of civil law regulation.

Based on the concepts of the subject and method of civil law, it is possible to derive its definition:

Civil law as a branch of law is a set of legal norms regulating property and personal non—property relations close to them by a generally permissive method between legally insubordinate property-separated entities.

The principles of civil law should be understood as its basic principles, i.e. the fundamental ideas formulated by the law or arising from the meaning of its prescriptions, contributing to the correct understanding of the content and textual expression of civil law norms, their adequate interpretation, resolution of contradictions between them, helping to fill in the gaps of legislation.

The principles of civil law of the Republic of Kazakhstan are fundamentally different from the principles on which Soviet civil law was based. Expressing the nature of the social relations that existed at that time and focusing on their strengthening and protection, the civil law of the Soviet period was built on such principles as the supremacy of state property over all its non-state types and forms, the obligation to submit to a planned task from above when concluding, interpreting and executing a civil contract, the inadmissibility of competition in economic relations, etc. All these principles reflected a centralized, command-and-order system of economic regulation and became a thing of the past along with this system.

Today it is already possible to name such principles of civil law as:

equality of the legal status of subjects of civil law relations;

inviolability of property;

freedom of civil contract;

non-interference of the state and all third parties in private affairs and personal life;

protection of entrepreneurs and consumers as the main subjects of civil law relations;

protection of the rights and legitimate interests of the creditor;

protection of civil rights.

All civil legal regulations, first of all, the Civil Code of the Republic of Kazakhstan, comply with these principles (must comply). The enumeration of most of them is contained in Article 2 of the Civil Code, which is called "The basic principles of civil legislation". All these principles are inextricably linked, complement each other and represent a single organic system.

Consider them.

Equality of subjects of civil law relations is conditioned by a general methodological premise: subjects of civil law relations become subjects who are not subordinate to each other, who are recognized by law as equal in the acquisition, exercise, and protection of civil rights, equal in duties and responsibility for their violation. None of the subjects of civil law has the right to order each other, and therefore their relationship is based on mutual agreement. More specifically , equality of subjects means:

the state or its administrative-territorial units, entering into civil legal relations, do not have any advantages or privileges over their civil partners - a citizen or a legal entity;

legal entities in any of their organizational forms are equated as subjects of civil legal relations with individuals;

foreign citizens and foreign legal entities acquire the same civil rights and obligations and in the same manner as Kazakh citizens and legal entities.

Some exceptions to such equality are possible only by virtue of direct prescriptions of legislative acts (see, for example, the Decree of the President of the Republic of Kazakhstan, which has the force of Law, "On the legal status of foreign citizens in the Republic of Kazakhstan" dated June 19, 1995)3.

Inviolability of property. The importance of this principle follows from the fact that property is the foundation of the entire economic system of the country. This principle emphasizes the rejection of previous institutions that allowed the State to interfere in all relations related to non-State property. Therefore, the principle of inviolability is also enshrined in the Constitution of the Republic of Kazakhstan (Articles 6 and 26).

Inviolability of property means, first of all, recognition of the owner's ability to use his property at his personal free discretion to achieve any purpose not prohibited by law (Article 188 of the Civil Code). It also means the inadmissibility of the forced termination of ownership, regardless of whether any compensation is paid or not paid to the owner. There should be an indispensable rule: compulsory termination of property is permissible only if there are grounds for it directly provided for by law (see, for example, Article 249). Therefore, it is not enough to refer to the fact that the termination of property rights is permissible only by a court decision. The decision itself must be based on an exact legal basis.

The possibilities of the owner, of course, are not unlimited, but the limits are clearly limited by law: legislative prohibitions (for example, when using their own weapons or dangerous substances), the inadmissibility of using property leading to violation of the rights and legitimate interests of other persons, restrictions on the rights of the owner to dispose of some things belonging to him (historical and cultural values, foreign currency, etc.). But such prohibitions and restrictions are applicable only as measures to protect public interests.

In addition to the right of ownership, civil legislation provides for some other property rights that allow their owner to directly use the property provided to him in his own interests: the right of land use (Land Decree), the right of economic management (Articles 195 — 201 of the Civil Code), the right of operational management (Articles 202 — 208), the right to housing (Article 194 The Civil Code; the Law on Housing Relations, etc.). Such rights, unlike property rights, are always derivative, the owner of the property is above the owners of such property rights. The boundaries of the powers of such property rights are established, as a rule, not only by legislation, but also by the will of the owner.

One of the most important principles of civil law is freedom of contract (except for Article 2, see also Article 380 of the Civil Code). This means that any person, at his discretion and without coercion from the outside, has the right to:

to conclude (or not to conclude) this or that contract;

choose a partner with whom he wants to conclude a contract;

choose the type of contract;

determine the terms of the contract.

At the same time, of course, it should be borne in mind that the contractual partner has the same rights. Therefore, only a voluntary and mutually accepted agreement can be recognized as a truly civil contract. The principle of freedom of contract should not be confused with the restrictions imposed on themselves by the parties to the contract, entering into it. Such self-restrictions become mandatory, and unilateral rejection of them is unacceptable. Freedom of contract, but not freedom from contract. Pacta sunt servanda.— Contracts must be executed.

The seller of a product, for example, as a rule, has the right to enter into a contract with the buyer, voluntarily agree or disagree with the terms of the contract at its conclusion. No one has the right to force the seller to make a decision. But if the decision is made and the seller has concluded a contract on certain conditions, then they become binding for him, and in the future he has no right, referring to the freedom of the contract, to unilaterally refuse to fulfill it, change its conditions, etc. This is explicitly stated in Article 401 of the Civil Code.

Freedom of contract has another boundary in the form of legislative prohibitions or imperative prescriptions of legal norms.

If it is prohibited by law to commit any actions (for example, the sale of weapons or drugs), then, of course, such actions cannot be included in the contract as a condition of it, even if both parties agree to it. Contracts containing such conditions must be declared invalid under Article 158 of the Civil Code.

It is known that some norms of civil legislation are imperative, i.e. they must be applied without fail. Among them may be rules restricting the freedom of contract to protect a weaker party, restrictions on monopolism, combating unfair competition, consumer protection, etc. The conditions provided for by mandatory legislative norms for this type of contract are necessarily included in the content of each specific contract of this type, regardless of whether the parties have included or not included these conditions in the the text of your contract.

Freedom of contract also consists in the ability to conclude any contracts in terms of content, regardless of whether they are provided for by law or not. Contracts are also possible, the content of which covers elements of several contractual types (Articles 7 and 380 of the Civil Code). It is only important that all the terms of the contracts do not violate the prohibitions and restrictions established by law (Article 381 of the Civil Code).

The need to protect public interests also introduces an amendment to the limits of the application of the principle of freedom of contract: the control of currency transactions, prohibitions to refuse to conclude public contracts or to determine their conditions for different clients in an unequal way (Article 387 of the Civil Code), licensing of certain types of activities.

The next principle of civil legislation can be called the inadmissibility of interference by anyone in private affairs and personal life. This principle applies to civil legal relations to the extent that they are of a personal property or non-property nature. In the previously existing Civil Code, it (the principle) was reflected very poorly and concerned only the protection of honor and dignity, the secrecy of personal records, diaries and letters. In the current Kazakh civil law, this principle has received significant development. It is also enshrined in the Constitution of the Republic of Kazakhstan (Article 18 of the Civil Code).

Next, we define the concept of a "system of a branch of civil law", which should be understood as a set of its links located in an internal logical connection and dependence: sections (sub-branches), institutions and norms.

Kazakh civil law is based on the model of the pandect system (pandectnae — comprehensive), the foundations of which were laid back in Roman law, and this model found a wider practical embodiment several hundred years ago in German law. Of course, for many years after the first construction of this model in different States that have adopted it, such a system has more or less departed from the original model. In the Republic of Kazakhstan, the first link of the system is the general provisions, the rules of which determine the range of relations covered by civil law norms, the ratio of these norms in legal force, their effect in time, space and persons, the conditions of their validity, interpretation and implementation. The same section includes norms on all types of civil rights, on their protection, on the meaning of terms in civil law. These provisions and norms apply to all subsequent sections and institutions, thereby allowing not to include in more private laws and private sections of the Civil Code of the Republic of Kazakhstan the rules contained in the general provisions.

At the same time, it should be borne in mind that each section (sub-branch) of civil law has its own general provisions within its narrower boundaries. General provisions can be clearly highlighted in the sections "Subjects of civil rights", "Property right", "Law of obligations" and in other sections.

In the unified system of civil law, after the general provisions, there is a section on subjects of civil rights and obligations, their legal capacity and legal capacity (legal personality), the grounds for the emergence, modification and termination of legal personality. Here is also the definition of the legal status of certain types of subjects of civil rights and civil duties, mainly legal entities, on the representation of such subjects in the field of civil relations.

The next big section is the unification of legal norms on property rights and other property rights. The section covers the concept of real rights, the powers of subjects of real rights, the grounds for their occurrence and termination, special ways to protect real rights from violations.

The largest section (sub-branch) of civil law is the law of obligations regulating legal relations between specific persons, one of whom may require the other to perform certain actions, and the other person is obliged to fulfill such requirements.

The law of obligations is clearly divided into a general part containing rules to be applied in regulating all types of obligations, and numerous institutions, each of which regulates certain types of obligations (purchase and sale, contract, bank relations with customers, transportation, and many others).

The next section of civil law covers the so-called non-contractual obligations (torts) generated by the actions of citizens or legal entities that cause damage to other citizens and legal entities outside of contractual relations with them.

According to the system adopted by us, torts are followed by an extensive section regulating relations related to the creation and use of the results of intellectual activity; that is, with the emergence and exercise of intellectual property rights. The legislation and applicable practice distinguish two subsections in this section: copyright, which regulates relations on the creation and use of works of science, literature and art, and patent law, which covers the use of the results of creative activity in industry and production. This subsection is often referred to as industrial law. It is adjoined by the norms on means of individualization of participants in civil turnover.

The final section of the civil law system is inheritance law, which regulates inheritance relations that arise in connection with the death of a citizen and the transfer of the deceased's property to his heirs.

A special section should be highlighted that relates to all types of civil legal relations, if foreign entities take part in them, i.e. a section that can be called private international law. This section defines the legal status of foreign citizens and foreign legal entities entering into various civil legal relations with Kazakh citizens and legal entities, as well as the criterion for choosing the applicable law that applies to these legal relations and according to the rules of which disputes between their participants should be resolved.

Traditionally, the entire branch of civil law is divided into two parts according to the structure of legislative material and material for study. The general part covering the rules of law placed according to the above scheme (including the general part of the law of obligations), and the special part (from individual binding legal institutions to private international law inclusive).

Lecture 2. Civil legal relations and its subjects.

Satisfying their needs, citizens and legal entities are constantly forced to enter into various relationships with each other. The real relationships that develop between people (legal entities created by them) are diverse and regulated by various social norms, in particular, moral and ethical. A significant part of such relations is regulated by the norms of law and takes the form of legal relations. As a result of legal regulation, along with existing social relations, some new relations (legal) do not arise. A legal relationship is only a form of real social relations.

Public relations are regulated by the norms of various branches of law. Civil law regulates mainly property relations and relations that develop in the sphere of commodity-money circulation. Personal non-property relations are also regulated by civil law. The object of personal non-property relations are non-property goods. Regulated by the norms of civil law, public relations acquire the quality of legal, namely, civil legal relations. A civil legal relationship is a social relationship regulated by the norms of civil law.

The peculiarities of civil legal relations are determined by the subject and method of civil law regulation. First of all, the most important feature of a civil legal relationship is the legal equality of its participants. The subjects of civil legal relations are not in a relationship of power and subordination to each other, they are legally independent of each other and are bound only by mutual rights and obligations. The demand of one of the participants in a civil legal relationship for the performance of duties by another is based not on authority, but on subjective civil law belonging to him. Equality of subjects of civil legal relations is based on their property independence.

The civil legal relationship is volitional. As a rule, such relations are established by the will of their participants, since the overwhelming number of civil legal relations arise on the basis of a contract. But even if they arise on other grounds, the rights and obligations that make up the content of such legal relations are carried out by the volitional actions of the participants.

Types of civil legal relations. Depending on the object of the relations regulated by the norms of civil law , the following types of civil relations are distinguished:

1) property rights;

2) personal non-property related to property;

3) personal non-property, not related to property. The overwhelming part of civil legal relations is of a property nature, since the subject of civil law regulation is primarily property relations. The object of property civil relations are material goods and rights (property). Property civil relations include property relations, relations mediating the transfer of property from one person to another (purchase and sale, exchange, loan, etc.). The object of personal non-property legal relations related to property are the results of intellectual creative activity. The rights to the results of intellectual creative activity are non-property in nature (the right of authorship, the right to inviolability of the work, etc.), however, their use by other persons is allowed as a general rule on a reimbursable basis, as a result of this, these legal relations, being non-property, are related to property. The object of personal non-property, not related to property, legal relations are inextricably linked with a person intangible rights and benefits: honor, dignity, business reputation, etc.

There are also absolute and relative civil relations. In absolute legal relations, an authorized person as an obligee is opposed by an indefinite circle of third parties, practically everyone and everyone is obligated in such a legal relationship. Absolute, for example, refers to the legal relationship of ownership, in which the subjective right of ownership corresponds to the obligation of all third parties not to violate this right, not to interfere with its implementation. In relative legal relations, a specific person (persons) is obligated. A relative legal relationship binds specific persons both on the authorized and on the obligated side, i.e. it is personalized. So, the harm-doer is obliged to compensate the victim, the buyer is obliged to pay for the thing he bought, and not everything and everyone. An absolute right can be violated by any person, accordingly, the subject of such a right is granted protection from violations by any person. Thus, the author's right to the inviolability of the work may be violated by any person. Violation of a relative right is possible only by an obligated person, who is always personified in a relative legal relationship. The right to demand payment for the work performed by the contractor can only be violated by the customer. Accordingly, the relative right is protected from violations by specific persons, in the above example - by the customer.

Civil legal relations can be proprietary and binding. In real legal relations, the authorized subject has such a right to the thing, the exercise of which is possible by his own actions (the right "to his own actions"). The subject of the real right can satisfy his interest in the thing by directly influencing the thing, without resorting to the assistance of other persons. Property, in particular, is a legal relationship of ownership. The owner has the right to own, use and dispose of the thing belonging to him, but the obligated subjects who are not personified should not perform any actions, they have a passive obligation not to interfere with the owner in the exercise of his right. The interest in the thing of the subject of the law of obligations can be satisfied by performing certain actions by another person. In a binding legal relationship, an authorized person has the right to demand that an obligated person perform certain actions (the right to "other people's actions"). So, the buyer has the right to demand from the seller the transfer of the thing to him, and the seller is obliged to transfer it, i.e. to perform a certain action.

The object of real legal relations is always a thing, the object of binding legal relations may not be things. For example, the object of the legal relationship between the publisher and the author, which arose from the contract for the creation of a literary work, is not a thing, but the result of intellectual activity - a literary work.

§ 2. The content of civil legal relations

Civil law regulation of property and personal non-property relations is carried out by endowing participants in such relations with rights and obligations. In essence, a legal relationship is the binding of persons by mutual rights and obligations. Subjective rights and subjective obligations of participants in civil legal relations constitute its content. Subjective right is a legally secured measure of the possible behavior of an authorized person. The subjective right may be expressed in the ability of the authorized person to act in a certain way himself (the right to his own positive actions) or in the ability to demand certain actions from the obligated person (the right to someone else's actions is the right of demand). Thus, the author's rights to publish the work, to the inviolability of the work can be realized by his own actions. On the contrary, the realization of the landlord's right to return the leased property after the expiration of the lease agreement is impossible without the performance of appropriate actions by the obligated person.

Subjective rights as elements of the content of legal relations can be divided into personal and transferable.

The rights that are inextricably linked with their carriers are called personal (for example, the right to be considered the inventor of a certain device), respectively, therefore all other powers can be called transferable.

A subjective obligation is a legally secured measure of the proper behavior of an obligated person. The subjective rights and obligations of its participants that make up the content of a civil legal relationship are closely interrelated, each subjective right corresponds to a corresponding duty, and vice versa. The subjective right of one side of the legal relationship to demand that the obligated person perform certain actions corresponds to the subjective obligation of the other side of the legal relationship to perform these actions. Accordingly, the subjective right to perform certain actions by the authorized person himself corresponds to the obligation of another participant in the legal relationship not to interfere with the exercise of the right, not to violate it.

Since the division (classification) of civil legal relations and, accordingly, subjective civil rights is carried out on various grounds, each competence usually has several of the above features. Thus, the right of the creator of a work of art to be considered its author is both personal, non-property, and absolute. The right of the same author to receive a fee from the publisher is both transferable, proprietary, and relative.

The subjective right of the participants in legal relations sometimes covers the possibility of committing many actions, or the possibility of demanding the commission of many actions from the obligated person. In such cases, the subjective right may be complex, with simpler constituent elements in its content — separate powers. Within the same legal relationship, the powers may be homogeneous or heterogeneous. Thus, in the contract of property lease, the right of the employer covers the ability to own and use the hired property (real, absolute powers), as well as the ability to demand from the landlord timely capital repairs (mandatory, relative power). Such complex rights, including legally heterogeneous powers, can be called complex.

Lec 3. Objects of civil legal relations.

The persons participating in the civil legal relationship are their subjects. The circle of subjects of civil legal relations is defined by Chapter 2 of the Civil Code. Regulated by law, including civil law, relations are social, i.e. relations between people. Participants in such relations can be both individual individuals and collective formations created by them. To designate subjects of civil law in legislative and other regulatory legal acts, the generalizing term "persons" is usually used. The possibility of participating in civil legal relations as an authorized or obligated person presupposes the presence of legal personality, which includes legal capacity and legal capacity. Legal capacity refers to the ability to have civil rights and bear responsibilities. Legal capacity is the ability to acquire and exercise rights by their actions, as well as to create and perform duties.

Individual individuals are referred to as individuals. The concept of "natural person" covers citizens of the Republic of Kazakhstan, foreigners and stateless persons. In the overwhelming majority of cases, the subjects of civil legal relations are citizens of the Republic of Kazakhstan, therefore, legal norms, as a rule, refer to citizens. The latter does not mean that the provisions of such norms apply only to citizens of the Republic of Kazakhstan. According to Article 12 of the Constitution of the Republic of Kazakhstan, foreigners and stateless persons enjoy rights and freedoms in the republic, as well as perform duties established for citizens, unless otherwise provided by the Constitution, laws and international treaties.

Collective formations (organizations) created by people are recognized as subjects of civil law if they have the status of a legal entity. Thus, branches and representative offices of organizations are not subjects of civil law, since they are not recognized as legal entities (Article 43 of the Civil Code).

A legal entity is an organization that has separate property on the right of ownership, economic management or operational management and is responsible for its obligations with this property, can acquire and exercise property and personal non-property rights and obligations on its own behalf, be a plaintiff and a defendant in court (Article 33). Depending on the objectives of the activity, legal entities are divided into commercial and non-commercial. Legal entities whose main purpose of activity is to generate income belong to commercial organizations. Non-profit organizations are created for purposes other than income generation. Thus, a religious association has as its main goal the joint confession and dissemination of the corresponding faith. Legal entities may be created only in such organizational and legal forms as are provided for by legislative acts. For commercial organizations, an exhaustive list of such forms is contained in the Civil Code (Article 34).

Along with individuals and legal entities, participants in civil legal relations may be the state and administrative-territorial units (regions, districts, cities, etc.), which in civil legal relations act on an equal footing with other participants in these relations (Articles 111 and 112 of the Civil Code). The State and administrative-territorial units are not legal entities, but the rules governing the participation of legal entities in civil legal relations are applicable to them (except in cases provided for by legislative acts).

Accordingly, the subjects of civil legal relations can be individuals (citizens of the Republic of Kazakhstan, foreign citizens and stateless persons), legal entities, the Republic of Kazakhstan and administrative-territorial units.

Objects of civil legal relations. In the legal literature, various points of view have been expressed regarding the object of the legal relationship. According to some authors, the object of a legal relationship can only be the behavior of its subjects. The object of a civil legal relationship, respectively, is the behavior of its subjects aimed at material or non-material good1. According to the opinion shared by the majority of civilists, the object of a civil legal relationship is what the legal relationship has developed about.

The main types of objects of civil rights are listed in Article 115 of the Civil Code, which divides them into property and personal non-property benefits and rights. Property benefits and rights, in particular, include things, money, including foreign currency, securities, works, services, objectified results of creative intellectual activity, brand names, trademarks and other means of individualization of products, property rights proper. Personal non-property rights and benefits include life, health, honor, dignity, business reputation, good name, privacy, personal and family secrets, the right to a name, the right to authorship, the right to inviolability of the work and other intangible benefits and rights.

Lec 4. Legal entities as subjects of civil rights.

All civil legal relations are established between people and the organizations they form. These people and organizations can enter into transactions and participate in legal relations only in the public capacity of a legal entity, which is also called a person.

The subjects of civil law or persons are recognized by the legislation of the Republic of Kazakhstan as people (individuals) and some of their organizations (legal entities, the state, administrative-territorial units) that have a special legal property — civil personality, i.e. the ability to have civil rights and obligations and exercise them. The possession of this property turns an individual or an organization into a subject of civil law. At the same time, each person, whether he acts as a citizen of the Republic of Kazakhstan, a citizen of another state or a stateless person, has a civil legal personality and, therefore, is recognized as a subject of civil law. Organization is another matter. It may or may not be a subject of civil law, have or not have a civil legal personality. Organizations recognized as legal entities, as well as the State and administrative-territorial units, have civil legal personality.

At the same time, it is impossible to identify the subject of civil law and its legal personality. The concept of "subject of civil law" is broader than the concept of his legal personality and also includes the name (name), place of residence (location) and some other signs.

The origins of civil legal personality are rooted in economic commodity relations, and the specified property itself is fixed by positive law, although the term "legal personality" is not used by civil legislation. The very concept of legal personality has been developed by legal science and is legally enshrined in the Constitution of the Republic of Kazakhstan.

The Civil Code of the Republic of Kazakhstan devotes a separate chapter to subjects of civil rights (Chapter 2), in which the terms "subjects of law" and "persons" are used as unambiguous. Norms on subjects of law are available not only in the Civil Code, but also in other legislative acts.

Among subjects of civil rights (or persons) The Civil Code distinguishes citizens of the Republic of Kazakhstan and other individuals, to whom this chapter of the textbook is devoted. In the chapter, the issues of the general concept of civil legal personality are touched upon to the minimum necessary extent, and, if necessary, the issues of legal personality of individuals and legal entities are considered in comparative terms.

The general concept of "natural person" is formulated in Article 12 of the Civil Code of the Republic of Kazakhstan. This article unites citizens of the Republic of Kazakhstan, citizens of other states (foreigners), as well as stateless persons by the generic concept of individuals. Since the vast majority of individuals located on the territory of Kazakhstan are its citizens, and the Civil Code itself is the national law of the Republic of Kazakhstan, it usually uses the term "citizen" in a broad sense to refer to individuals, not just citizens of Kazakhstan. Such a broad understanding of the term "citizen" is possible, since foreigners and stateless persons enjoy the rights and duties established for citizens of Kazakhstan, unless otherwise provided by legislation and international treaties (paragraph 4 of Article 12 of the Constitution of the Republic of Kazakhstan, paragraph 7 of Article 3 of the Civil Code of the Republic of Kazakhstan). It refers to citizens only in a special sense of the word as subjects of civil law, although the concept of "citizen" has a much broader meaning and is applied in all branches of law.

Civil legal personality is one of the types of sectoral legal personality. When analyzing this concept, the question immediately arises: why does legal personality arise and exist at all as a legal reality, what is its practical significance? The most concise answer is that the existence of legal personality as a special institution of civil law is objectively conditioned by the need to differentiate the possibilities and the measure (limits) of inclusion of people as social beings in legal relations. Therefore, legal personality is a social, legal property of people. In different branches of law, this differentiation is carried out according to different criteria. The Constitution of the Republic of Kazakhstan differentiates the legal personality of people primarily on the basis of the allocation and distinction of human and civil rights. The latter's rights have a greater scope than human rights. They include all human rights plus the rights and duties inherent only to citizens of the Republic of Kazakhstan (for example, political rights, military service duties).

In civil law, the existence of legal personality as a prerequisite for the possession of specific rights and obligations is associated with the legal differentiation of participants in commodity-monetary and other relations based on equality of participants, on individuals, legal entities and special subjects of civil law, and the measure (limits) of the ownership of these participants are different.

The legal personality of individuals, as a type of civil legal personality, is difficult to understand without taking into account the general concept of civil legal personality. At the same time, it, as an objectively existing legal reality, as a common property of individuals, should not be confused with the concept of legal personality as a reflection of this legal reality. In reality, there is no legal personality at all, but there is the legal personality of individuals as their common legal property. This property does not belong to some only conceivable, existing only in the concept of a generalized person, as is sometimes believed in the legal literature, but represents a common property of individual real persons, i.e. a common property inherent in each individual subject. The belonging of legal personality to each individual is clearly traced in the terminology of the Constitution of the Republic of Kazakhstan, Article 13 of which states that everyone has the right to recognition of his legal personality.

In the legal literature, including educational literature, the characteristic of legal personality as an abstract prerequisite for the ownership of specific subjective rights and obligations is widespread. One can agree with this with a reservation — only understanding the abstract not only as existing in the concept, but also as a real common legal property of individuals.

Some authors believe that legal personality as an abstract possibility of copyright ownership cannot be represented as a set or complex of individual rights of a legal subject.1 It is impossible to agree with this. After all, the abstract nature of legal personality does not mean that it is meaningless. Civil legal personality has both its scope and content, and having its own characteristics in relation to different types of persons, in particular, individuals and legal entities. Moreover, even the scope and content of the legal personality of different types of individuals and legal entities are different. Article 14 of the Civil Code speaks about the main content of the legal personality of citizens, its constituent elements. In particular, this article of the Civil Code provides that a citizen can own property, inherit and bequeath it, freely move around the territory of the republic and choose a place of residence, engage in any activity not prohibited by legislative acts, create legal entities independently or with other citizens and legal entities, make transactions and participate in obligations, to demand compensation for material and moral damage, to have other property and personal rights. The total scope and content of legal personality is determined by all civil legislation.

By its legal nature, civil legal personality is a special subjective right — the right to make transactions and have subjective rights and obligations. The nature of legal personality as a subjective right is particularly evident in the legislation, including in the norms of the Constitution. Thus, the Constitution speaks about the rights of everyone who is legally located on the territory of the republic to move freely around this territory and choose a place of residence, the right of everyone to freedom of entrepreneurial activity. At the same time, the Constitution enshrines the right of everyone to be recognized as a legal personality and reveals its main content in the form of a list of constitutional human and civil rights (Articles 13, 21 and 26 of the Constitution of the Republic of Kazakhstan).

The Criminal Code of the Republic of Kazakhstan calls the right one of the elements of the legal personality of citizens, providing as a punishment deprivation of the right to engage in certain activities (Article 41).

Recognition of legal personality as a special subjective right has not only theoretical, but also important practical significance. In particular, such recognition makes it possible to apply the norms of Article 8 of the Civil Code on the exercise of civil rights in the implementation of legal personality. Thus, the exercise of legal personality should not violate the rights and legally protected interests of other subjects of law, should take place in good faith, reasonably and fairly.

Civil legal personality as a legal property of a person, expressed in the possibility of ownership of specific subjective rights and obligations, as a special subjective right should be distinguished from specific subjective rights and obligations. Although by its legal nature, legal personality is also a subjective right, but in comparison with a specific subjective right, it is a right of a different level: they relate to each other as general and individual. In other words, each legal entity can acquire and have the corresponding specific subjective rights and obligations. Each legal entity has legal personality to the extent provided for by legislative acts. The situation is different with respect to specific subjective rights and obligations. Their set for each person is individual (singular) and constantly changing. For example, all individuals can own property by right of ownership, in particular, own an apartment. But not every person really has the right to own a specific apartment in a certain house at a certain address. The same can be said about any other property, the specific set of which is individual for each subject of law. The right of ownership as a specific subjective right is always individualized — it is the right of a certain person to a certain property.

Sometimes the differences between legal personality and a specific subjective right are not as clear as in the example given, but, nevertheless, they always exist. For example, every citizen has the right to choose a place of residence as an element of legal personality, but the right to live in a chosen place of residence is already a specific subjective right.

Every subjective right, both general (legal personality) and specific (individual), arises, changes and ceases through certain legal facts. For example, the legal personality of a citizen arises from the moment of his birth and ceases with death.

A specific subjective right also arises and terminates on the basis of legal facts, the set of which is diverse. Sometimes a specific subjective right arises and ceases on the basis of not one fact, but a number of facts called the actual composition. Thus, the right of ownership of certain objects for a certain person arises on the basis of such legal facts as purchase and sale transactions, donations, acceptance of inheritance, etc., but always from a person who has the appropriate legal personality. It is a prerequisite for the emergence of specific subjective rights and is preserved when they arise in full. But the restriction of legal personality entails the termination of the corresponding specific subjective right.

Unlike the legal personality of legal entities, which exists in the form of an inseparable unity of legal capacity and legal capacity, the civil legal personality of individuals is divided into legal capacity and legal capacity, which in the Civil Code are regulated by different articles in the paragraph on individuals.

The legal capacity of a citizen is understood as his ability to have civil rights and bear responsibilities. Legal capacity is understood as the ability of a citizen to acquire and exercise civil rights by his actions, create civil duties for himself and fulfill them (Articles 13 and 17 of the Civil Code).

Legal capacity. The basis of the civil legal personality of all subjects of civil law, including individuals, is legal capacity. The lack of legal capacity is irreplaceable. The lack of legal capacity of a legally capable person is compensated by the actions of other persons. A subject who does not have civil legal capacity cannot be a subject of civil law at all. A person who does not have civil legal capacity, but has civil legal capacity is a subject of civil law, i.e. a person who may have specific subjective rights and responsibilities. It is characteristic that the Civil Code has a special article on the legal capacity of legal entities (Article 25), but there is no such article in relation to their legal capacity.

The legal capacity of legal entities follows from the norms of the Civil Code, which, without using the term "legal capacity" itself, determine the procedure for a legal entity to assume rights and obligations through its bodies and representatives. Legal capacity is therefore covered by the concept of legal personality in essence as a general condition for the exercise of legal capacity. But at the same time, it is a necessary condition for the exercise of legal capacity, and the allocation of legal capacity in legal personality is related to the intellectual qualities of a person, the level of his abilities to comprehend his actions and guide them. Considering that the determining element in legal personality is legal capacity and, based on Article 12 of the Constitution of the Republic of Kazakhstan, according to which human rights and freedoms belong to everyone from birth, as well as paragraph 2 of Article 13 of the Civil Code, according to which the legal capacity of a citizen arises at the time of his birth, it can be concluded that the legal personality of a citizen arises from the moment of his birth.

In Article 13 of the Civil Code, where the above definition of a citizen's legal capacity is formulated, it is stated that it is recognized equally for all citizens. Thus, the Civil Code fixes the principle of equal legal capacity of citizens, which does not depend on their origin, social, official and property status, gender, age, race, nationality, language, attitude to religion, beliefs, place of residence, education, mental abilities and any other circumstances. Only in exceptional cases, certain limitations in legal capacity, directly provided for by legislative acts, are possible. Deprivation of legal capacity, as well as legal capacity, is generally unacceptable.

The possibility of limiting the legal capacity and legal capacity of citizens only in accordance with legislative acts and, moreover, in exceptional cases, provided for by the Civil Code, corresponds to the norm of paragraph 1 of Article 39 of the Constitution of the Republic of Kazakhstan. According to the Constitution, human and civil rights and freedoms may be restricted only by law and only to the extent necessary for the protection of the constitutional order, the protection of public order, human rights and freedoms, health and morals of the population.

Among the limitations of civil legal capacity, in particular, are restrictions for persons who are not citizens of the Republic of Kazakhstan. The number of such restrictions in the acts of civil legislation is small. So, for example, in the private property of foreign citizens, according to the legislation on land, there can not be land plots provided for personal subsidiary farming, gardening and suburban construction.

Legislative acts have established restrictions for individuals who are not citizens of the Republic of Kazakhstan, and for engaging in certain types of activities (lawyer, notary). Restrictions on legal capacity can be established not only for certain categories of individuals, but also for individual individuals as punishment for crimes committed. These restrictions are established by a court verdict in accordance with the Criminal Code of the Republic of Kazakhstan, which provides for the deprivation of the right to hold a certain position or engage in a certain activity as a type of punishment.

The principle of equality of civil legal capacity is not a universal principle for all types of subjects of civil law, but applies only to individuals. As for legal entities, firstly, they cannot have rights that are inherently related only to individuals (for example, the right to bequeath property). Secondly, the very legal capacity of legal entities for their different types is not equal. Thus, the legal capacity of state-owned enterprises is narrower than the legal capacity of state-owned enterprises that have property on the right of economic management. The legal capacity of institutions is narrower than the legal capacity of business partnerships. The legal personality of legal entities is discussed in more detail in the chapter on legal entities. Here it is also necessary to pay attention to the fact that the realization of the legal capacity of both individuals and legal entities depends on a number of circumstances that take place in legal reality. For example, only persons who have the appropriate permit or license have the right to engage in certain types of activities. The occupation of some types of activity is associated with the mandatory registration of these persons or the presence of higher education and the passage of state certification (for example, for practicing law). The law sometimes connects the measure of legal capacity itself with certain facts, in particular, obtaining a license. For example, Article 35 of the Civil Code establishes that the legal capacity of a legal entity in the field of activity for which it is necessary to obtain a license arises from the moment of its receipt and ceases at the time of its withdrawal, expiration, invalidation. Thus, the legal personality of a legal entity may change over time due to the presence of certain legal facts.

All that has been said regarding the content of legal capacity and the circumstances associated with its implementation, served at one time as the basis for the emergence of the theory of legal capacity as a dynamically developing phenomenon. Thus, M. M. Agarkov believed that civil legal capacity for each person at any given moment means the opportunity to have specific rights and obligations depending on his interaction with other persons.2

The theory of dynamic legal capacity with amendments to modern realities may be suitable for legal entities. But in relation to individuals, it contradicts not only the norms of the Civil Code, but also the constitutional principle of equality of human and civil rights. Indeed, a number of circumstances stipulated by the legislation may affect the realization of the legal capacity of citizens. But these circumstances do not change the legal capacity of individuals, as is the case with legal entities, but are the conditions for its implementation. Therefore, in relation to individuals, it is necessary to clearly distinguish legal capacity as equal for each person and the conditions for its implementation.

The conditions for the exercise of legal capacity can be divided into general and special. The presence of general conditions is necessary for the exercise of legal capacity in all cases. Special conditions are necessary for the exercise of legal capacity in certain cases provided for by law.

The general condition for the realization of legal capacity is legal capacity, which is precisely as such a general condition covered by the concept of legal personality.

A citizen's full legal capacity comes upon reaching the age of 18. The realization of the legal capacity of incapacitated citizens occurs through their legal representatives.

In addition to legal capacity as a general condition for the exercise of legal capacity, legislation in some cases also provides for special conditions for its implementation. These are obtaining a license or other permit, having a special education, passing certification and other circumstances established by law. For example, in accordance with the legislation on a production cooperative, its member may be a person who has reached the age of 16 and is able to take part in the activities of the cooperative.

All special conditions for the exercise of legal capacity by their legal nature are legal facts and the concept of legal capacity of legal entities is not covered, since the legislation proceeds from the constitutional principle of equal legal capacity of citizens and other individuals.

Legal capacity. Unlike legal capacity, as a legal property of a person not related to his mental state, legal capacity is due to the presence of a sufficiently developed intellect and will, the ability to realize his actions and direct them. Therefore, the law provides that citizens have full legal capacity with the onset of adulthood, i.e. upon reaching the age of 18. Thus, the presumption of mental maturity of adults is established, allowing them to be fully capable. By their actions, adults can fully acquire and exercise civil rights, create civil duties for themselves and fulfill them. In particular, the concept of legal capacity covers the ability of citizens themselves to make transactions (transactionability) and other lawful actions, as well as to be responsible for civil offenses (delinquency). At the same time, legal capacity is precisely the legal ability to perform actions, direct them and be responsible for them, and not the commission of actions itself. The latter may be legal facts.

All citizens have equal legal capacity, unless otherwise established by legislative acts (paragraph 3 of Article 17 of the Civil Code).

The connection of a citizen's legal capacity with the state of his intellect and will leads, firstly, to the need to limit the legal capacity of minors and, secondly, to the possibility of deprivation or restriction of the legal capacity of adults due to the shortcomings of their intellect and will. Restrictions on the legal capacity of minors are established directly by legislative acts, unless otherwise provided by them, and adults — only by the court in cases provided for by legislative acts.

The legislation of Kazakhstan makes only one exception from the general rule on the emergence of full legal capacity upon reaching the age of 18: when legislative acts allow marriage before the age of 18, a person who has not reached this age acquires full legal capacity from the time of marriage (paragraph 2 of Article 17 of the Civil Code).

According to Article 13 of the Law "On Marriage and Family" of December 17, 1998, the rights and obligations of spouses are generated only by a marriage concluded in accordance with the established procedure. Therefore, it should be concluded that the actual marriage (cohabitation) of a minor does not entail the acquisition of legal capacity in full.

The civil legislation of the Republic of Kazakhstan does not know the institution of emancipation, i.e. declaring a minor fully capable by decision of a competent state body, as, for example, under the Civil Code of the Russian Federation. But the Civil Code of the Republic of Kazakhstan, however, as well as the Civil Code of the Russian Federation, provides for some exceptions to the general rule on the onset of full legal capacity of citizens upon reaching adulthood. Such exceptions apply only to certain areas of civil relations. In particular, minors have the right to make deposits to banks and independently dispose of their deposits (Article 25 of the Civil Code).

Depending on the level of mental development, the Civil Code of the Republic of Kazakhstan establishes a different measure of the legal capacity of minors, dividing them into persons under the age of 14 and persons from 14 to 18 years old.

Persons under the age of 14 are incapacitated. Therefore, transactions on their behalf are made by parents, adoptive parents and guardians, unless otherwise provided by legislative acts (paragraph 1 of Article 23 of the Civil Code). They are also responsible for the harm caused by incapacitated minors.

From the general rule on the incapacity of citizens under the age of 14, the law provides for some exceptions. These persons have the right to make small household transactions corresponding to their age, which are executed when they are made (paragraph 2 of Article 23 of the Civil Code), as well as to make deposits to the bank and independently dispose of the deposits they have made.

Minor household transactions should be understood as insignificant transactions related to the satisfaction of the daily household needs of the minor himself, his family and other persons familiar to him. Small household transactions include, for example, the purchase of food, newspapers, school supplies, the purchase of tickets for public transport, etc. At the same time, household transactions made by persons under the age of 14 must simultaneously meet the following three conditions. Firstly, these transactions should be small, i.e. insignificant in value. Secondly, they must correspond to the age of the minor, i.e. the level of his psyche, and the range of such transactions is limited. It is clear, for example, that the level of development of the mental state of a two-year-old, 7-year-old and 13-year-old child is different. A two-year-old child, according to the level of his mental development, is not able to make even small household transactions, and a 7-year-old is unlikely to be able to make all even small household transactions (for example, to purchase matches). Although the cost of these transactions may be small, but the properties of matches are such that it is dangerous to transfer them into the hands of a child who may use them improperly. As a rule, children of this age cannot act as sellers or donors even for small household transactions. Thirdly, persons under the age of 14 can only make transactions that are executed when they are made, for example, purchase products only for cash, but not on credit.

It should be noted that in the Civil Code of the Russian Federation, the issue of the legal capacity of persons under the age of 14 is solved differently. Minor household transactions can be concluded by minors aged 6 to 14 years. They also have the right to conclude transactions aimed at obtaining benefits free of charge, which do not require notarization or state registration, as well as transactions on the disposal of funds represented by a legal representative or with the consent of the latter by a third party for a specific purpose or for free disposal. It seems that such a formulation of the law introduces serious difficulties in assessing the legal capacity of a minor when making a specific transaction.

Unlike minors under the age of 14, citizens between the ages of 14 and 18 are legally capable, although their legal capacity is limited. According to the general rule of the law (paragraph 1 of Article 22 of the Civil Code), they have the right to independently make transactions, but with the consent of parents, adoptive parents or trustees. The form of such consent must correspond to the form that is established for a transaction made by a minor.

Legislative acts may establish cases when the transaction by minors and for a minor requires the prior consent of the guardianship and guardianship authority. Usually such cases are provided for by family legislation for the most important transactions on the alienation of property (for example, the sale of apartments).

Minors between the ages of 14 and 18 are independently responsible for the transactions they have made, and are also responsible for the harm caused by their actions (clause 4 of Article 22 of the Civil Code).

As an exception to the general rule on transactions by persons aged 14 to 18 years with the consent of parents, adoptive parents or trustees, minors of the specified age have the right to independently dispose of their earnings, scholarships, other income, which includes income from entrepreneurial activity or from working in a production cooperative as a member. Persons between the ages of 14 and 18 also have the right to independently dispose of intellectual property objects created by them, for example, literary works, inventions, etc., as well as to make small household transactions.

The expansion of the legal capacity of persons aged from 14 to 18 years in these cases equalizes their legal capacity with adults. Limiting the legal capacity of minors to dispose of income or intellectual property objects created by them would stifle incentives to engage in income-generating activities or create intellectual property objects, which in itself indicates a sufficiently high level of mental maturity of minors. In the case of abuse by minors in these cases (for example, the squandering of income), the Civil Code provides for the right of guardianship and guardianship authorities to restrict minors in the relevant rights or even deprive them of these rights.

Some persons who have reached the age with which the law associates the emergence of legal capacity, due to the defects of their mental state, who are not able to sufficiently understand the meaning of their actions and direct them, may be recognized by court as incapacitated or with limited legal capacity.

According to Article 26 of the Civil Code, citizens who, due to mental illness or dementia, are unable to understand the meaning of their actions or direct them can be recognized as incapacitated.

Both mental illness and dementia are types of mental disorder, and dementia, although associated with a painful condition, occurs from the moment a citizen is born. For the recognition of a citizen as incapacitated, only such mental disorders that have led to a loss of the ability to understand the meaning of their actions or to direct them are important.

Recognition of a citizen as incapacitated due to mental disorders is carried out only by a court in accordance with the procedure provided for by the Civil Procedure Code, and serves as a basis for establishing custody over him.

A citizen recognized by a court as incapacitated due to a mental disorder cannot independently make transactions, including small household ones, and bear civil liability for his actions. On behalf of a citizen recognized as incapacitated, transactions are made by his guardian.

In case of recovery or significant improvement in the health of an incapacitated citizen, who created an opportunity for him to understand the meaning of his actions and direct them, he is recognized by the court as capable, after which custody is removed from him.

Restriction of the legal capacity of citizens by court is allowed in cases of abuse of alcoholic beverages or narcotic substances by them, if as a result of such abuses a citizen puts his family in a difficult financial situation (Article 27 of the Civil Code).

To limit the legal capacity of a citizen abusing alcoholic beverages or narcotic substances, it is essential that as a result of such abuses, the family of a citizen falls into a difficult financial situation, regardless of the number of family members. If a citizen does not have a family, but puts only himself in a difficult financial situation, then this does not serve as a basis for recognizing him as having limited legal capacity. The difficult financial situation of the family of a citizen abusing alcoholic beverages or drugs should be understood as a significant decrease in its material standard of living, and the impossibility of raising this level due to these abuses.

Guardianship is established over a citizen recognized by the court as having limited legal capacity. Such a citizen, only with the consent of the trustee, has the right to make all transactions, except for small household ones, as well as to receive wages, scholarships, pensions, other types of income and dispose of them.

Restriction of the citizen's legal capacity and guardianship over him is canceled on the basis of a court decision after the termination of the citizen's abuse of alcoholic beverages or narcotic substances.

The procedure for recognizing a citizen as having limited legal capacity and canceling such restriction is determined by the Civil Procedure Code.

Guardianship and guardianship. It has already been said above that guardians and trustees make transactions on behalf of incapacitated and partially capable persons. They can only be adult capable persons.

Guardians are appointed by special state guardianship and guardianship bodies to represent and protect the interests of the incapacitated, and trustees — persons with limited legal capacity.

Guardians and trustees for the representation and protection of the interests of minors are appointed if the last parents (adoptive parents) no, or they cannot perform their functions of representing the interests of minors. The procedure for appointing guardians and trustees, their functions, rights and obligations are determined by family legislation.

LEGAL ENTITIES

The subjects of civil law relations, along with individuals, are legal entities (Article 1 of the Civil Code of the Republic of Kazakhstan).

A legal entity is an organized, created and endowed with rights and obligations subject of property relations. The founders (creators) of a legal entity form it in order to separate the legal entity as a subject of property relations from themselves. The practical significance of the institution of a legal entity for property civil law relations is that "the founders of a legal entity have the opportunity to limit their entrepreneurial risk to the amounts they consider acceptable for themselves"1.

As a legal category, a legal entity has not found an unambiguous definition in the legal literature.

During the existence of the Soviet state, various opinions about the nature of legal entities were very popular in the theory of civil law. Basically, the object of the study was legal entities — state-owned enterprises and institutions, which is understandable due to the dominance of state ownership in the economic2.

The most detailed concept of a legal entity in relation to state organizations, given by academician A.V. Venediktov, entered the legal literature as the "theory of the collective"3.

Currently, the question of the essence of a legal entity is not so popular in the theoretical discussions of scientists. Of the recent statements in the scientific literature, one can note the definition of a legal entity "as a target property". According to E. A. Sukhanov, "... modern commercial practice contains many arguments in favor of the theory of "target property", which explains the essence of a legal entity as a personified property specifically intended for participation in civil or commercial (commercial) turnover."4

The theory of fiction and the theory of reality, the commonality of which is the justification of the legal personality of collective entities, are the most popular in relation to a legal entity abroad.

The theory of the fiction of a legal entity is associated with the name of the German lawyer, the head of the historical school of law that arose in the XIX century, K. F. Savigny. He argued that a person, and only a person, is a valid subject of law. His concept was reduced to the fact that a legal entity is nothing more than a legal entity artificially created by means of a simple fiction, the only possible carriers of legal personality — individuals - remain the real subjects of legal relations in a legal entity.

According to some scientists, the permissive procedure for the emergence and special legal capacity of a legal entity arising from the theory of fiction were primarily aimed at ensuring state control over associations of persons who do not pursue the purpose of profit-making.5

The theory of fiction has become widespread in England and the USA.

The recognition, regardless of its constituent members, of the existence of a legal entity has become a fundamental principle of corporate law in England and the USA. The theory and practice of the United States is known for the popular definition of the corporation by Chief Justice D. Marshall back in the XIX century: "A corporation is an artificial entity, invisible, intangible and existing only from the point of view of the law."6

The theory of reality, or organic theory, associated with the name of the German lawyer of the XIX century. Gierke, considered a legal entity as a really existing subject of law necessary for the normal functioning of the state, as an allied personality that exists independently of the state as a kind of social reality.

In essence, Gierke proceeded from the same idealistic position as Savigny, constructing a "real" allied personality in the image and likeness of a person. Modern followers of organic theory consider a legal entity as a separate unity of interests, which the rule of law gives rights and obligations.

In Western law, a legal entity is understood as an organization or institution that acts as an independent participant in civil legal relations.7 Although the civil legislation of Western states prefers either not to define a legal entity at all (in Germany, up to 1978, even the term "legal entity" was not contained, in the Civil Code of Italy in 1942 only the classification of legal entities is given, although chapter I of title II of the first book refers to legal entities and is called "General Provisions"), or the legislator is limited to the most general and very brief formulations. Thus, Article 52 of the Swiss Civil Code of 1907 defines legal entities as a combination of persons having a corporate structure and an independent institution founded for some special purpose.

The most detailed definition of a legal entity is contained in the civil codes of Latin American countries. For example, the Civil Code of Chile of 1865 gives the following formulation of the concept of a legal entity: "A fictitious person is a legal entity capable of exercising rights, carrying out civil duties and entering into legal and non-legal relations." A similar definition is contained in the civil codes of Colombia, El Salvador and Ecuador.

Based on the above legislative practice, it can be stated that the institution of a legal entity occupies one of the central places in civil law.

The institution of a legal entity can be defined as a set of norms, a sub-branch of civil law that establish the legal capacity of legal entities, their organizational and legal forms, the procedure for the creation, reorganization and liquidation of legal entities.

The legal definition of a legal entity is fixed in paragraph 1 of Article 33 of the Civil Code of the Republic of Kazakhstan: "A legal entity is an organization that has separate property on the right of ownership, economic management or operational management and is responsible for its obligations with this property, can acquire and exercise property and personal non-property rights and obligations on its own behalf, be a plaintiff and a defendant in the court. A legal entity must have an independent balance sheet or an estimate."

Signs of a legal entity. It follows from the definition of a legal entity that not every organization can be recognized as a legal entity. In order for it to acquire the status of a legal entity, the following features must be present in the aggregate:

organizational unity;

property isolation;

independent property liability;

speaking in civil circulation on his own behalf.

Organizational unity. The Civil Code defines a legal entity as an organization. An organization is understood as a collective of citizens subject to certain rules of interaction and functioning, and not just a certain number of individuals. The organizational unity of a legal entity as a collective entity consisting of many persons should be understood as its performance in civil legal relations as a single entity expressing a single will outside.

At the same time, organizational unity cannot always be reduced to the obligatory presence of a multitude of persons. In most countries in the last decade, against the background of the process of centralization of capital, legal entities consisting of one participant (an individual or a legal entity) have become commonplace. For example, in Germany by the early 70s, out of 42,000 limited liability partnerships, approximately 9300 (i.e. 22 percent) had turned into one-person companies. In Germany, legislative acts have been adopted allowing the creation of joint-stock companies with a single member (Law of May 10, 1968) and the formation of a limited liability partnership by one person (Law of May 4, 1980).

A similar phenomenon is observed in the legislation of a number of countries — France, the USA, Norway, Sweden, Switzerland, Denmark and England. Although in the latter, unlike in the first two states, the creation of a corporation by one person is officially prohibited, but the recognition of a company by one person is indirectly carried out by extending to the one member of the corporation remaining as a result of any events, the company unlimited liability for the debts of the corporation.8

Our previous legislation did not allow the existence of a legal entity consisting of one participant. The current Civil Code assumes the possibility of forming legal entities with one participant (Articles 40, 58 of the Civil Code).

The organizational unity of a legal entity is expressed in the constituent documents of a legal entity. In accordance with Article 41 of the Civil Code, legal entities act on the basis of the charter and the constituent agreement, or the charter. The charter is approved by the founder (founders) of the enterprise, and the founding agreement is concluded by the founders. The charters must contain the name of the legal entity, location, subject, purpose of activity and other necessary data. The existence of a charter is a prerequisite for the existence of a legal entity — a state enterprise (Articles 103, 104 of the Civil Code of the Republic of Kazakhstan).

Property isolation is a fundamental feature of a legal entity, from which its independent property responsibility follows. The property isolation of a legal entity is manifested in the consolidation of property for it, which a legal entity has the right to dispose of. Y. K. Tolstoy rightly notes that "the sign of a legal entity is rather not the presence of separate property,9 but such a principle of the functioning of the organization as property isolation, and this is not the same thing."10 Thus, the property isolation of a legal entity is assumed from the moment of its registration (for example, paid—up capital for a joint-stock company (see Article 8 of the Law on Joint-Stock Companies), and the presence of separate property, for example, the declared authorized capital of a joint-stock company - after its formation (Article 15 of the same Law).

The degree of separation of legal entities varies and depends on the form of ownership of this property (public, private). If it is a state-owned enterprise, then the property is assigned to it on the right of economic management or operational management and is thus separated from the property of other enterprises.

The manifestation of the property isolation of legal entities is self-sufficiency and an independent balance sheet. A legal entity must have an independent balance sheet or an estimate (clause 1 of Article 33 of the Civil Code).

Independent property liability is based on the property isolation of a legal entity. This feature is reflected in Article 44 of the Civil Code: each legal entity bears independent civil liability for its obligations, neither its founders (or participants) nor the state bear any responsibility for its debts. At the same time, the law provides for a number of exceptions to this general rule to ensure, in some cases, the interests of creditors. Thus, exceptions are established for state-owned enterprises, state institutions and institutions that are responsible for creditors' debts not with all their property, but only with the money they have (Article 207 of the Civil Code of the Republic of Kazakhstan), if, for example, a state-owned enterprise has insufficient money, the subsidiary responsibility for its obligations is borne by the Government of the Republic of Kazakhstan or the relevant local executive body (see paragraph 2 of paragraph 1 of Article 207 of the Civil Code as amended on December 16, 1998).

Separate rules of liability of a legal entity are established in cases when the bankruptcy of a legal entity is caused by the actions of its founder or the owner of the property and in cases of subsidiary or joint liability of the founders of certain types of legal entities for their debts (Articles 70, 84, paragraph 3 of Article 96 of the Civil Code). In addition, the additional liability of the founders (participants) of legal entities for the debts of the latter may be established by the constituent documents (paragraph 2 of Article 44 of the Civil Code).

Acting in civil turnover on its own behalf is manifested, in particular, in the ability of a legal entity to acquire and exercise property and personal non-property rights on its own behalf, to bear obligations, to be a plaintiff and a defendant in court.

The name of a legal entity is a means of individualization and concretization of an organization in order to recognize it as a subject of legal relations. Speaking in civil circulation on his own behalf is a derivative of other signs of a legal entity. Thus, according to Article 38 of the Civil Code, it is with the name that the legislator associates the organizational and legal form of a legal entity. For example, the corporate name of a state-owned enterprise must contain an indication that the enterprise is state-owned (Clause 4 of Article 104 of the Civil Code).

A legal entity that is a commercial organization must necessarily have a company name. At the same time, a legal entity has the exclusive right to use a brand name, up to bringing guilty entities to material responsibility for their use of someone else's brand name. The corporate name of a legal entity may be used by another legal entity for a certain payment.

In addition to the brand name, a commercial legal entity can also use such means of individualization as a trademark and a service mark (trademark). A trademark (service mark) is a designation registered in accordance with the Trademark Law or protected without registration by virtue of international treaties in which the Republic of Kazakhstan participates, serving to distinguish goods (and services) of some legal entities or individuals from similar goods (and services) of other legal entities or individuals (art. 1 of the Law "On Trademarks, Service Marks and Appellations of Origin of Goods" dated July 26, 199911.) A trademark or service mark as a means of individualization of a legal entity is of great practical importance both for consumers of products of a legal entity and for the legal entity itself. According to the trademark, it is possible to find the manufacturer if it is necessary to address claims and requirements to the manufacturer. At the same time, a trademark, a trademark is a means of distinguishing the manufacturer of a well-known product.

A service mark, which is equated to a trademark, is registered by legal entities whose main activity is to provide services.

The name of the place of origin of the goods is also a means of individualization of a legal entity. Organizations that manufacture products whose properties are largely determined by the natural conditions or human factors of their place of production have the right to register and use the name of the place of origin of the goods (for example, Vologda lace or Dymkovsky toy). Unlike a trademark, the right to use the appellation of origin is not exclusive and may also be assigned to other legal entities manufacturing similar goods in the same locality.

Thus, a legal entity is an organization that has separate property in its ownership, economic management, operational management and is independently responsible for its obligations with this property, acts in civil turnover on its own behalf.

Bodies of a legal entity. These include persons and collective formations of a legal entity authorized by legislation or constituent documents to act on behalf of a legal entity before other legal entities without special authorization (without a power of attorney).

The bodies of a legal entity can be individual (director, president, manager) or collective (collegial). The latter include, for example, the general meeting, the management board, the board of directors, etc.

The types, procedure for appointing and electing bodies of different types of legal entities and their powers are determined by legislative acts on certain types of legal entities and constituent documents.

The body of a legal entity acts in property relations on behalf of a legal entity, and not as an independent entity. Therefore, a legal entity is responsible for the actions of its bodies, even if they exceed their powers (paragraph 4 of Article 44 of the Civil Code).

The body of a legal entity is not a representative of the latter, therefore, the performance of the functions of the body does not require any power of attorney. It is enough to present an official document confirming the official position.

The exclusion from Article 37 of the Civil Code of the paragraph on the possibility for a legal entity to acquire civil rights and assume civil duties through its participants and representatives does not mean that a legal entity is not entitled to do so. In this case, the general provisions on representation apply (see Chapter 5 of the Civil Code).

Branches and representative offices of a legal entity. Branches and representative offices that do not have the status of a legal entity are property and geographically separate subdivisions of a legal entity outside its location.

The branch (representative office) does not have its own separate property, the property of the branch (representative office) is often listed on a separate balance sheet for accounting purposes, but such a balance sheet is not independent; in property relations, the branch (representative office) does not act on its own behalf, but on behalf of the legal entity that created it; and finally, it does not bear an independent property the legal entity is responsible for his actions.

A branch of a legal entity performs all or part of the function (for example, a branch of the Kazakh State Law University in Astana). A representative office is a subdivision of a legal entity that performs legal actions on behalf of a legal entity and monitors their execution.

Branches and representative offices operate on the basis of a Regulation approved by the legal entity that created them. The regulations on the branch (representative office) define intra-branch relations and relations between the branch (its internal divisions) and the main legal entity: the goals and main activities of the branch, the procedure for appointing its officials, their competence, forms of control, the procedure for transferring property from the branch to the legal entity and vice versa, the conditions for termination of the branch (representative office).

Heads of branches and representative offices are appointed by the authorized body of a legal entity, except for cases provided for certain types of legal entities. Thus, the heads of branches and representative offices of public associations are elected in accordance with the procedure provided for by the charter of the public association and the regulations on its branch or representative office (see paragraph 4 of Article 43 of the Civil Code).

Branches and representative offices of legal entities located on the territory of the Republic of Kazakhstan are subject to state registration without acquiring the rights of legal entities.

Legal capacity is a special legal property, a general ability recognized by the legislator to have specific subjective civil rights and bear specific subjective duties.

Since a legal entity is, along with citizens (individuals), a subject of property relations (Article 1 of the Civil Code), it must have legal capacity. Legal capacity and legal capacity of legal entities arise simultaneously, at the time of its state registration (paragraph 3 of Article 42 of the Civil Code), therefore, for legal entities, the distinction of these categories does not matter.

Unlike citizens with general legal capacity, legal entities have special legal capacity.

A legal entity may have civil rights and bear obligations related to its activities in accordance with the current legislation (Article 35 of the Civil Code) and in accordance with the constituent documents for the implementation of statutory tasks.

Civil rights and obligations arise as a result of legal facts. For legal entities, such facts are primarily transactions. Therefore, when determining the content of the legal capacity of legal entities, we mean first of all the range of transactions that a legal entity has the right to make. Previous legislation prohibited all legal entities from making transactions not provided for by legislation or constituent documents, i.e. transactions that do not correspond to the statutory goals. The legal capacity of legal entities was expressed in the principle of "everything is prohibited except what is permitted."

The development of market relations required flexibility in the activities of economic entities, and the narrowly special legal capacity of legal entities did not meet the realities of today. The new Civil Code of the Republic of Kazakhstan and the regulatory legal acts adopted in accordance with it have expanded the legal capacity of legal entities.

But it is impossible to talk about general or universal legal capacity in relation to legal entities in an objective sense, because a legal entity is a legal entity created for certain purposes and therefore endowed by its founder with specific rights and obligations for the implementation of statutory tasks. Therefore, the legal capacity of any legal entities will be of a special nature. The legal capacity of some of them is strictly limited, it is described in detail in the constituent documents. The legal capacity of other types is as close as possible to the universal one. This applies primarily to commercial legal entities (paragraph 1 of Article 35 of the Civil Code). Their legal capacity can be characterized by the principle of "everything is allowed except what is prohibited." But some legal entities, primarily state-owned enterprises, have a special legal capacity. Enterprises on the right of economic management have a narrower legal capacity than that possessed by non-state commercial legal entities (Article 200 of the Civil Code, Decree on a state enterprise). State-owned enterprises are created to carry out only certain types of activities purely in the public interest for the implementation of special, special purposes, therefore they are entities with special, even narrower, legal capacity (chapter III of the Decree on State Enterprises).

The issue of the legal capacity of non-profit organizations should be considered separately. Their legal capacity should definitely be characterized as special, since the law clearly provides for the creation of such organizations for certain purposes — managerial, social, coordination, charitable, etc. Therefore, non-profit legal entities can only engage in those activities that are provided for in their charters. Until recently, the Civil Code provided for public and private institutions the opportunity to independently dispose of income from entrepreneurial activity (see paragraph 2, paragraph 1, Article 206 of the Civil Code of the Republic of Kazakhstan as amended in 1994). Now, due to the exclusion from the Civil Code of the norm that fixed the right of independent disposition12, we can talk about an even narrower nature of special legal capacity and state institutions, and private institutions.

In addition to the general boundaries of legal capacity, which are applicable to all legal entities formed in one or another organizational and legal form, the law restricts legal capacity for some types of legal entities, taking into account the content of their activities. The restriction is carried out either by allowing certain legal entities to engage in certain activities, or, on the contrary, by prohibiting legal entities specified by law from engaging in certain types of activities. For example, paragraph 3 of art. 1 of the Decree on Banks and Banking Activity prohibits any legal entities that have not received the official status of a bank from calling themselves a bank and engaging in banking activities.

The legal capacity of legal entities in the field of entrepreneurship may be limited by the licensing system for certain types of activities.

As stipulated in clause 4 of Article 10 of the Civil Code, the production and sale of certain types of goods, works and services for reasons of state security, law enforcement, environmental protection, property, life and health of citizens can be carried out only under state licenses. The list of such goods, works and services, the procedure for issuing state licenses are established by the Decree on Licensing.

Legislative acts regulating certain types of activities may provide for other grounds and a different procedure for issuing and revoking a license and suspending its validity.

The need to license certain types of activities requires clarification of the time of the emergence and termination of legal capacity of legal entities, as well as the definition of its boundaries.

The legal capacity of a legal entity arises at the time of its creation and ceases at the time of its liquidation. But the right to perform actions requiring licensing is not included in the content of such legal capacity. Only after obtaining a license, these rights are introduced into the content of the legal capacity, expanding its boundaries. Upon recognition of the license as invalid, its termination, revocation or suspension of its validity, the content of the legal capacity of the legal entity returns to its former general boundaries.

OBJECTS

The concept of objects of rights is one of the controversial in the science of law (this concept is considered in detail in relation to objects of civil rights in chapter 5 of this textbook on legal relations). In this chapter, we will only note that, in accordance with the general concept of an object developed in philosophy and often used in the science of law, the object of subjective law should be understood as everything that the subject of law has or can have an impact on. At the same time, the impact of the subject of law on the object of law is specific. It does not change the natural and other non-legal properties of the object, but affects only its legal properties and conditions, and only within the framework provided for by law.

Civil rights objects are assigned a special chapter by the Civil Code (Chapter 3), which regulates mainly general issues of the legal regime of civil rights objects and such important and specific objects as money and securities. But a number of special issues of the legal regime of certain types of objects of rights are regulated by other chapters of the general and special parts of the Civil Code and other civil legislation.

The objects of civil rights may be property and personal non-property goods and rights (paragraph 1 of Article 115 of the Civil Code). Thus, the Civil Code divides the objects of civil rights into two main groups: property benefits and rights and personal non-property benefits and rights.

Property benefits are understood as those material objects and other values (in particular, energy, works and services) that can satisfy the material and other needs of subjects of civil law, are subject, as a rule, to monetary valuation, and are included in the sphere of relations regulated by civil law.

Property rights are understood as subjective civil rights to property goods (in particular, the rights to use, own and dispose of property goods).

The main types of property benefits and rights are listed in paragraph 2 of Article 115 of the Civil Code. These include: things, money, including foreign currency, securities, works, services, objectified results of creative intellectual activity, brand names, trademarks and other means of individualization of products, property rights and other property.

The list of the main types of property benefits and rights given in the Civil Code is far from exhaustive. It did not include, for example, such an important property benefit for the present time as information.

Personal non—property benefits include values that are inseparable or closely related to the personality of subjects of civil law, and personal non-property rights are rights to the mentioned values. For example, a person's life refers to personal non—property benefits, and the right to life refers to personal non-property rights.

Personal non-property benefits, as objects of rights, are so closely related to personal non-property rights that the Civil Code sometimes speaks only of personal non-property rights, implying personal non-property benefits mediated by these rights (for example, Section 3 of Chapter 3 of the Civil Code).

Paragraph 3 of Article 115 of the Civil Code provides a list of basic personal non-property benefits and rights. These are life, health, personal dignity, honor, good name, business reputation, privacy, personal and family secrets, the right to a name, the right to authorship, the right to inviolability of a work and other intangible benefits and rights. As can be seen, the list of personal non-property benefits and rights in Article 115 of the Civil Code is not closed.

The list includes personal non-property goods and rights of two types: not related to property goods and rights, for example, life, human dignity, and related to property goods and rights, for example, the right to authorship, the right to inviolability of the work.

Personal non-property benefits and rights are the subject of consideration of other chapters of the textbook. It should also be noted here that a number of personal property benefits and rights are enshrined in the Constitution of the Republic of Kazakhstan as human and citizen rights. These are, for example, the rights to life, dignity, privacy.

In accordance with paragraph 2 of Article 12 of the Constitution, human rights and freedoms belong to everyone from birth, are recognized as absolute and inalienable. They determine the content and application of laws and other regulatory legal acts, including civil law.

When characterizing property and personal rights as objects of civil rights, it is necessary to take into account that in the legal literature, when considering civil legal relations, subjective rights are usually defined as elements of the content or form of legal relations, but not as their object1. But such an approach does not adequately take into account the dynamics of legal relations, the relative nature of the concepts of the subject, the object of the content and the form of legal relations. Subjective property law can and often acts as objects of rights, which is directly provided for in paragraph 1 of Article 115 of the Civil Code. Property law can, for example, act and acts as an object of rights when it becomes the subject of transactions that create a new legal relationship. For example, in the legal relations of permanent land use, the object is a land plot as a property benefit. But the right of permanent land use can be the subject of transactions. Non-state land users can dispose of this right, such as: sell, give, change, bequeath, etc. (paragraph 1 of Article 43 of the Decree on Land). Thus, when selling or otherwise assigning the right of permanent land use, a new obligation arises, for example, the obligation to purchase and sell the right of land use. At the same time, a "right to the right" is formed, the rights of the seller and the buyer to the right of land use as an object in the obligation of purchase and sale.

We see a similar picture when protecting violated property and non-property rights, when they turn into objects of rights in protective legal relations.

The concept of "property" is one of the important concepts of civil law. The concept of property relations as a subject of civil law regulation is closely related to it.

The legal concept of property as an object of law, paragraph 2 of Article 115 of the Civil Code combines property benefits and property rights. The Civil Code understands property as separate property benefits and rights, as well as their sets or complexes. In the latter case, they speak, for example, about the property of a citizen or a legal entity, without singling out individual property benefits or rights in it.

Under the property of the Civil Code, in some cases, it understands not only property benefits and rights, but also property obligations, and also includes claims and debts as part of property complexes (paragraph 2 of Article 119). Therefore, in property, its asset is distinguished as a set of property benefits and rights belonging to this subject of civil law, and a liability as a set of property benefits that this subject of law temporarily legally possesses, but belonging to other persons, and a set of its obligations2.

The property of property or property goods in material objects is their social, legal property given to them in public relations, and not natural. Therefore, not all objects of nature are recognized as property and objects of civil rights. We have already said that property benefits are understood only as material objects and other values that can satisfy the material and other needs of legal entities and are involved in the sphere of relations regulated by civil law. Therefore, for example, the sun is not included in the number of property benefits, although, undoubtedly, it is a boon for humanity. Only those objects of nature that are natural resources, i.e. can be the subject of human activity and therefore are recognized by law as objects of property (Article 193 of the Civil Code), belong to property benefits.

The following main types of property can be distinguished: 1) things; 2) money and securities; 3) works and services; 4) results of creative intellectual activity; 5) information; 6) property rights (separate paragraphs of this chapter are devoted to money and securities as objects of rights).

Things are one of the most common types of property. Things in the legal literature are usually understood as objects of the material world external to a person — both created by man and formed by nature itself and possessing natural properties.3 However, the essence of a thing as property lies not so much in its natural properties, although they are reflected in its legal regime, but in its social properties as a property good capable of satisfying human needs, having a use and exchange value, which can usually have a monetary value and, as a rule, capable of turnover. A thing acquires these social properties as an intermediary of a social relation, as its material form. In other words, a materialized social relationship.

Only due to its social properties can a thing be an object of rights, since the subject of law cannot influence its natural properties by legal means, although the latter influence the legal regime of the thing. What has been said about the nature of the impact of the right to property objects in the form of things requires some explanation. At first glance, it may seem that the subject of the right to use a thing acts on it as an object by extracting its useful natural properties from the thing. By consuming a thing, the subject exerts not only a legal, but also an actual impact on it. However, the right of use itself is only a legal opportunity to extract its useful natural properties from the property, but not the actual extraction of these useful properties (paragraph 2 of Article 188 of the Civil Code). The right of use and actual use differ as legal and actual, as an opportunity and validity. Hence the differences between property as an object of legal and actual impact.

What has been said may seem like abstract theorizing that has no practical significance. But the distinction between the legal and the actual is of great importance. It is very important to use the mechanism of legal regulation, to determine the measure of the possibilities of legal means to influence actual relations in society, and, consequently, to understand the possibilities and effectiveness of legal regulation.

Things, like property, are very diverse and are always in certain relations to the subjects of law (for example, they belong to them by right of ownership, right of use, etc.). By things, the legislation also understands various natural resources and products of human labor, acting in the form of things. The number of things includes various types of energy (for example, thermal, electrical). Plants and animals are recognized as things.

The legal regime of things that are fruits, products and incomes has some peculiarities. The proceeds received as a result of the use of property (fruits, products and income) belong to the person using this property on a legal basis, unless otherwise provided by legislation or an agreement on the use of this property (Article 123 of the Civil Code). Fruits as a legal concept usually mean natural products of vital activity of plants and animals that have value, for example, fruit trees, tea leaves, animal offspring, wool, milk, eggs produced by plants and animals and separate from these things, i.e. they are receipts received as a result of the use of fruit-bearing things. But again, we are talking about the legal properties of things, i.e. their quality of property.

Products should be understood as things created through the productive use of other things in the process of labor (for example, bread produced by a bakery, sewing products produced by sewing production, etc.).

Income should be understood as monetary and other receipts from the use of a thing (things) or productive activity. However, income can be not only in the form of things, but also monetary and other claims on obligations.

Works and services. Works and services as objects of civil rights are elements of the process of expedient human activity, which in themselves are material goods.

The differences between them are that the work creates a material result that is separable from the work process itself (for example, as a result of the work on the basis of a contract, a structure or structure is created). In this case, the object of the rights are the construction works themselves, but the object of the rights further is the structure itself or the structure as a thing.

Services, representing an independent object of rights, have no other useful result, except for the activity of rendering services (an example of services may be the services of a notary).

It should be noted that both works and services become objects of civil rights if they are of a commodity nature, intended as use values for other persons. For example, the repair of your own apartment by its owner does not become an object of rights. On the contrary, the repair of an apartment for other persons under a contract refers to works that are subject to civil rights.

The results of creative intellectual activity represent an independent type of objects of civil rights, a special type of property, which, unlike things, although it exists objectively, is not material, but ideal. Means of individualization are equated to the results of creative intellectual activity according to their legal regime: a legal entity, products of an individual or legal entity, works or services performed by them (paragraph 1 of Article 125 of the Civil Code).

The results of creative intellectual activity, in particular, include: works of science and art, audiovisual works, inventions, utility models, industrial designs, selection achievements, integrated circuit topologies and some other results of creative intellectual activity. Trade names, trademarks, service marks, etc. are equated to them as objects of exclusive rights.

The law unites all these objectified results of creative intellectual activity and the means of individualization equated to them with the concept of intellectual property (Article 125). The use of objects of intellectual property rights by other persons, except the holders of this right without the consent of the latter, is not allowed and entails liability established by legislative acts.

It is necessary to distinguish between the objects of intellectual property rights and the material carriers of these objects. The right to intellectual property objects and to the material carriers of this right as independent objects exist independently of each other. For example, a person who is the owner of a book or tape recorder with a recording of a musical work can dispose of a book or cassette: sell it, donate it. But the right to a literary work printed in a book as a result of creative intellectual activity or the right to a musical work recorded on a cassette does not belong to the owner of the book or cassette, but to the owner of the literary or musical work. Therefore, the owner of a book or a cassette has no right to replicate and distribute works printed in a book or recorded on a cassette without the permission of the owner of a literary or musical work.

Information. A special type of objects of civil rights is information that is currently widely included in civil circulation.

There are a large number of different definitions of information in the literature. To characterize information as an object of civil rights, it is sufficient to define it as information about something or someone that has received objective expression in a form accessible to human perception (directly or indirectly using various mechanisms and devices). For example, fixing or communicating information using oral or written speech, graphs, diagrams, drawings, computer and other equipment). Information is an ideal good expressed in a material form or placed on a material carrier. Nowadays, machine information, generated, stored and transmitted using computer technology, is of particular importance. Information can exist in a single form, on a single medium, or it can be replicated in large quantities (for example, in newspapers). But as an object of rights, information acts only in the public form of property, is one of its types. At the same time, information itself and its material carriers should be distinguished as objects of rights.

It should be borne in mind that the right to information is protected only in cases stipulated by law, for example, the right to secrecy of official and commercial information.

In the Civil Code of the Russian Federation, information is directly indicated as one of the types of objects of civil rights (Article 128). In the Civil Code of the Republic of Kazakhstan, it is covered by the concept of "other property" as an object of rights (Article 115). For example, information may be subject to civil rights in a purchase and sale obligation.

Only certain types of information are specifically regulated in the Civil Code of the Republic of Kazakhstan, for example, the results of creative intellectual activity, which represent a special type of information, as well as such type of information as official and commercial secrets. The results of creative intellectual activity as an object of rights have already been mentioned; here we will focus in more detail on official and commercial secrets.

Civil legislation protects information constituting an official or commercial secret (clause 1 of Article 126 of the Civil Code). Only the information that simultaneously has three characteristics is subject to protection: it has real or potential commercial value due to its unknown to third parties; there is no access to the information by third parties on legal grounds; the owner of the information takes measures to protect its confidentiality.

The composition and volume of information constituting an official or commercial secret may be determined by legislation, and in cases where there is no corresponding legislative regulation — by entrepreneurs in relation to commercial secrets and by state bodies in relation to official secrets. For example, by the Decree of the President of the Republic of Kazakhstan, which has the force of Law, "On Accounting" dated December 26, 1995, it was established that the content of accounting registers and internal accounting statements is a commercial secret. The content of the constituent agreements of limited and additional liability partnerships of joint-stock companies is also recognized as a commercial secret by virtue of the law, unless otherwise provided by the constituent agreements.

Information that is freely accessible by law (for example, data on registration and registered rights to immovable property) cannot be recognized as information constituting an official or commercial secret.

Information about official and commercial secrets should be distinguished from information that is a state secret and other secrets protected by public law legislation, which is protected in a special manner.

Persons who illegally obtained information constituting an official or commercial secret, as well as employees who, contrary to an employment contract or contract, contrary to a civil contract, divulged such a secret, are obliged to compensate for the damage, which in this case means both the losses caused and moral damage.

Property rights are one of the most important types of property as an object of rights. Such objects can become both real (for example, the right of permanent land use) and binding rights (for example, the right of a creditor to receive a debt from a debtor upon assignment of a right).

Property rights also include intellectual property rights.

Property complexes. In many cases, property does not act as separate things or rights, but as property complexes. One of the types of such property complexes is capital. Capital in the legal sense of the word is understood as a property complex intended for entrepreneurial activity. The types of capital allocated by legislation are quite diverse. For example, the Decree of the President of the Republic of Kazakhstan, which has the force of Law, "On Accounting" dated December 26, 1995. he speaks of equity, by which he understands the assets of the entity after deducting its liabilities. The Civil Code includes the norm on the authorized capital of a business partnership, which is formed at the expense of its founders. The contribution to the authorized capital of the partnership may be money, securities, things, property rights, including rights to the results of intellectual activity, and other property (paragraph 1 of Article 59 of the Civil Code). Art. 88 The Civil Code speaks about the authorized capital of a joint-stock company, which consists of the total nominal value of shares, while distinguishing between the declared and issued authorized capital.

Another property complex provided for by law is the entrepreneurial business of an individual entrepreneur. Entrepreneurial business is defined as a set of property, including property rights, on the basis and through which an individual entrepreneur carries out his activities (paragraph 1 of Article 14 of the Law "On Individual Entrepreneurship" of July 19, 1997). In essence, the concept of "entrepreneurial business" is close to the concept of "capital".

A kind of property complex regulated by Article 119 of the Civil Code is an enterprise as an object of rights. In legislation and in practice, the enterprise most often appears as a subject of law. For example, paragraph 2 of Article 102 of the Civil Code speaks about the property of the enterprise. In this case, the company acts as a subject of property rights. The law considers an enterprise as a subject of rights in a number of other cases.

An enterprise as an object of law is a property complex used for entrepreneurial activity. It includes all types of property necessary for its functioning as an enterprise, including buildings, structures, equipment, inventory, raw materials, products, the right to land, claims, debts, as well as the rights to designations that individualize its activities (brand names, trademarks, etc.), other intellectual property.

The enterprise as a whole is recognized as real estate, although movable property is also included in it as a property complex.

An enterprise or part of it may be the subject of transactions. In essence, an enterprise as a property complex is a kind of capital, although it is not designated in the law as such.

There are many other examples when property acts in the form of property complexes.

Lecture 5. Transactions

One of the main types of legal facts are transactions. Moreover, in the sphere of civil turnover, it is transactions that ensure the dynamics of such turnover, continuously generating legal relations and continuously developing them.

According to Article 147 of the Civil Code, transactions are actions of citizens and legal entities aimed at establishing, changing or terminating civil rights and obligations. Transactions, therefore, are recognized as purposeful actions of subjects. Their direct purpose is to establish civil rights or obligations (for example, the donation of property is directly aimed at transferring ownership of the thing from the donor to the donee), changing such rights and obligations (for example, the parties agreed to postpone the return of the leased property), or, finally, their termination (the creditor released the debtor from debt repayment).

The focus on the legal consequences of the transaction differs from other acts of behavior — actions that are directly aimed at achieving a different, non-legal result, however, by virtue of the law, they also lead to the emergence, change or termination of civil rights and obligations.

A citizen, for example, left his place of permanent residence to visit a sick mother in another city. Then I stayed there and decided not to return to my former place of residence. When leaving for his mother, the citizen did not intend to give up the rights to the state apartment in which he lived before leaving. But due to the requirement of the law providing for such a situation, a citizen loses the right to an apartment.

A transaction is a manifestation of lawful, permissible, and most often legally approved behavior. In everyday life, the term "transaction" is sometimes called an action that is negatively evaluated by society. This use of the word does not coincide with its legal meaning.

According to the signs of legality, the transaction differs from purposeful illegal actions, i.e. actions leading to damage to other persons. Such actions also give rise to civil rights and obligations related to the need to compensate for the damage caused, but they arise not from the transaction, but from the fact of causing damage, i.e. from a tort.

The legality of behavior as a necessary quality of a transaction does not require that all types of transactions are directly provided for by law, on the contrary, transactions that are not provided for by law are quite possible; it is only required that they do not contradict the law, do not violate its prohibitions (Article 7 of the Civil Code). The law, for example, does not regulate contractual relations between the sponsor and the person to whom he provides assistance, but such a contract is quite possible. Moreover, the Civil Code (Article 381) permits the conclusion of mixed contracts, which contain elements of various contracts provided for by law. A typical contract of this kind is an investment contract (Chapter 47, Articles 917-952 of the Civil Code).

Transactions generate civil rights and obligations for the one who commits them. On this basis, they differ from administrative acts, i.e. actions of competent state bodies, which may give rise to civil rights and obligations for persons subordinate to these bodies. For example, the decision of the competent state property management authorities obliges, or, on the contrary, prohibits the extension of the contract under which the building of the state enterprise was leased for a period of three years. On the same grounds, transactions differ from a court decision that generates, changes or terminates a legal relationship for a person who has applied to the court.

Transactions are consciously performed actions, they manifest the will of the one who acts. It is necessary to distinguish between the internal content of the will of the person making the transaction (his true intentions) and the external expression of the will (words spoken or written on paper, gestures, more complex actions).

Since the true aspiration of the will can be judged only by what a person says or does, it is assumed that the external expression of the will corresponds to its inner content.

However, in cases where a discrepancy is proved between the actual intention of a person and the external manifestation of his will (for example, the buyer, poorly knowing the language in which he explains with the seller, made a mistake in naming the price of the thing being purchased), more importance is attached to the actual will.

Since transactions are always an expression of will, they can only be made by persons whose will the law attaches legal significance to. Consequently, incapacitated citizens cannot make transactions, and persons with limited legal capacity have the right to make only such transactions as are permitted for them by law (see Articles 22 and 23 of the Civil Code).

The law (Article 148 of the Civil Code) distinguishes two types of transactions: unilateral transactions and contracts. A unilateral transaction expresses the will of one person and acts regardless of how other citizens or legal entities treat it. A unilateral transaction, for example, will be the refusal of a citizen from any right belonging to him, the termination of a power of attorney issued, a will, etc. A unilateral transaction, as a rule, generates (alone or together with other legal facts) rights from other persons who may not even know about such rights until they are notified of them. For example, a will after the death of the testator generates the rights of heirs. But such a transaction cannot impose obligations on third parties, except for those obligations that arise from the rights granted (for example, a testamentary refusal — Article 1057 of the Civil Code).

Often, a unilateral transaction generates a simple obligation in which the person who made the transaction becomes the debtor, and the person in whose favor the unilateral transaction was made becomes the creditor. For example, the issuance of a promissory note.

Sometimes a unilateral transaction terminates an obligation under which the person who made the transaction is a creditor, and the person in whose favor the transaction was made is a debtor. For example, debt forgiveness (Article 373 of the Civil Code).

Most transactions express the agreed will of two or more persons, i.e. they are contracts. For contracts, see Articles 378 — 405 of the Civil Code.

To recognize a transaction as a contract, it is not enough to simply make transactions by two or more persons, even if such actions were ultimately aimed at achieving a single goal. It is required that the actions be mutually agreed, i.e. each of the participants performs actions that the other participant consciously recognizes or even approves. If such actions are autonomous and each participant acts independently, without informing the other participant about his actions, there will be two consecutive transactions, but not a contract. For example, the drafting of a will and the acceptance by the heir of the inheritance bequeathed to him after the death of the testator.

On the other hand, every contract is generated by at least two unilateral actions: the offer of one party to conclude a contract (such a unilateral transaction is called an offer) and the consent of the other party to accept the offer (unilateral transaction — acceptance). See Chapter 23 of the Civil Code.

For other reasons, transactions can be divided into other types. A very important practical significance, for example, is the distinction between causal and abstract transactions.

The fate of a causal (causa — reason, reason) transaction depends entirely on the basis on which it was made. The disappearance of the foundation invalidates an already completed unilateral transaction. The buyer, for example, made an advance payment for the purchased goods, but the seller did not deliver the goods. The seller's right to the money received from the buyer disappears.

The legal force of an abstract transaction does not depend on its basis, if the transaction itself expressed the true will of the one who made it. For example, the buyer paid for the received goods by handing the seller a bill of exchange for the amount of the cost of the goods. If it subsequently turns out that the goods turned out to be of poor quality, the bill cannot be claimed back, on the contrary, the rights under the bill remain valid for the holder of the bill, and for all subsequent holders to whom the bill will be transferred, and for the one who is obliged to pay it.

The difference between the main and additional (accessory) transactions (contracts) is of practical importance.

Accessory transactions complement, provide, and clarify the main one. The fate of the accessory transaction depends on the fate of the main one, unless otherwise follows from the law, the substance of the transaction or the agreement of the parties.

An additional transaction can be called a pledge (Clause 1, clause 1, Article 322 of the Civil Code), guarantees and sureties (Clause 1, Article 336 of the Civil Code), a deposit (clause 1, Article 338 of the Civil Code) and some others.

In arbitration practice, there was a case when three separate executors undertook to perform a common work for the customer with a total amount of payment. Then they concluded an agreement among themselves on the mutual division of the received payment. Soon the customer refused the services of one of the performers, who, however, demanded that other performers transfer to him a share in the payment in the amount of 35 percent of its amount, referring to the fact that the payment sharing agreement did not say anything about the consequences of termination of the contract in respect of one of the performers. Such requirements cannot be considered justified due to the accessory nature of the payment sharing agreement.

So, a transaction is a generic concept, and a contract is a specific one. Every contract is a deal, but not every deal is a contract. In everyday and even official practice, the contract is also denoted by other terms: contract, agreement of the parties. But all these are contracts. Contracts make up the predominant number of transactions.

Article 150 of the Civil Code is devoted to transactions made under a condition, i.e. conditional transactions.

The term "condition" in relation to a transaction can have two meanings. The first is an element of the transaction that defines the rights and obligations of the parties. Such, for example, will be the conditions on the property to be rented out and on the amount of wages. The second is a circumstance, depending on which the rights and obligations of the parties serving as the content of the transaction arise or terminate. Such a circumstance is of an additional nature in relation to the main content of the transaction.

Article 150 of the Civil Code gives the term "condition" a second meaning. A transaction in which the occurrence or termination of the fundamental rights and obligations of the parties is made dependent on such a condition is conditional. For example, the parties agreed on the purchase and sale of an Almaty apartment if its seller moves to Astana for permanent residence. This circumstance (relocation or refusal to move) is a condition, and the contract of sale is conditional.

The condition must relate to the future. If the circumstance with which the parties linked the exercise of rights and obligations has already occurred before the transaction, even if its participants did not know it, it does not affect the transaction.

A condition may be a natural phenomenon, the actions of other persons, the actions of the parties to the transaction, etc. But it is impossible to define as a condition such acts of behavior that are illegal or immoral in nature.

By its nature, the condition can be positive (the circumstance will occur): the thing will be made if the contractor finds the required material in the stores, or negative (the circumstance will not occur): the manuscript of the article will be submitted to the journal if the author is not sent abroad.

Article 150 of the Civil Code distinguishes between transactions concluded under a suspensive condition and transactions concluded under a revocable condition. In the case of a transaction concluded under a suspensive condition, the rights and obligations come into force not at the time of the transaction, but upon the occurrence of the condition. The above example of the purchase and sale of an apartment just serves as an illustration of such a transaction. If the suspensive condition does not occur, the transaction terminates.

In the case of a transaction concluded under an annulment condition, the rights and obligations of the parties come from the date of the transaction, but terminate upon the occurrence of the condition. For example, the owner of the house rents out a room under the condition of its release if the owner's son returns home after graduation. Of course, all calculations for the time elapsed before the occurrence of the condition must be completed. If the cancellation condition is not met, the transaction turns into an unconditional one.

A condition can only be such a circumstance, the occurrence of which is likely, but not necessarily. If the condition cannot objectively occur, then the transaction is either non-existent or unconditional.

On the contrary, a circumstance that is bound to occur makes the transaction not conditional, but urgent. For example, the owner gives another person the opportunity to use the property until the spring.

The term may also have a suspensive and cancellative value for the transaction, since it is often associated with the occurrence, modification or termination of the rights and obligations of the participants in the transaction.

The parties to the transaction have the right to act in accordance with their interests, have the right to promote or prevent the occurrence or non-occurrence of a favorable or unfavorable condition for them. But they should not use illegal or immoral means that promote or hinder the condition, they should not act in bad faith (see Article 8 of the Civil Code). For example, a citizen agreed to sell a piano to a housemate if he was hired as an accompanist at the Philharmonic. Then he found a more profitable buyer and, in order to get rid of the first one, prevented him from getting a job at the Philharmonic, using family ties with its director. Since the seller, by his unscrupulous actions, prevented the occurrence of a condition that became unprofitable for him, the condition is considered to have occurred.

On the contrary, if a party to a transaction unfairly promotes the occurrence of a favorable condition, it is considered not to have occurred. For example, a contractor has committed to repair a residential building if he does not have to go on a business trip to another city. Then a more profitable order turned up for him, and in order to get rid of the first customer, he arranged a false call from another city and achieved a business trip, although it had already been decided to send another employee there. Under the circumstances set forth, the condition should be considered non-fulfilled.

Special types of transactions are exchange transactions provided for in Article 156 of the Civil Code. Exchange transactions are understood to be transactions concluded on the exchange. They basically generate the same rights and obligations between the participants that the corresponding transaction, concluded in a general manner, generates and are subject to the general legislative rules on the validity and invalidity of transactions. At the same time, they differ in a number of significant features that relate to the legal status of participants in exchange transactions, the subject of transactions, the procedure for their conclusion and execution, ensuring their execution and resolving exchange disputes.

As a rule, an exchange transaction is concluded through an intermediary (broker, dealer). Professional participants of the securities market (custodian, central depository, registrar, nominal holder of securities, etc.) usually participate in the conclusion of transactions with securities.

Exchange transactions are subject to registration.

The subject of commodity exchange transactions can be exchange—traded goods - both real and those that can be delivered in the future (forward transactions). Transactions are allowed, the subject of which are standard contracts for future delivery or for the future transfer of rights and obligations (futures or options transactions). Special forms of settlements and methods of ensuring the real execution of exchange transactions are possible on the exchange.

Disputes related to the conclusion of transactions on the commodity exchange may be considered by the exchange arbitration commission, whose decision may be challenged in court.

The procedure for concluding exchange transactions and their specifics are determined by legislative acts (first of all, the Decree of the President of the Republic of Kazakhstan, which has the force of Law, dated April 7, 1995 "On Commodity Exchanges", the Laws of March 5, 1997 "On the Securities Market", "On registration of securities transactions in the Republic of Kazakhstan"), the charter of the exchange, as well as properly approved exchange trading rules.

**§ 2. The form of the transaction and its meaning**

A transaction can acquire legal significance only after it is clothed in the form prescribed by law, through which the will of the participant is perceived.

Article 151 of the Civil Code distinguishes between oral and written form of the transaction. The written form, in turn, can be simple or notarial.

Transactions made in words are considered to be concluded orally. These include those transactions in which the will is manifested through direct, so-called conclusive actions of a person (for example, the transfer of money to the seller for the selected goods), and those transactions, the will to commit which is expressed in the form of silence. But such importance is attached to silence only in cases directly established by law or by agreement of the parties. For example, the buyer of the goods handed over to the supplier a written order indicating the desired delivery conditions, agreeing during the transfer that if the supplier does not object to these conditions within five days, the contract will be considered concluded.

The law determines in which cases the transaction must be concluded in writing. But there are no equally specific legislative instructions for the possibilities of using the oral form of concluding a transaction. Therefore, a general permissive rule applies here: the oral form of the transaction is always permissible, except in cases when it contradicts certain norms of legislation or the agreement of the parties.

The oral form of the transaction, according to Article 151 of the Civil Code, is applicable in cases when the transaction is executed at its very conclusion. The amount of the transaction, which serves as the limit of the admissibility of its oral form (see paragraph 1 of Article 152 of the Civil Code), is not set here. You can buy a thing worth millions of tenge without concluding a written transaction. But on condition that the parties, having agreed, immediately transfer to each other both the thing and the purchase amount. If, however, the same thing is sold on credit or with prepayment, the purchase and sale transaction must be made in writing.

The oral form of the transaction facilitates the position of the participants in the event of disputes about whether the transaction was actually concluded and what its terms were. These circumstances can be proved by any lawful means, including witness testimony.

Paragraph 3 of Article 151 of the Civil Code refers to transactions concluded orally, as well as transactions confirmed by the issuance of a token, ticket or other similar sign. The conclusion and content of such transactions can be proved by witness testimony.

These confirmation signs may or may not mention the names of the participants in the transaction. If, however, such a sign not only names the participants, but also contains their signatures, the transaction should be considered concluded in writing.

Modification, execution or termination of a transaction is usually executed in the same way as the conclusion of a transaction. But in some cases, due to the direct indication of regulatory acts or at the request of the parties, which does not contradict the law, an agreement concluded in proper written form is executed by performing actions, i.e. making transactions without drawing up a written document formalizing each action (paragraph 5 of Article 151 of the Civil Code).

Thus, the execution of a written delivery contract providing for the delivery of goods to the buyer on an hourly schedule can be made out by marking in the schedule, issuing a confirmation mark and other similar ways.

The transfer of money under the loan agreement is made in writing, usually by issuing a receipt by the debtor to the creditor, and the execution of the contract is by returning the receipt without any written registration.

Unlike Article 151 of the Civil Code, where the oral form of the transaction is allowed within very wide limits, Article 152 outlines stricter boundaries of the need for a written form of the transaction.

According to the said article, transactions must be made in writing: transactions

carried out in the course of entrepreneurial activity, except for transactions executed at their very commission, unless otherwise specifically provided for by law for certain types of transactions or does not follow from business practices;

in the amount of more than 100 monthly calculation indices, except for transactions executed at their very commission;

in other cases stipulated by the legislation or the agreement of the parties.

The expediency of the written form for these cases is determined by the fact that it more reliably confirms both the existence of the transaction and its content. This can provide more reliable protection of the interests of the participants in the transaction and a more accurate accounting system.

Transactions made in the course of entrepreneurial activity require a written form, regardless of whether both parties to the transaction or only one of them carry out such activities.

Civil legislation, supplementing Article 152 of the Civil Code, provides for a number of specific types of transactions, which must also be concluded in writing (see, for example, art. 294, 331, 337, 544, 709, 772 and 825 GC).

Usually, a written transaction is concluded by drawing up a single document, which is signed by the parties or their representatives, unless otherwise follows from business customs.

It is often used to conclude a transaction (contract) in writing by exchanging letters, telegrams, telephone messages that formalize separate stages of the contract conclusion process — an offer and acceptance (see Articles 393-397 of the Civil Code). In this case, each of the parties to confirm the conclusion of the contract in writing must have all the documents exchanged by the parties at its conclusion: the originals of all documents received and copies of all documents sent.

In the practice of recent years, the exchange of facsimile copying letters has become increasingly widespread, especially when concluding one-time, short-term, etc. contracts. Article 152, as a general rule, permits the use of facsimile copying.

In contrast, Article 160 of the Civil Code of the Russian Federation permits the use of facsimile reproduction of text and signature only in cases where it is provided for by legal acts or by agreement of the parties. Consequently, in the form of a general rule, the use of these funds is not given legal significance by Russian legislation.

To conclude some types of transactions, their standard or typed forms are used (transportation, insurance, sale of goods on credit, etc.). This, for example, is the usual practice of concluding public contracts, especially accession contracts (Articles 387-389 of the Civil Code).

In such cases, the document expressing the transaction is drawn up in the form established by the standard, standard or sample sample, sample conditions, etc. Such documents are developed, as a rule, by the seller, the contractor of works or services. The document may be amended by mutual agreement of the parties. The approximate terms of the contract published in the press, if the necessary requirements are met, can be considered as business practices (see Articles 3, 382 and 388).

When assessing the requirements for the written form of a transaction, it is necessary to take into account Article 15 of the Law "On Languages in the Republic of Kazakhstan" dated July 11, 1997, according to which all transactions of individuals and legal entities in the Republic of Kazakhstan, made in writing, are set out in the state and Russian languages, with an appendix, if necessary, translation into other languages. Transactions with foreign individuals and legal entities made in writing are set out in the state language and in a language acceptable to the parties.

For some transactions, the legislation complicates the simple written form of transactions, requiring not only the preparation of a document signed by the parties, but also the presentation of the contents of the transaction on a certain form, certification of signatures with a seal, etc. Such requirements for the written form of the transaction are mandatory if they are provided for by law or by agreement of the parties. In other cases, even if the transaction is concluded by legal entities or with the participation of legal entities, compliance with these requirements is not necessary. It is enough not to violate the general rules for making transactions in writing.

If a citizen, due to physical disability, illness or illiteracy, cannot sign with his own hand, then at his request, another citizen can sign the transaction. The signature of the latter, unless otherwise provided by law, must be attested by a notary or other official authorized to perform such a notarial act, indicating the reasons why the person making the transaction could not sign it with his own hand.

The party who executed the transaction made in writing has the right to demand from the other party a document confirming the execution. The same right is granted to the party who executed an oral business transaction, except for transactions executed at their very commission. Usually such a document is a receipt, receipt, copy of the invoice, etc.

In cases established by legislative acts or by agreement of the parties, written transactions are considered completed only after their notarization (Article 154 of the Civil Code).

The requirements for the need for notarization of a transaction are imposed by law only for specific types of transactions. For example, paragraph 5 of Article 58 of the Civil Code requires notarization of the constituent agreement on the formation of a business partnership.

The law prohibits violation of the required form by simplifying it. When requiring notarization of a transaction, it is impossible to limit its conclusion to a simple written form, or to use an oral form instead of a written form. On the contrary, a deviation from the established form agreed upon by the parties to the transaction in the direction of its complication is quite permissible and does not cause any negative consequences for the parties. For example, the parties have the right to conclude a transaction in writing, even if the law allows oral form; the parties have the right to notarize a written transaction, even if the law does not require it.

In some cases, the law requires registration of concluded transactions (see, for example, Articles 118 and 238 of the Civil Code). The rule on registration of transactions and related rights, established by Article 155, boils down to the fact that a transaction that needs registration by law acquires full legal force only after such registration is made with the appropriate registration authority.

Registration solves a number of problems:

firstly, the transaction, as noted, acquires full legal force;

secondly, the registration document reliably confirms the rights of the subject acquired under the transaction;

thirdly, the unified registration system allows you to establish a full accounting of transactions, the commission of which acquires not only private, but also public interest;

fourth, and finally, registration allows interested parties to get acquainted with a particular transaction and the rights arising from it, if such familiarization is not prohibited by law. This ensures the protection of the legitimate interests of persons intending to conclude transactions with the owners of objects of registration by obtaining information about the rights to such objects and their encumbrances. Here, of course, registration of real estate transactions is of great importance.

Notarization of transactions (Article 154 of the Civil Code, Chapter 8 of the Law of the Republic of Kazakhstan "On Notaries" dated July 14, 1997) and their state registration are similar procedures, but at the same time significantly different from one another. Transactions as such are subject to notarization, state registration — to a greater extent the rights arising from transactions, although it is customary to also talk about the registration of transactions. But not all transactions subject to notarization require state registration, and not all transactions subject to state registration require prior notarization.

Registration has been widespread in the country before, especially in terms of the acquisition of real estate and transactions with it. But it was carried out by various bodies that were not integrated into the system, and according to different rules. The completeness of the registration and its reliability caused reasonable doubts. There were frequent cases when cases were lost, real estate mortgages that provided bank loans were not registered, etc.

In order to fully implement the requirements of Article 155 of the Civil Code, it is necessary to create a complete registration system as soon as possible and independent of departmental interests. It is equally important that this system reliably and immediately provides information about the objects of registration and transactions with them to all interested parties for an easy fee.

The requirements for the need for notarization and state registration of a large category of transactions imply the paramount importance of the reliability of documents confirming these acts. In practice, cases of fictitious notarization, errors or incompleteness of registration are still not uncommon, which causes great damage to persons who accept false materials as reliable.

The problem is solved only in one way — by establishing the responsibility of notaries and officials authorized to perform notarial actions for damage caused by violation of the rules on notarization of transactions (Article 24 of the Law on Notaries); state registration authorities (or the state) for incompleteness, unreliability or failure to provide information, if this causes damage to persons who have applied to to such bodies (see Article 31 of the Decree on State Registration of Rights to Immovable Property).

The most important object of state registration is real estate transactions. The procedure for such registration is established by the said decree.

But, in addition to the state registration of real estate transactions, the Law provides for the registration of transactions with other objects, especially transactions leading to the emergence, modification and termination of property rights. First of all, means of transport are meant. Depending on the type of transport, the registration authority is determined.

The Law of June 30, 1998 "On registration of pledge of movable property" provides for registration of pledge of movable property.

The usual consequences of non-compliance with the requirements for transactions (see below) are that they are invalidated (Article 157 of the Civil Code). But to the question of what are the consequences of non-compliance with the written form of the transaction? it is impossible to give such an unambiguous answer. More precisely, two answers follow from the Law: one is applied as a general rule, the other as an exception to the general rule.

General rule: violation of the written form of the transaction does not entail its invalidity. It remains legally valid if the parties do not argue about the fact that it was concluded and about its conditions (content). The transaction must be executed, and its violation entails generally established liability. For example, Article 152 of the Civil Code requires a written form for transactions in excess of 100 calculated indicators. Let's say a citizen lent his friend a sum of money equivalent to 150 monthly calculation indices. The repayment period has come, but the debtor, without denying the fact, the amount and term of the loan, does not return the money. Under these conditions, the transaction retains its full legal force, and the creditor can apply to the court with a claim for compulsory debt collection.

However, the form was still broken. What are the consequences of the violation?

If one of the participants denies that he has concluded a deal at all, or denies the existence of conditions in its content, which the other party insists on, the person demanding execution cannot provide witness testimony in support of his rightness. But he can cite other, most often written evidence. Let's take a familiar example. The debtor does not return the money and declares in court that he did not receive it from the creditor at all. The latter brought a mutual acquaintance to court, who confirms that he was present when the creditor transferred money to the debtor. The court should not take such testimony into account. But if the creditor presents a letter from the debtor, in which he apologizes for the delay in repayment of the loan, this letter can confirm the fact of the transaction, and the creditor has the right to demand the adoption of coercive measures for its execution.

Thus, as a general rule, the violation of a simple written form does not entail the invalidity of the transaction, but seriously complicates the proof of its existence and its conditions.

There is an exception to the rule. If, for example, a law or an agreement of the parties adds a phrase to the written form requirement that a violation of the form entails the invalidity of the transaction, it will not have any legal force if the form is violated, even if the parties do not deny the fact of its conclusion.

In this case, therefore, the general consequences of violating the mandatory requirements for the transaction are applicable — its invalidity, with the resulting right of the participant (or participants) of the transaction to demand the return of everything that he transferred under the transaction to another participant, and compensation for losses caused by non-return or incomplete (improper) return, i.e. what is commonly called bilateral restitution.

The rules on the need for a written form of a transaction under pain of its invalidity are provided, for example, by Articles 294, 331, 337, and other articles of the Civil Code.

A foreign economic transaction, i.e. a commercial transaction between Kazakh and foreign citizens or legal entities must be concluded in a simple written form. Otherwise, it is declared invalid with the above consequences (paragraph 3 of Article 153 of the Civil Code). At the same time, we will take into account that the validity of a foreign economic transaction does not require, unless otherwise provided by law or contract, confirmation of signatures with a seal or other signs of legitimacy.

If the need for a written form of the transaction arises not from the requirements of the law, but from the agreement of the parties, the transaction does not enter into force and does not generate legal consequences until the parties have executed it in writing. Of course, the parties have the right to change their original agreement on the form of the transaction, but only by mutual consent.

But in some cases, as already noted, it is not enough to draw up a document signed by the parties to the transaction or exchange similar documents to conclude a written transaction. It is also required to comply with certain details: the use of special forms, confirmation of signatures of participants in the transaction with a seal, etc. (paragraph 3 of Article 152 of the Civil Code). Violation of the form of such transactions, unless otherwise established by the parties, also leads to the recognition of the transaction as invalid and to bilateral restitution.

The consequences of violating the requirement for mandatory notarization of the transaction (paragraph 1 of Article 154 of the Civil Code) are similar, i.e. failure to comply with the notarization of the transaction required by law leads to its invalidity. If the parties have already fulfilled it in full or in part, they are obliged to return to each other everything that they managed to transfer under the transaction (see Article 157 of the Civil Code).

But paragraph 2 of Article 154 of the Civil Code also provides for an exception to this general rule, which amounts to judicial confirmation of a transaction concluded in violation of the requirement for its notarization. We are talking about transactions, the fact of the commission and the content of which is not disputed. The rule protects the participant of the transaction in cases when another participant (or his successor), who was also guilty of violating the form, later, wanting to get rid of the transaction, which for some reason became unprofitable for him, puts forward his own violation as a reason to invalidate the transaction. The behavior of such a participant also violates paragraph 2 of Article 158 of the Civil Code. In such circumstances, the court may recognize the transaction as valid. The court decision replaces the notarial certificate.

To apply the above exception, three conditions must be present simultaneously:

a) the transaction violates the requirement of the law on the form, but does not contradict the law on the content;

b) the transaction has already been executed by the parties or at least one of the parties;

c) the transaction does not violate the rights and legitimate interests of third parties.

The issue is more difficult to solve in case of violation of the requirement to register transactions (rights arising from them), established by Article 155 of the Civil Code. As follows from the literal text of the article, a transaction requiring registration is considered completed only after its implementation. Therefore, the transaction before registration does not have full legal force, even if it was executed properly. Paragraph 2 of art . 155 in this regard, it says: "If a transaction requiring state registration is made in the proper form, but one of the parties evades its registration, the court has the right, at the request of the other party, to make a decision on the registration of the transaction. In this case, the transaction is registered in accordance with the court decision."

Such a rule grants the right to a participant in a drawn up, but not registered transaction, who is faced with the unwillingness of another participant to register: 1) to demand the application of bilateral restitution if some property has already been transferred under this transaction; 2) to demand compulsory registration for the evading participant by court.

When choosing the second option, registration is made by a court decision, the transaction acquires legal force and is subject to enforcement against the will of the evading participant.

§ 3. Invalid transactions

Article 157 of the Civil Code establishes that in case of violation of the requirements imposed on the form, content and participants of the transaction, as well as on the freedom and adequacy of their expression of will, the transaction may be declared invalid at the suit of interested persons, the appropriate state body or prosecutor. In case of violation of at least one of the above requirements, the transaction cannot be recognized as a perfect legal fact and does not acquire legal force. This is what the legislator is guided by, establishing specific grounds for invalidating the transaction. The most important and widespread grounds are concentrated in the articles of Chapter 4 of the Civil Code.

The grounds for invalidating the transaction based on the violation of the form of the transaction were discussed above.

Further, other specific grounds for invalidating the transaction, provided for in Chapter 4 of the Civil Code, and the consequences of invalidity will be highlighted.

The Civil Code of the Republic of Kazakhstan, unlike the norms of the Model Civil Code and the Civil Code of the Russian Federation, does not divide invalid transactions into null and void, since this division is of practical importance only for determining who has the right to demand recognition of the transaction invalid — a participant in the transaction, another interested individual or an authorized state body. This is specifically stated in the articles defining the specific grounds for invalidity.

The main distinguishing feature between void and disputed transactions, Article 166 of the Civil Code of the Russian Federation sees that the disputed transaction is invalidated by virtue of a court decision, and a court decision is not required to invalidate a void transaction. But this feature is not reliable enough. If the participants of an insignificant transaction (or at least one of them) do not agree with its assessment of invalidity, from whomever it comes, then it is impossible to do without a court decision on this issue.

Therefore, the point is not whether judicial recognition of the invalidity of the transaction is required or not, but whose interests (private or public) were violated at the conclusion of the transaction, and, consequently, who has the right to apply to the court with the corresponding requirement.

If the violation affects private interests, then the recognition of the transaction as invalid may be carried out by the court only on the claim of the interested private person. State bodies have no right to interfere in this dispute by virtue of Article 2 of the Civil Code. On the contrary, in case of violation of public interests, a claim for invalidity addressed to the court may be presented by a public authority, even if both parties to the transaction agree with its condition.

The following exposition proceeds from this distinction.

So, a transaction can be declared invalid if it violates the requirements of: a) the legality of its terms, i.e. the legality of its content; b) the transactional capacity of the participants in the transaction; c) the freedom and adequacy of their will.

Violation of the requirements on the legality of the content of the transaction. Article 158 of the Civil Code on this occasion determines that the most important requirement of the transaction is its full compliance with the law. At the same time, not all violations of the law are meant. A large number of violations serve as the basis for the invalidity of transactions by virtue of Article 159 of the Civil Code and other legislative rules. And Article 158 is directed against non-compliance with the law of the content of the transaction, i.e. against open illegality. These may be the terms of a transaction providing for the commission of a crime, evasion of the mandatory rules of the law, sale of items withdrawn from circulation to private individuals, etc.

However, the mere absence of a rule in the law authorizing a particular transaction cannot lead to its invalidity. A transaction whose content violates the prohibitions of the law must be declared invalid.

Transactions that are obviously contrary to the fundamentals of law and order and morality are equated with illegal ones. For example, a deal for the sale of a child. Another example. A subsidiary joint-stock company sells its products to the main company at a deliberately low price in order to artificially reduce the income subject to taxation.

This ground of invalidity is designed to make up for the possible incompleteness of the law in the field of protecting the most important interests of society. Therefore, when applying it, there may be no reference to which specific law was violated by the participants of the transaction, which requires special care to invalidate the transaction on this basis, and the reason must be very serious. It is also necessary to prove that the participants of the transaction well understood its illegal or anti-moral orientation.

Paragraph 2 of Article 158 of the Civil Code provides that a person who intentionally concluded a transaction that violates the requirements of the law, the charter of a legal entity or the competence of its bodies, does not have the right to demand that the transaction be declared invalid if such a demand is caused by selfish motives or intentions to evade responsibility.

For these reasons, it is unacceptable to satisfy the claims of both an individual and a legal entity who knowingly violated the law when concluding a transaction, and then, referring to their own violation, demanding recognition of its invalidity.

The norm in question corresponds to the principle well-known to foreign law: "Not go to Court with dirty hands" ("You can't go to court with dirty hands").

At the same time, it is impossible to dismiss the fact that the transaction provided for in paragraph 2 of Article 158 of the Civil Code may objectively violate the requirements of the law regardless of the intentions of its participants. And this is connected not only with the private interests of the participant who committed such a violation, but also with public interests.

Based on the above, it can be concluded that a transaction that violates the requirements of the law cannot be invalidated by the claim of the one who committed the violation and seeks to use the fact of the violation in his own private interests. But a violation that offends the public interest may serve as a basis for invalidating the transaction at the request of persons and bodies representing public interests (licensing authority, tax authority, prosecutor's office).

Paragraph 2 of Article 158 of the Civil Code, obviously, has a substantive and procedural nature, determining not only the signs of a violation, but also a possible plaintiff in a court dispute on the recognition of the transaction as invalid. Here is an example from practice. A Russian legal entity has concluded an agreement with a Kazakh commercial bank on opening a deposit account with accrual of interest on the invested amount established by the agreement. After the expiration of the contract, the depositor demanded a refund of his money with accrued interest. The depository bank stated that the rules on currency transactions were violated when opening the account, therefore it (the bank) considers the transaction invalid and refuses to execute it, but is ready to return the amount that was originally credited to the account.

We believe that such a transaction cannot be invalidated by the claim of the depositary, because one cannot blame one's own violation on another and protect private interest under the pretext of protecting public interest, however, recognition of the invalidity of the transaction is possible by the claim of the competent state authority. In all cases, the other party to the transaction, being innocent, has the right to receive from the guilty party full compensation for losses (including lost income) caused by the recognition of the transaction invalid.

Paragraph 3 of Article 158 of the Civil Code establishes another rule that was not previously contained in our legislation, specifically aimed at protecting creditors whose interests were violated by an unscrupulous debtor. A transaction may be declared invalid, provided that it was made for the purpose of evading a person from fulfilling an obligation, or from liability to third parties or the state.

In previous years, transactions of this kind were defined as those made in circumvention of the law. Examples may be the sale, donation or other form of alienation of property, which, as its owner fears, may be the subject of debt collection, confiscation, etc. Often the transactions referred to in paragraph 3 of Article 158 of the Civil Code are made in connection with the expected initiation of bankruptcy proceedings, or in order to create the appearance of bankruptcy (false bankruptcy). A necessary condition for the application of this rule is the improper behavior of another participant in the transaction (the acquirer of the property). Therefore, in cases where such a participant does not know and, due to the circumstances of the case, should not know about the intentions of the alienator of the property, the transaction should not be invalidated, because this would violate the legitimate interests of the acquirer of the alienated property.

It also follows from the exact meaning of clause 3 of Article 158 of the Civil Code that a claim for invalidation of a transaction may be brought by an interested person (for example, a creditor, a competent state authority), but not by the person who sold the property. This, in turn, means that the alienator of the property does not have the right to demand that the transaction be declared invalid, even if his fears about a possible foreclosure on such property turn out to be groundless.

A lawsuit aimed at invalidating a transaction for these reasons is often called a Paulian lawsuit (named after a Roman lawyer).

Paragraph 1 of Article 159 of the Civil Code establishes a rule on the invalidity of a transaction made without obtaining the necessary license or after the expiration of the license. The rule proceeds from the fact that obtaining a license, i.e. a special permit from a competent state body, is a prerequisite for the implementation of certain types of entrepreneurial activity. Committing actions requiring licensing without obtaining a license is an offense. A similar offense should be recognized as a transaction made in cases when the license has been terminated, revoked prematurely, suspended (for the period of suspension) or declared invalid (Articles 21, 22 of the Decree on Licensing).

A transaction that violates the licensing conditions is invalid.

Difficulties are caused by cases when the other party to the transaction did not know and, due to the circumstances of the case, could not know about the absence of a license, or even more so about the expiration of its validity or its early revocation, invalidation. It would be unfair to punish such a participant in the transaction under these conditions.

Paragraph 2 of Article 159 of the Civil Code invalidates a transaction that pursues the goals of unfair competition or violates the requirements of business ethics. We are talking about a transaction that does not comply with Article 11 of the Civil Code. Plaintiffs in such cases may be not only persons whose interests are violated by the transaction, but also state antimonopoly authorities.

Violation of the requirements of the transaction capacity of the participants of the transaction. The legally recognized ability of a citizen to make transactions that acquire legal force is a transaction capacity. All able-bodied citizens have transaction capacity, with some exceptions established by the Civil Code. Such exceptions are taken into account in paragraphs 3-7 of Article 159 of the Civil Code.

A transaction made by a teenager under the age of 14 should not be executed, except for minor transactions that a minor has the right to make independently (Article 23 of the Civil Code). On behalf of such a teenager, the transaction can be concluded by his parents (adoptive parents, guardians).

Minors who have reached the age of 14 make transactions themselves, but with the consent of their parents (adoptive parents, trustees). Consent can also be given after the transaction has been executed. Such a teenager has the right to make some transactions independently (Article 22).

If a minor who has reached the age of 14 makes a transaction without the consent of his parents (adoptive parents, trustees), it is invalidated only at the request of the latter. Without such a requirement, it remains legally valid.

Article 24 of the Civil Code establishes that for some transactions made by minors (aged 14 to 18 years) or for a minor (under the age of 14), the consent of parents (guardians, trustees) is not enough. It is required to obtain the prior consent of the guardianship and guardianship authorities. Specific types of such transactions should be determined by legislative acts (see, for example, Article 114 of the Law "On Marriage and Family" of December 17, 1998). It follows from this that the commission of such transactions without obtaining consent may serve as a basis for invalidating the transaction at the request of the guardianship and guardianship authorities. Paragraph 3 of the same article generally prohibits (with some exceptions) the conclusion of transactions by a ward with his guardian (trustee) and close relatives of the latter.

An adult participant in a transaction who knew or should have known that he was concluding it with a minor, i.e. was guilty of committing a transaction prohibited by law, bears an additional obligation to reimburse the minor for the costs associated with the transaction. For example, transportation costs, repair costs of property returned to a minor that was damaged during transportation, etc. The fault of an adult participant in the transaction is assumed, and in order to get rid of additional costs, he must prove that he did not know and, due to the circumstances of the case, should not have known that he had concluded a deal with a teenager.

Neither the teenager nor his parents (adoptive parents, guardians, trustees) are obliged to reimburse the expenses of an adult. Things damaged by a minor, received by him under the transaction and returned to the original owner, spent money, etc. may remain uncompensated.

The will of incapacitated persons recognized as such by the court due to their mental illness or dementia has no legal significance (Article 26 of the Civil Code), therefore, the transaction they made is invalid (paragraph 5 of Article 159 of the Civil Code). The guardian's attitude to this transaction does not affect its invalidity.

When deciding whether to declare a transaction invalid on this basis, the court does not find out in what mental state the incapacitated person was at the time of the transaction. Even if this period was marked by an improvement in mental health, the threat of invalidation of the transaction persists until the day when the court again recognizes the person as capable.

Article 159 of the Civil Code, however, makes an exception. Transactions made by incapacitated persons, as well as transactions made by teenagers under the age of 14, can be recognized as valid if committed to the benefit of these persons.

The basis for invalidity is also the conclusion of a transaction by a person whose legal capacity is limited due to alcoholism or drug addiction (Article 27), if there was no consent to the transaction by the trustee of the said person. Restrictions also apply to the disposal of wages. The transaction is invalidated only at the request of the trustee.

The transaction may be declared invalid, even if by the time of its commission a citizen has refused to abuse alcoholic beverages or drugs, until the limitations of legal capacity are lifted by court.

Transactions made by persons whose incapacity or limited legal capacity is determined by pre-established signs (age, court decision on deprivation or restriction of legal capacity) are recognized as invalid, regardless of the actual intellectual and volitional state of the person who made the transaction. The court has no right to recognize a transaction made by a 13-year-old teenager, even though it would be a very reasonable child. In this area, the concepts of legal capacity and transaction capacity coincide.

But Article 159 also provides for cases when it is possible to invalidate a transaction concluded by a person of appropriate age and not deprived of legal capacity by the court, but actually incapable of making a transaction. The person is capable, but not capable. So, in paragraph 5 of Article 159, it is said about the possibility of invalidating a transaction made by a citizen who was in a state of mental disorder at the time of the commission, but was recognized as incapacitated later.

Paragraph 7 of Article 159 of the Civil Code establishes in an even more definite way that a transaction made by a citizen, although capable, but who was in such a state at the time of its commission when he could not understand the meaning of his actions or direct them, may be declared invalid by a court. We are talking about citizens who are not deprived or limited in legal capacity, but who were in such an intellectual and strong-willed state at the time of the transaction when they did not understand their actions or could not direct them. For example, a citizen's illness that caused a temporary mental eclipse. There are also other causal circumstances — a strong mental shock, a state of intoxication, etc.

The basic rules determining the consequences of the invalidity of transactions are established by Article 157 of the Civil Code. The consequences of the invalidity of transactions caused by a violation of their form have already been discussed. Let us now consider the consequences of the invalidity of transactions under the conditions set out in the previous section.

In accordance with paragraph 3 of Article 157 of the Civil Code, the general consequence of invalidating a transaction is the so-called bilateral restitution, i.e. the return of the parties who concluded the transaction that turned out to be invalid to the original position, to the position "before the transaction".

If a transaction is declared invalid before it is executed, it simply should not be executed. If the execution has begun or the transaction has been executed in full, each party returns to the other party what it received during the transaction. The inability to return can be compensated with money.

It is not uncommon for only one party to be guilty of the invalidity of a transaction. For example, a deal is concluded under the influence of deception. The deceived participant was actually innocent. Under these conditions, it is possible to demand from the guilty person not only what he received under the transaction, but also the losses incurred by the innocent party as a result of the transaction and its invalidation.

Unlike the Civil Code of the Republic of Kazakhstan, the Model Civil Code and the Civil Code of the Russian Federation, in addition to bilateral restitution, establish as consequences of invalidity not only bilateral, but also unilateral restitution (property is returned only to one party, the other receives nothing, and the property transferred under its transactions is transferred to the state income) or prevention of restitution (all, what was supposed to be transferred by transactions by both parties is converted into state revenue).

The Civil Code of the Republic of Kazakhstan does not provide for such a general division of consequences, but, as an exception, allows the use of unilateral restitution or the prevention of restitution, however, with one indispensable condition: the orientation of the transaction to a criminal purpose — the purchase and sale of drugs, a contract for the theft of someone else's car, etc.

Article 157 of the Civil Code says the following about this:

"4. If the transaction is aimed at achieving a criminal goal, then if there is intent on both sides, everything received by them under the transaction or intended to be received is subject to confiscation by a court decision or sentence. In case of execution of such a transaction by one party, everything received by it and everything due from it under the transaction to the first party shall be confiscated from the other party. If none of the parties has started execution, everything provided for by the transaction for execution is subject to confiscation.

5. If there is intent to achieve a criminal goal only from one of the parties, everything received by her under the transaction is subject to return to the other party, and what was received by the latter or owed to her under the transaction is subject to confiscation.

6. Taking into account specific circumstances, the court has the right not to apply partially or completely the consequences provided for in paragraphs 4 and 5 of this article in terms of confiscation of property received or to be received under an invalid transaction." In this part, bilateral restitution is applied.

The criminality of intentions can only be established by the court, considering a civil case or satisfying a civil claim in a criminal case. Here, the court has the right to move away from bilateral restitution as a consequence of an invalid transaction and recover the property that was the subject of the transaction to the state's income. At the same time, the participant in the transaction is not necessarily subject to criminal punishment.

Of course, an innocent injured party in a transaction invalidated as a result of the criminal actions of the other party has the right to demand from the latter not only the return of the property transferred under the transaction or compensation for its loss or damage, but also compensation for losses caused by the fact of invalidation of the transaction.

As a rule, the decision to declare the transaction invalid is retroactive and makes the actions of the parties illegitimate from the moment the transaction is concluded.

But, of course, there may be cases when the return of everything received under a transaction later invalidated is impossible or impractical. It is impossible, for example, to give retroactive effect to decisions on invalidation of a lease for which the tenant has already used the property. Therefore, Article 157 of the Civil Code allows the invalidity of the transaction for the future.

Article 160 of the Civil Code defines the concepts of imaginary and pretended transactions and establishes their consequences.

An imaginary transaction is a transaction made only for appearance, without the intention of the parties to cause legal consequences. Others may be misled. The parties themselves are aware that there is no deal and it does not impose any obligations on them. For example, fearing the confiscation of property, a person against whom a criminal case has been initiated "sells" the most valuable things to a relative, agreeing with him that he will not receive money from him and he will return the things at the first request. Imaginary transactions are also called fictitious.

An imaginary transaction should not be executed at the request of a party who would like to benefit from it. For example, the donee does not have the right to demand the transfer of property to him under a fictitious donation agreement.

The obligation to prove the fictitiousness of the transaction is assigned to the one who puts forward such an assertion. The fact confirming the imaginary nature of the transaction is usually the failure of the parties to perform those actions that are included in its content.

If the fictitiousness of a transaction is not proven, its legality, validity and consequences are determined by the general conditions of validity and invalidity of transactions.

In contrast to the imaginary, in a pretended transaction, the will of the parties is aimed at establishing civil rights and obligations. But not those who make up the external appearance to others, but others, which parties actually had in mind. In a fake transaction, one should distinguish: a) an external, fake transaction that covers another; b) an internal, covered transaction.

A fake deal is most often aimed at circumventing the prohibition of the law. But there are also such fake transactions that are not aimed at achieving an illegal result, although they create a false impression in others about the real intentions of the parties. A citizen, for example, would not like to make public his special attitude towards another person. Therefore, by donating valuable property to him, a citizen forms out a transfer by a contract of sale, although in reality he does not receive money for the property. Sometimes a fake transaction arises from the legal ignorance of the parties who do not know how to properly formalize a completely legitimate agreement.

Since two transactions are distinguishable in the pretended one, each of them needs an independent assessment. A transaction covering another one is always invalid. It does not lead to any consequences, since the parties did not really seek them.

As for the covered transaction, which the parties have really committed, its legality or illegality is determined by the actual signs. If the parties violated the law on such grounds, the covered transaction is also invalid.

In the case when a completely legitimate transaction was covered up, which does not violate the interests of the state and third parties protected by law, it is recognized as valid and its execution does not entail any adverse consequences for the parties.

If it is possible to single out any illegal part in the transaction, without which the transaction will retain its significance for the parties, it is permissible to limit the invalidation of only part of the transaction so that it remains valid in the rest (Article 161 of the Civil Code). The parties, for example, agreed on the purchase and sale of a residential building, and the seller assumed the obligation to redevelop the kitchen and corridor before transferring the house to the buyer. When considering the redevelopment project, it was found that it violates mandatory building codes. It is possible to invalidate only the redevelopment condition, and otherwise execute the transaction unhindered.

But such recognition of the invalidity of only part of the transaction is permissible only under two conditions. Firstly, it should not be the part without which the transaction is impossible at all. Consequently, if invalidity has struck the constitutive (fundamental) part of the transaction, it cannot exist in the other parts either. Secondly, the transaction as a whole may remain valid if any part of it is invalid, if the parties agree to be executed without this invalid part. Otherwise, at the request of each of the parties, the entire transaction must be considered invalid.

Article 162 of the Civil Code in relation to disputes on the invalidity of transactions establishes some features of the calculation of the limitation period. In particular, the limitation period for disputes related to the invalidity of a transaction on the grounds provided for in paragraphs 9 and 10 of Article 159 of the Civil Code is one year from the date of termination of violence or threat under the influence of which the transaction was made, or from the day when the plaintiff learned or should have learned about other circumstances provided for in paragraph 9 and 10 and are the basis for invalidation of the transaction. Here, apparently, it is taken into account that the grounds for invalidating the transaction are obvious to the interested person, therefore it is impractical to postpone the protection of his interests for a long period.

In other cases, a general three-year limitation period applies to disputes on the invalidity of transactions, unless otherwise provided for by legislative acts. Thus, a special reduced limitation period for disputes on the invalidity of the contract of sale of the privatized object is provided for in Article 25 of the Decree on Privatization (six months from the date of signing the contract, if the claim is brought by a party to the contract. If a claim is filed by other interested persons or by the prosecutor, the limitation period for disputes is six months from the day when the plaintiff learned or should have learned about the circumstances that are the basis for invalidating the contract, but no later than three years from the date of signing the contract).

Lecture 6. Representation and power of attorney.

The concept of representation. As a general rule, subjects of civil law have the opportunity to participate in property turnover independently, without resorting to the mediation of other persons — to representation. Nevertheless, the institution of representation is widely used in civil turnover. The need for representation arises, in particular, when the represented person cannot personally exercise his rights and obligations, for example, by virtue of the law, when personal participation is hindered by his lack of legal capacity, or due to other specific life circumstances, when personal participation is impossible due to illness, employment, etc. There are a number of cases when the services of representatives are resorted to in order to take advantage of the special knowledge, qualifications or experience of a representative (for example, representation when concluding transactions on the securities market, etc.).

Representation in civil law is a legal relationship by virtue of which transactions or other legally significant actions (for example, filing a lawsuit or participating in a court hearing) committed by one person on behalf of another person directly create, modify or terminate civil rights and obligations for the latter. A person making a transaction in the interests of another person is called a representative, a person in whose interest the transaction is being made is a principal or a represented person, and persons with whom the representative enters into a transaction in the interests of the represented person are third parties.

The legal regulation of representation is traditional for civil law and is similar in many provisions to the regulation in many countries. Representation is quite widely used in property turnover, but it is necessary to note the existing exceptions in the possibility of its application. Representation is not applicable when making transactions that by their nature can only be made in person, as well as when making transactions in respect of which legislative acts provide for their mandatory personal commission or a ban on their conclusion through a representative. An example of a transaction prohibited from being made through a representative is the drafting of a will. If the testator, for any reason, cannot sign the will with his own hand, then it is signed in the presence of a notary or other person certifying the will by another citizen, the so-called "handyman", indicating the reasons why the testator could not sign the will with his own hand. The handshaker is not a representative of the testator, but is a certain means of reflecting the will of the testator on paper.

A number of transactions or other legally significant actions, for example, the conclusion of a marriage, an employment contract, a contract for the alienation of a house with a condition of lifelong maintenance, even in the absence of a direct prohibition in legislative acts, by their nature require personal participation and therefore their commission through a representative is impossible.

The essential point of representation is the commission of legal transactions by the representative in the interest of the represented. This is directly enshrined in Article 163 of the Civil Code, which defines representation. By the sign of legally significant actions, a representative office differs from all other relationships in which one person replaces another (for example, exercising the legal capacity of a legal entity through its body — the director, the management board) or actually assists it (for example, provides paid services, performs contract work, sells goods or provides intermediary services).

The commission of legal actions presupposes the manifestation of an independent will, and not only the repetition of the will of the represented. Therefore, the concept of representation does not include the activity of an envoy, a messenger, who is only a means of transmitting the will of the sender and who does not independently express his will and does not perform legal actions.

Representation involves the execution of transactions by a representative on behalf of the represented person. In the interest of the representative, at his expense, but in his own name, the commission agent makes transactions, and under the appropriate conditions of the contract, the trustee also makes transactions. Often, commission relations (and trust management, if there are conditions in the contract for the performance of actions for the management of the trustee on his behalf) are classified as a hidden representation, as opposed to direct representation in the sense of Article 163 of the Civil Code. But there are no significant signs of representation in the relations under the commission agreement. The Commission has similar features to the representation only on an economic basis — the commission of actions at someone else's expense, but not on a legal basis, the essence of which is the commission of actions on behalf of the represented. Therefore, the practical consequences of the relations between the commission and the representation differ significantly from each other, which makes it impossible to classify the commission as a representation. Also, any activity of persons carried out, although in the interests of others, but not on behalf of the represented person, in particular, activities on their own behalf, is not a representation. Therefore, the activity of, for example, a trustee authorized to act on his own behalf will not be a representation (clause 4 of Article 163 of the Civil Code).

The activity carried out in the interests of another person, but not generating civil legal consequences for the latter, will not be a representation, since an essential feature of representation is the performance of legal transactions by a representative. For example, the activities of commercial intermediaries who are entrusted with facilitating the conclusion of transactions, and not making transactions on behalf of another person, or the activities of persons (in particular, employees of a legal entity whose official functions include carrying out such work) who are entrusted with entering into negotiations regarding possible future transactions, signing a protocol of intent, will not be representative. which is not a civil contract.

Subjects of the representation relationship. In the case of representation, relations arise between the representative, the representative and a third person with whom the representative has a legal connection due to the actions of the representative. For the establishment of relations on representation and on a transaction concluded with the help of representation, the joint and coordinated will of three persons is necessary: a representative — to establish rights and obligations in the person of the representative; a third person — in order to enter into relations with the representative; represented — in order to give in advance or later his consent to the transaction through a representative.

Directly representation is the legal relationship between the represented and the representative, which is called the internal relationship of representation or representation in the proper sense of the word. The relationship between a representative and a third party refers to the external relations of the representation and is the implementation of the powers of the representation, is not independent, since the essence of the representation is that the transaction made by the representative, the rights and obligations arise directly from the representative. In a transaction to which a representative is recognized as a party, the person represented becomes the subject of rights and obligations, and for a third person, the figure of the representative does not matter significantly, since a third person enters into legal relations directly with the representative through the representative. A representative's transaction is a legal fact that generates a relationship, the active and passive subjects of which are the represented and a third person. The representative remains outside the relationship established by means of representation, and does not acquire any rights or obligations in it.

Since the subject of rights and obligations is not a representative, but a representative, then he is required to have a general civil legal capacity. As a general rule, any subject of civil turnover can act as a representative — a legal entity or a citizen, regardless of the state of legal capacity. At the same time, there are a number of exceptions to this general rule. In particular, in some cases, the legislation establishes certain requirements for the parties for certain types of transactions, for example, the need for a special license to conclude transactions arising from the implementation of banking, insurance and other licensed activities, and in this case, the represented person must have a license to conclude a transaction both independently and through a representative. Another exception to the implementation of transactions through a representative arises from restrictions on the conclusion of transactions with limited turnover property, for example, a ban on the acquisition of agricultural land by foreigners, the availability of a special permit for the purchase of hunting weapons, etc. In this case, the represented person must also meet the requirements imposed by law for the party to such a transaction.

At the same time, it should be noted that representation is also unacceptable in relation to incapacitated citizens who, having general civil legal capacity, do not have the right to independently conclude transactions through a representative, since they do not have the right to independently conclude transactions at all. It is unacceptable to conclude transactions through a representative office, which a legal entity does not have the right to conclude independently due to certain legal or statutory limitations of legal capacity, for example, state-owned enterprises do not have the right either independently or through a representative to conclude transactions in respect of property related to the fixed assets of the enterprise, or a legal entity to conclude a transaction is obliged to obtain permission in accordance with the provisions of its charter any body (for example, the supervisory board).

If the rules on the presence of the necessary legal capacity of the representative, imposed by the legislation on certain transactions or to certain subjects of civil turnover, are not observed, then the transaction concluded by the representative will be invalid and will not give rise to a legal relationship for the represented and a third party. Therefore, the transaction will be invalid when it involves, for example, the acquisition of an agricultural land plot into ownership, if the represented is a foreigner, the citizenship of the representative for this case does not matter, unless he has the legal capacity necessary for the representative. Transactions concluded, for example, by banks or insurance organizations through a representative and aimed at trading in tangible assets will also be invalid, unless these transactions are prohibited for these organizations.

There is also no doubt that the external relationship on representation is essential for representation, in particular, in matters of relations between the represented and third parties. When making transactions, the representative expresses his own will, although on behalf of the represented and within the limits of the powers granted, and not the will of the represented, and therefore he is a direct counterparty in contracts. Therefore, when investigating the consequences of a transaction concluded through a representative, for example, in disputes between the represented and third parties (in particular, when invalidating transactions made under the influence of deception, violence, threats, etc.), the motives of the will of the representative, and not the represented, should be accepted. So, for example, the representative at the conclusion of the contract of sale could not be warned by the seller about the shortcomings of the object of sale, and this circumstance will affect the consequences of the concluded transaction, gives the representative the right to demand a proportionate reduction in the purchase price, damages, etc.

Since a representative is required to express his will, a person with general civil capacity can act as a representative, i.e. only one who is not prohibited by law from entering into contracts can be a representative. Therefore, citizens recognized by the court as incompetent cannot be representatives. Minors, incapacitated and partially capable citizens have the right to be representatives only for transactions that they can make independently. At the same time, the emergence of rights and obligations under the transaction from the representative does not require the presence of licenses necessary for the conclusion of certain transactions. The special legal capacity of a representative of a legal entity is also not an obstacle to the conclusion of transactions by him that are not included in the scope of his legal capacity, since the rights and obligations under the transaction concluded by him arise from the represented.

Powers of representation. A power is a circle of transactions that a representative is allowed to make. The authority is mandatory not only for the representative, but also for other persons with whom he enters into legal relations on behalf of the represented, since representation without authority or with excess of authority cannot generate legal consequences, except in cases of their subsequent approval by the represented. Therefore, the powers of the representative should, as a general rule, be secured in ways that are possible for review and verification by third parties.

As a rule, the powers of a representative arise from the content of the legal fact on which the representation is based.

In the case of representation based on the appointment of the head of a branch or representative office of a legal entity, due to the requirements of the legislation, it is necessary to issue a power of attorney to the head to perform representative functions. In this case, the powers of the representative are indicated in the power of attorney.

In the case of representation based on an event or a court decision, the powers of the representative follow from the norms enshrined in the legislation, by virtue of which representation arises. For example, when representation arises from the event of the birth of a child, the powers of representatives — parents — follow from the norms of Article 23 of the Civil Code, which provides for the procedure for transactions of minors under the age of 14. When a citizen is recognized as incapacitated by a court decision, the powers of the representative follow from Article 26 of the Civil Code, which provides for the procedure for making transactions by an incapacitated person.

When a representative office arises from a transaction, the representative's powers are fixed in its terms. Thus, when concluding a contract of assignment or commercial representation, the powers of the representative are indicated either in the contract or in the power of attorney issued to the attorney or commercial representative.

Powers may also appear from the situation in which his representative is placed by the representative, for example, a seller behind the counter of a store authorized to make retail transactions, a cashier in the bank's cash desk, authorized to accept, issue money and make other types of monetary settlements. In such cases, the powers of the representative follow from official duties and do not need to be certified by a power of attorney.

In order to protect the interests of the represented, the representative is prohibited from making transactions on behalf of the represented, for which he is authorized by a power of attorney, in relation to himself personally or in relation to another person, if he is simultaneously a representative of this person when making such a transaction. Otherwise, it would contradict the nature of two- or multilateral transactions, since the mandatory agreement of the will of two or more parties would be replaced by the will of one person — representative. Therefore, transactions made by a representative in violation of the prohibition on simultaneously representing the interests of both parties in such a transaction are invalid. An exception to this rule is a commercial representation, in which it is allowed to represent the interests of different parties to the contract to a person who carries out representation as a type of entrepreneurial activity and bears, respectively, entrepreneurial responsibility for his actions.

The basis for the establishment of a representative office is a law or contract. Representation arising by virtue of law is called lawful or necessary. Representation arising by virtue of a contract is called contractual or voluntary.

Legal representation arises in cases where it is necessary to make up for the lack or lack of legal capacity of a person. Examples of legal representation are the establishment of guardianship over minors recognized as incapacitated or with limited legal capacity (mentally ill, drug and alcohol dependent patients, etc.). Cases of legal representation are fixed in the legislation. At the same time, for legal representation, the legislation contains a certain composition of legal facts, the occurrence of which is associated with the emergence of legal representation.

Directly legal facts that give rise to legal representation are:

events with which the legislation provides for the onset of relations on representation, for example, the birth of a child authorizes parents by law to perform representative functions;

the decision of the court establishing relations on representation, for example, the recognition of a citizen as incapacitated and the establishment of custody over him by a court decision establishes relations on representation of an incapacitated citizen for his guardian;

an administrative act that generates a relationship of representation by virtue of legislation, for example, the appointment of an adoptive parent.

Initially, the representation arose in the form of a legitimate one. Roman law, which did not recognize voluntary representation as inconsistent with the individual nature of the obligation1, had a fairly developed institution of legal representation, which subsequently became, with the development of law and with some significant transformation, the basis for the modern institution of representation, which includes both legal and voluntary representation.

Legal representation is quite common in property turnover. It arises in relation to incapacitated persons. Minors under the age of 14 and citizens under guardianship are completely incapacitated. The grounds, conditions, and procedure for establishing guardianship are regulated by the norms of marriage and family legislation, in particular, the relevant norms of the Law on Marriage and Family. Minors under the age of 14 and citizens over whom guardianship is established are certainly recognized as subjects of civil law, since they are recognized as having general legal capacity. At the same time, civil law does not recognize such persons as capable of acquiring rights and responsibilities by their independent actions, since minors under the age of 14 and citizens under guardianship cannot understand the consequences of their actions. Therefore, the law provides for the acquisition of rights and duties by minors under the age of 14 and citizens over whom guardianship is established, in the person of their legal representatives, who are recognized as parents or guardians, in order to replenish the legal capacity of such persons. At the same time, it should be noted that the main criterion for distinguishing the scope of legal capacity between incapacitated and capable persons of civil turnover is such an element of legal capacity as transactionability — the ability of a person to enter into transactions.

Parents, adoptive parents or guardians who make transactions for minors under the age of 14, as well as guardians who make transactions for citizens recognized as legally incompetent, are their legal representatives. The powers in this case arise from legislation linking the emergence of a representative office with the occurrence of a certain legal fact, for example, an event (the birth of a child), a court decision (recognition of a citizen as incapacitated), and does not require any special registration.

The procedure for determining the legal capacity of minors from 14 to 18 years of age and citizens with limited legal capacity, and, therefore, the limits of the application of legal representation in relation to such persons, is quite complex and depends on a number of circumstances. As a rule, such persons have the right to make transactions with the consent of either parents (acting as guardians by law) or trustees appointed in accordance with the procedure established by law, and in this case there can be no question of any representation. In addition, minors from 14 to 18 years of age have the right to independently dispose of their earnings, scholarships, other income, intellectual property objects created by them, as well as independently make small household transactions. At the same time, the guardianship and guardianship authorities, if there are sufficient grounds, may deprive a minor of the right to independently dispose of his earnings, scholarships, and other income created by them objects of intellectual property. In this case, as in the case of minors under the age of 14, the representatives of minors from 14 to 18 years are their parents or guardians.

Legal representatives, as a rule, have the right to make all transactions or other lawful legally significant actions that their wards could perform. At the same time, legislation linking the emergence of a representative office with the occurrence of a certain legal fact may impose certain restrictions on the powers of a certain category of legal representatives. So, in order for the guardians to make certain transactions, such as the pledge of the property of the represented, the exchange of living space, the renunciation of the rights belonging to the ward, the renunciation of inheritance, the consent of the guardianship and guardianship authorities is required. When performing the above actions, the consent of the guardianship and guardianship authorities is also necessary in cases of legal representation of parents, in particular, when disposing of a privatized apartment, of which minor children are also co-owners.

Contractual representation arises in cases when it is necessary to expand the scope of a person's activity or replace it due to the temporary inability due to various life situations to independently perform certain legal actions. Contractual (voluntary) representation arises on the basis of certain transactions establishing relations of representation, for example, the issuance of a power of attorney, the conclusion of a commercial representation agreement, the conclusion of a contract of assignment. Contractual representation also includes representation relations arising by virtue of labor or other functional duties of an employee (for example, representation by freight forwarders, sellers, cashiers by virtue of their official duties), since their basis is contractual relations arising from the conclusion of an employment contract for employment as a forwarder, seller, cashier, etc.

As a rule, in the case of contractual representation, the attorney issues a special written document to the representative, called a power of attorney, which contains a list of transactions for which the representative is authorized. At the same time, the powers may also be contained in the contract between the representative and the representative on the establishment of representation — in the contract of assignment, in the contract of commercial representation, etc. In the latter case, a separate document may not be issued, and the contract itself may act as a power of attorney (for example, commercial representation is carried out, as a rule, on the basis of a contract without issuing a power of attorney). The need to issue a power of attorney is caused by the fact that the contract may contain information reflecting the internal relationship between the representative and the represented, which does not concern third parties and is not required for them when concluding a transaction with a representative. Internal information reflecting the relationship between the representative and the represented may also relate to trade secrets. If the representative's powers are reflected in the contract without issuing a power of attorney, such an agreement must meet all legal requirements in terms of the form and conditions imposed on the power of attorney.

Commercial representation. A special kind of voluntary representation with significant features of legal regulation is a commercial representation, the features of legal regulation of which are fixed in Article 166 of the Civil Code. A distinctive feature of a commercial representation is the participation in the representation of a special entity — a commercial representative. A commercial representative is a person who constantly and independently represents entrepreneurs when they conclude contracts in the field of entrepreneurial activity, who is not in an employment relationship with the represented, acting on the basis of a written contract with the latter, receiving remuneration for his activities and is obliged to act in the execution of the assignment given to him with the care of an ordinary entrepreneur. Commercial representation is an independent type of business activity. In relation to the represented, the commercial representative is always an outsider. The representation of a legal entity, by virtue of official or labor relations, cannot be attributed to a commercial representation, since a commercial representative is a person who carries out representation as an entrepreneurial activity.

A special feature of a commercial representative office is that it has the right, in accordance with paragraph 2 of Article 166 of the Civil Code, to simultaneously represent the interests of different parties to a contract concluded with its participation.

Commercial representatives can be both legal entities and citizens engaged in entrepreneurial activity. Commercial representatives are, for example, brokers and other professional participants in the securities market when performing transactions on the stock exchange on behalf of and on behalf of the represented entrepreneurs on the basis of a long-term contract, professional participants in the securities market who manage the client's securities package under the contract, trust managers who manage funds and other property on the basis of the contract the principal on behalf of the latter, including banks performing trust transactions on behalf of the client, etc.

A commercial representative carries out entrepreneurial activity, and therefore all the features of the legal regulation of entrepreneurial activity provided for by law apply to him, in particular, the norms of the articles of the Civil Code on the early fulfillment of obligations related to entrepreneurial activity, on the fulfillment of a joint obligation related to entrepreneurial activity, on the liability of persons who have not fulfilled or improperly fulfilled an obligation in the implementation of entrepreneurial activity activities, on the liability of the debtor for the actions or omissions of third parties. In relation to a commercial representative, all the norms of the legislation on the liability of persons engaged in entrepreneurship (liability without fault) apply.

The procedure for payment, the amount of remuneration to the commercial representative and the procedure for reimbursement of expenses incurred by him during the execution of the order, the procedure for distributing the obligation to pay remuneration and reimbursement of costs between the persons represented by the commercial representative is determined by agreement of the parties. At the same time, the legislation contains a replenishing norm on the procedure for distributing equal shares of remuneration to a commercial representative and reimbursement of costs incurred by him between entrepreneurs whose interests were simultaneously represented by a commercial representative in the execution of an order.

The legislation, in particular, paragraph 4 of Article 166 of the Civil Code, establishes that information about trade transactions that became known to a commercial representative during the execution of an order given to him is a commercial (entrepreneurial) secret. This norm is a development of the provisions of the legislation on commercial secrets, which provides for the possibility of establishing in the legislation a list of information constituting a commercial (business) secret. The commercial representative is obliged to keep this information secret both during the execution of the order and after its execution. Failure to comply with the secrecy requirement is the basis for the liability of a commercial representative in the form of compensation for losses caused by the disclosure of commercial (business) secrets.

The specifics of commercial representation in certain areas of entrepreneurial activity may be established, in accordance with paragraph 5 of Article 166 of the Civil Code, by legislation. In particular, the banking legislation contains the specifics of the implementation of trust transactions, the legislation on the securities market contains the specifics of the activities of professional participants in the securities market, etc.

Representation without authority. A representative may be a person authorized to do so by the will of the person being represented, by legislation, a court decision or an administrative act, and only within the limits established by the authorization. At the same time, there are many life situations when one person makes transactions on behalf of and in the interest of another person, without having any legal grounds, without being a legal representative, and also without having a properly executed agreement with the represented person or a properly executed power of attorney for representation. The motive for such actions may be family relations, friendship, partnership and joint entrepreneurial activity, etc. For example, a person, knowing that his relative needs a home, but is temporarily absent at a certain point in time and cannot find it himself, can conclude an apartment rental agreement on behalf of the latter.

Similar situations arise in the case of non-compliance with the form of a transaction required by law to establish a representative office. In case of non-compliance with the written or notarized form of the power of attorney, the transactions to establish a representative office or the power of attorney are invalid and there is no need to talk about the proper implementation of the representation. There may also be cases when a person with proper authority, when exercising representation, goes beyond the limits of the powers granted, for example, having the authority to conclude a house lease agreement, enters into a purchase and sale agreement.

 The actions of an unauthorized person or representative with excess of authority are referred to as representation without authority or actual representation. Such actions can be attributed to a type of representation, in accordance with Article 165 of the Civil Code, only if they receive subsequent approval from the person in whose interest the transaction was made. In the event that the actions of an unauthorized person or representative with excess of authority do not receive approval from the representative, such actions do not cause legal consequences for the representative and cannot be attributed to the representation.

Based on the nature of the representation, it should be noted that any transactions made without authorization or exceeding the limits of authority do not oblige the representative to anything, unless he approves them later.

Since representation is a legal relationship, according to which a certain person — a representative — makes transactions or other legally significant actions in the interests of another person — represented — with third parties, transactions or other legally significant actions performed by a representative with an excess of authority or an unauthorized person, bind the other party (third party), since, by committing them at her own risk, she knew about the lack of authorization or about the excess of her powers by the representative and the need for subsequent approval of the transaction for its validity. If the represented person subsequently approves the transaction, then the second party has no right to evade it with reference to the non-authorization of the representative.

Approval can be expressed in various forms, for example, in the form of a written document, the actual assignment of the results of a transaction concluded by a representative, in particular, acceptance of products, crediting of received money, etc.

Subsequent approval of a transaction or other legally significant actions performed on behalf of another by a person who is not authorized or in excess of authority makes the completed transaction and other legally significant actions valid from the moment of commission.

Attorney

This is a written document that records the authority to represent on behalf of another or several persons who issued such a document. A power of attorney is issued for the relations of a representative on behalf of the represented with other persons who, on the basis of a power of attorney, are certified in the authority, i.e., granting the representative the right to act on behalf of the represented, and in the powers, i.e., in the content and limits to which the representative is entitled to represent the represented (paragraph 1 of Article 167 of the Civil Code).

As mentioned earlier, the powers can be fixed both in a separate document — a power of attorney, and in an agreement on the establishment of a representative office — a contract of assignment, a contract of commercial representation, etc. When the powers are included in the terms of the contract, the power of attorney will be the contract itself. Such an agreement must meet all legal requirements for a power of attorney.

A power of attorney, as a separate written document, is a unilateral transaction. Therefore, all provisions of the legislation on transactions apply to the power of attorney. The nature of the power of attorney issue presupposes the will of one person — the principal (who is also the represented person) and the volitional actions of another person — the attorney (who is also the representative). Therefore, the principal and the attorney must have full legal capacity. The absence or limitation of the legal capacity of the principal or attorney is the basis for the invalidity or termination of the power of attorney.

A power of attorney as a written document is a necessary attribute of representative relations. Although the issuance of a power of attorney is a unilateral transaction, it is still necessary to recognize that the basis for the issuance of a power of attorney and the implementation of representation is a contract — an agreement between the representative and the representative to establish representation. In this case, the contract between the representative and the representative on the establishment of relations on representation can be concluded in any form: in writing (for example, the conclusion of a contract of assignment), orally (for example, the issuance of a power of attorney without any other written contract). The very fact of issuing a power of attorney (without the representative performing legally significant actions on behalf of the represented person — transactions) does not generate representation. When a representative carries out legally significant actions — transactions on behalf of the represented person and on the basis of a power of attorney, even in the absence of a written agreement between them on the establishment of representation of one person by another person, it is impossible to deny the agreement of the will of the parties on the establishment of representation.

Power of attorney form. For a power of attorney as a special type of transaction, the legislation provides for a mandatory written form.

As a general rule, the power of attorney must be made in simple written form. A notarized form of power of attorney is required in cases when it is issued for the management of property or for transactions requiring notarization. At the same time, the rule on notarization of powers of attorney for property management is not mandatory and contains a reservation on the possibility of establishing an exception based on legislative acts (paragraph 2 of Article 167 of the Civil Code).

In accordance with paragraph 3 of Article 167 of the Civil Code , notarized powers of attorney are equal to:

1) powers of attorney of military personnel and other persons undergoing treatment in hospitals, sanatoriums and other medical institutions for the military, certified by the chiefs, deputies for the medical part, senior and duty doctors of these hospitals, sanatoriums and other medical institutions for the military;

2) powers of attorney of military personnel, and in the locations of military units, formations, institutions and educational institutions for the military, where there are no state notary offices and other bodies performing notarial acts, also powers of attorney of workers and employees, their family members and family members of military personnel, certified by the commanders (chiefs) of these units, formations, institutions, institutions;

3) power of attorney of persons in places of deprivation of liberty, certified by the heads of places of deprivation of liberty;

4) power of attorney of adult capable citizens who are in institutions of social protection of the population, certified by the head of this institution or the relevant body of social protection of the population.

In some cases, it is allowed to certify a power of attorney without observing the notarial form of the power of attorney. In particular, these cases are listed in paragraph 4 of Article 167 of the Civil Code — a power of attorney to receive correspondence, wages and other funds can be certified by local authorities, the organization where the principal studies, etc. It should be noted that the legislation provides an exhaustive list of powers that such a power of attorney may contain.

In order to facilitate and speed up the transfer of a power of attorney to an attorney, it is allowed, when necessary, to transfer a power of attorney by telegraph or other official means of communication, for example, when the attorney and the principal are located in various remote cities and urgent representation of interests is required that do not allow obtaining a power of attorney by courier or by mail. Such a power of attorney must be additionally certified by the communications authorities.

It is possible to transfer a power of attorney without using official communication channels, for example, you can transfer a power of attorney by fax. In this case, the third person for whom the power of attorney was issued has the right to recognize or not to recognize its authenticity. If a third party recognizes such a power of attorney as genuine, the principal has no right to refer to non-compliance with the requirements for the form of the power of attorney and on this basis refuse to accept the results of the transaction or declare the recognition of such a transaction invalid.

Registration of powers of attorney on behalf of a legal entity in accordance with paragraph 6 of Article 167 of the Civil Code has a special procedure. A power of attorney on behalf of a legal entity does not, as a general rule, require notarization, except in cases where a power of attorney is issued by way of transfer. A power of attorney on behalf of a legal entity is issued signed by its head or another person authorized to do so by the constituent documents, and sealed with the seal of this organization. The constituent documents of a legal entity may provide for the possibility of issuing a power of attorney on behalf of a legal entity also by another person, for example, his deputy.

A power of attorney on behalf of a state body or a legal entity to receive or issue money and other property values must be signed, except for the head or other person authorized to do so by the constituent documents, also by the chief (senior) accountant of this organization (Clause 7 of Article 167 of the Civil Code). This norm is established in connection with the need to control the payment and expenditure of money and other material resources, and non-compliance with the rules for registration of such a power of attorney is the basis for its invalidation.

The specifics of the procedure for issuing and forms of powers of attorney for transactions in the bank and powers of attorney for transactions in the field of trade may be established by special rules established by authorized state bodies.

The term of the power of attorney. The power of attorney is a fixed-term transaction, i.e. it has a deadline for validity. The validity period of the power of attorney, as a rule, is indicated in the text of the power of attorney itself. At the same time, the legislation imperatively sets the maximum deadline for which a power of attorney can be issued — three years. If a longer term is specified in the power of attorney, this does not affect the validity of the power of attorney as a whole, but limits its validity to a three-year period from the date of issue of the power of attorney.

Although the power of attorney refers to a fixed-term transaction, the absence of its validity period in the text of the power of attorney does not entail its invalidity, since the legislation, in particular, Article 168 of the Civil Code, provides for compensating norms for this case, the content of which boils down to the fact that if the power of attorney does not specify its validity period, then such a power of attorney is considered issued for a period of one year from the date of issue.

The indication of the date of issue of the power of attorney is mandatory and is important for its validity. The absence of the date of issue of the power of attorney entails its invalidity. Specifying the expiration date of the power of attorney does not replace the obligation to specify the date of issue and cannot fill it. Despite the simplicity of this requirement, in practice, there are frequent cases of issuing powers of attorney without specifying the date of issue and subsequently invalidating them because of this.

Retrust. The general rule of the legal relationship on representation is the personal execution by the attorney of the actions for which he is authorized. This is due to the confidential nature of the representation relationship between the principal and the attorney. The transfer to the attorney of the powers granted by the power of attorney is possible, in accordance with art. 169 of the Civil Code, only in two cases: when the right to transfer powers of attorney is granted by the power of attorney itself, for example, when the principal issues a power of attorney with the right of transfer, as well as when the attorney is forced to transfer powers due to extraordinary circumstances that threaten the interests of the principal and prevent the attorney from coordinating the transfer of trust with the principal, for example, the attorney's illness, which deprived him of the opportunity personally execute an order requiring immediate execution on pain of otherwise damaging the interests of the principal, and the inability to immediately contact the principal to obtain consent to the transfer of trust or the latter to make another decision to protect and represent their interests.

Due to the exclusivity of cases of transfer of trust and in order to establish strong guarantees for the protection of the interests of the principal, the legislation establishes the need for notarization of the transfer agreement, even in cases where the main power of attorney itself does not require notarization. Notarization of a transfer of trust also applies to a transfer of trust carried out by a power of attorney on behalf of a legal entity, despite the fact that such a power of attorney is not notarized, but in another way. Failure to comply with the notarization of the transfer of trust entails its invalidity.

The legal relationship of trust is derived from the main legal relationship of representation. Therefore, a power of attorney for the transfer of powers to another person should not contradict the content or may not exceed the validity period of the main power of attorney. A power of attorney for the transfer of powers to another person may be issued with a narrower content, and then, according to the powers not included in the power of attorney issued by way of transfer, the original person remains the attorney.

A power of attorney for the transfer of powers to another person may be issued for a shorter period, after which the former attorney re-enters into the relationship of representation.

The attorney who transferred the powers to another person must immediately notify the principal and inform him of the necessary information about the new attorney and his place of residence (paragraph 4 of Article 169 of the Civil Code). Under the necessary information, it is necessary to understand the characteristics of the personal and professional qualities of the new representative, contributing to the fulfillment of their duties. Such notification is necessary so that the principal knows about the transfer of trust, can assess his personal and professional qualities, cancel the transfer or reject the candidacy of a new attorney, contact the new attorney and, when he finds it necessary or expedient, cancel the transfer or otherwise resolve the issue of representation of his interests.

Having promptly notified the principal of the transfer of trust and having informed him of the necessary information about the new attorney and his residence, the attorney disclaims responsibility for the actions of the new attorney, being responsible only for the correctness of the choice of his replacement, i.e. for the compliance of the business qualities of the new attorney with the nature of the assignment. Otherwise, the original attorney is liable to the principal for the actions of the new attorney as his own.

Types of powers of attorney. The types of powers of attorney differ in the scope and content of the powers conferred on the attorney. A power of attorney may be issued for: a) performing one specific legally significant action, for example, concluding a contract for the purchase and sale of a certain apartment; b) representing the interests of a shareholder at one meeting of shareholders; c) to perform the same actions for a certain time, for example, to constantly represent the interests of a shareholder in the management of a joint-stock company for a certain time, to receive a monthly salary from a bank by a cashier; d) to exercise a whole range of property rights and obligations of the principal for a long time, for example, managing the property of the principal, representation of the interests of a legal entity at the location of a branch or representative office, etc. Depending on this, you can distinguish between a one-time, special or general power of attorney.

Termination of the power of attorney. The power of attorney is terminated both on general grounds of termination of the obligation, and on special grounds provided for by law for a power of attorney, in particular, Article 170 of the Civil Code.

Any power of attorney is issued for a certain period. Even if the power of attorney does not specify a term due to the filling provisions of the legislation, it is possible to determine the validity period of such a power of attorney. The expiration of the term is one of the grounds for termination of the power of attorney, regardless of whether the attorney performed the actions provided for by the power of attorney or not.

A power of attorney is issued for making any transactions or legally significant actions. Therefore, the achievement by the attorney of the goal for which the power of attorney was issued terminates the legal relationship on representation and, accordingly, terminates the power of attorney.

The power of attorney is terminated at any time, regardless of the term or other circumstances, in the event of its cancellation by the principal or the attorney's refusal of the power of attorney in connection with the granting by law to the principal of the right to cancel and the attorney of the right to refuse the power of attorney at any time.

The legal relationship by proxy is based on the participation of two persons in it — the principal and the attorney, and these relations have a personal, mutual trust character, which manifests itself in the requirement to fulfill the obligation, as a rule, by the attorney personally, in the possibility of revoking the power of attorney by the principal or the attorney's refusal to fulfill the obligation at any time. Therefore, the termination of the legal entity-the principal or the liquidation of the legal entity-the attorney, as well as the death of the citizen-the principal or the recognition of his missing or the death of the citizen-the attorney or the recognition of his missing entails the termination of the power of attorney, regardless of the presence of legal successors.

Representation relations require personal strong—willed, purposeful actions both on the part of the principal making a unilateral transaction - the issuance of a power of attorney, and on the part of the attorney making transactions and other legally significant actions in the interests and on behalf of the principal. Therefore, the recognition of a citizen-principal or a citizen-attorney as incapacitated, with limited legal capacity entails the termination of the power of attorney, regardless of the presence of persons called upon to make up for the absence or limitation of legal capacity, for example, guardians or trustees.

The mutual nature of the relationship between the principal and the attorney is of great importance for the legal relationship of representation. Therefore, in case of loss of trust or interest between the participants in the legal relationship on representation for any reason, for example, in case of dishonesty of one of the parties, loss of interest by the principal in the transaction in respect of which a power of attorney has been issued, etc., the legislation provides an opportunity at any time, without explaining the reasons, to the principal to cancel the power of attorney or the right of transfer, and to the attorney — to refuse the power of attorney. This rule is imperative, which does not allow any other agreement on the issue of revocation of the power of attorney or transfer of trust by the principal or on the issue of the attorney's refusal of the power of attorney, and any agreement on the waiver of this right is invalid.

In case of cancellation of the power of attorney by the principal, the latter is obliged to notify the attorney, as well as all third parties known to him, for making transactions with whom or for presenting to whom the power of attorney was issued. The attorney's notification is important for the cancellation of the power of attorney, since the power of attorney is terminated only from the moment when the attorney learned or should have learned about the principal's decision to cancel the power of attorney.

In cases of termination of the existence of the legal entity on whose behalf the power of attorney was issued, or the death of a citizen-principal, entailing the termination of the power of attorney in accordance with sub-paragraphs 5 and 7 of paragraph 1 of Article 170 of the Civil Code, the legal successors are obliged to notify the attorney and all known third parties for representation to whom the power of attorney was issued, termination of the power of attorney is similar to the duties the principal in case of cancellation of the power of attorney.

Until the attorney receives a notice of termination of the power of attorney, the power of attorney, with the good faith of the attorney's actions, remains valid both for the principal or his legal successors, and for third parties.

The notification of third parties has a warning character both for the case when the attorney may perform the actions for which he is authorized by a power of attorney before receiving the notice of cancellation of the power of attorney, and for the case of unfair action of the attorney after receiving the notice of cancellation of the power of attorney.

Third parties notified of the cancellation of the power of attorney or who have learned of the termination of the power of attorney for any other reason are not entitled to make transactions with the attorney. Otherwise, the principal or his legal successors have the right not to accept the results of such transactions or to take appropriate actions to invalidate such transactions and recover the losses incurred.

The commission by the attorney of a transaction for which he was authorized by a power of attorney, after receiving a notice of cancellation of the power of attorney, will be nothing more than a representation without authority. In some cases, for example, in case of paid alienation of property by the attorney after the cancellation of the power of attorney to bona fide purchasers, the property cannot be claimed from the latter, and the actions of the attorney will be mandatory for the principal or his legal successors, but they have the right to recover the losses incurred from the attorney.

Upon termination of the power of attorney, the attorney or his legal successors, legal representatives are obliged, in accordance with paragraph 3 of Article 171 of the Civil Code, to return the power of attorney to the principal or legal successors, legal representatives of the principal.

Since the power of attorney by way of transfer is derived from the main power of attorney, the termination of the latter entails the termination of the power of attorney by way of transfer, and the transfer of powers under such a power of attorney to a new attorney becomes invalid (Clause 4 of Article 171 of the Civil Code).

Lecture 7. Terms in civil law.

§ 1. The concept and types of terms in civil law

The concept of deadlines. The time factor plays an important role in civil turnover and in solving social problems. With a certain period (segment) of time or a moment in time during which it is necessary to perform an action or inaction provided for by legislation, a transaction or a court, the emergence, modification or termination of civil legal relations are associated.

Periods of time or moments in time, the onset or expiration of which entails certain legal consequences, are referred to in civil law as terms.

The significance of deadlines lies in the fact that certain legal consequences are associated with their onset or expiration. Deadlines streamline civil turnover, discipline its participants; contribute to the timely implementation of contracts, the role and importance of which have increased dramatically in market conditions; provide timely protection of the rights and interests of various subjects of civil rights. By its legal nature, a term is a legal fact with which the law associates the occurrence of certain legal consequences. Legal facts, as is known from the course of the theory of law, are divided, in turn, into events and actions. As a rule, the term is classified as an event, since the onset or expiration of the terms is objective, i.e. does not depend on the will of the subjects of civil rights1. But there is another point of view in the legal literature, according to which deadlines represent a special independent category of legal facts that cannot be attributed to either events or actions.2

This point of view is based on the fact that legal deadlines, obeying the objective law of the passage of time, are nevertheless volitional in origin, since they are determined by the will of the legislator or the parties to the contract and therefore have a dual nature. It is difficult to agree with this opinion, because even the term appointed by someone's will as a period of time or a moment in time still comes objectively, i.e. it cannot be brought closer, nor removed, nor changed, nor canceled.

The Civil Code of the Republic of Kazakhstan contains norms regulating in detail the procedure for calculating deadlines (Chapter 6 of the Civil Code). According to paragraph 1 of Article 172 of the Civil Code, the term established by law, a transaction or appointed by a court is determined by a calendar date or an indication of an event that must inevitably occur.

A calendar date is the actual date of a certain month and year.

Events are legally significant facts that arise independently of the will of people (natural death of a person, expiration of a term, etc.). The inevitability in this case is expressed in the fact that the event indicated in a legislative act or a transaction or a court decision must necessarily occur. The peculiarity of determining the term by indicating an event that must inevitably occur is that the participants in the civil legal relationship do not know in advance the exact date of its occurrence. Thus, the time of the opening of the inheritance, according to paragraph 2 of art. 1042 CC, the day of the testator's death is considered, from this day the time for accepting the rejection of the inheritance is counted.

References to a calendar date are most often found in transactions when the exercise of civil rights and the performance of duties is linked to the exact date. For example, the goods must be delivered before December 31, 1999. But such references may also take place in court decisions, as well as be determined by the legislation itself. Thus, according to Article 1042 of the Civil Code, when a citizen is declared dead, the date of the entry into force of a court decision or the day specified in the court decision is recognized as the time of the opening of the inheritance. Or, as indicated in art. 49 of the Decree on Taxes, — the declaration of total annual income is submitted to the tax authorities before March 31 of the year following the reporting year.

Terms representing periods of time are determined by an indication of their duration and are calculated in years, months, weeks, days or hours (clause 2 of Article 172 of the Civil Code). For the correct calculation of deadlines, it is important to accurately determine its beginning and end. According to Article 173 of the Civil Code, the duration of the term is determined by the period of time that begins on the day after the calendar date or the occurrence of the event that determines its beginning. So, if the residential lease agreement was concluded on February 15, 1998, then, consequently, its validity period begins to flow from February 16, 1998. The day of the calendar date or the occurrence of the event is not taken into account. As for the rules for the end of the term, they differ depending on the unit of time used.

The term, calculated in years, expires in the corresponding month and the date of the last year of the term (clause 1 of Article 174 of the Civil Code). So, if the three-year limitation period began to flow from April 1, 1999, then it will expire on April 1, 2002.

The term calculated in months expires on the corresponding date of the last month. At the same time, if the end of the term calculated in months falls on a month in which there is no corresponding date, then the term expires on the last day of that month. So, if the monthly lease term of the property began to flow from January 31, 1999, then it should end on February 31, 1999, but since there is no such date in the calendar, therefore, it will end on February 28 (or 29), 1999.

Similarly, the issue of the last day of the term, calculated in half a year and a quarter, is being resolved. At the same time, a period of six months is considered equal to six months, and a quarter is considered equal to three months, and the quarter is counted from the beginning of the year.

A period of half a month is considered as a period calculated in days, and is considered equal to 15 days. When calculating the term in weeks, it expires in the last week on the same day by name as its beginning is determined. So, if the weekly period started on Friday, then it will expire on the next Friday after the beginning of its course. In cases where the last day of the term falls on a non-working day, the day of the end of the term is considered to be the next working day following it. At the same time, a public holiday, a generally established day off, as well as one provided for by the regime of this organization, is considered a non-working day. For example, December 25 is a non-working day for German foreign campaigns, since the religious national holiday "Christmas" is celebrated on this day. The expiration date in these cases is considered to be the nearest working day following the non-working days.

When calculating the term determined by the clock, there is no need to establish the beginning of the term, since with this method of determining the term, its onset or completion is initially indicated with extreme accuracy.

If the deadline is set for the commission of any action, it can be performed as a general rule up to 24 hours of the last day of the deadline. However, when this action is to be performed in an organization, the deadline expires at the hour when the relevant operations are terminated in this organization according to the established rules. In such relations, the last day of the term expires at the time of the official termination of work in these organizations, or the termination of the relevant operations. For example, it is established that the reception of correspondence and documents in the Higher Attestation Commission is carried out before 16 o'clock in the afternoon, despite the completion of the working day by them at 18 o'clock. But at the same time, all written statements and notices, even if intended for submission to the relevant organizations, but submitted to the post office or telegraph before 24 hours of the last day of the deadline, are considered to have been sent on time.

Types of deadlines. The classification of terms can be made on various grounds. Depending on who sets the deadlines, there are legal, contractual and judicial deadlines. According to the legal consequences, the terms are divided into law-forming, law-changing and law-terminating.

By their legal nature , the terms are divided into the following types:

1) the terms of the exercise of civil rights are the periods of time during which an authorized person has the opportunity to perform any actions to exercise his subjective right. They are established, as a rule, by a legislative act, but can also be determined by an agreement of the parties (ownership, copyright, etc.);

2) the period of existence of subjective rights is the period of time during which the subjective rights that have arisen remain, the limits of which are limited in time. For example, a power of attorney is issued for a period of no more than three years;

3) preemptive deadlines are deadlines that are set for the purpose of repayment of certain rights. Thus, paragraph 6 of Article 8 of the Law of the Republic of Kazakhstan "On Notaries" dated July 14, 1997 categorically prescribes that a person who has received a notary license, but has not started performing notarial actions for three years, is allowed to notarial activity only after re-passing the qualification exam;

4) warranty periods — the periods for the buyer to establish the shortcomings of products intended for long-term use or storage, which could not be detected during their normal acceptance. Warranty periods are established by state standards or a contract. Moreover, contracts may establish warranty periods, even if they are not provided for by standards or specifications, as well as warranty periods longer than those provided for by standards. The establishment of warranty periods ensures the satisfaction of the interests of consumers and serves as an incentive to improve the quality of products or work performed;

5) claim deadlines are established by law for filing claims against a person who has violated a subjective right regarding the fact of violation of the right with a requirement for voluntary performance of duties arising from this violation. The law sets not only deadlines for filing claims, but also deadlines for responding to claims. For example, before filing a claim against the carrier arising from the carriage of cargo, it is mandatory to file a claim against him in accordance with the procedure provided for by legislative acts (paragraph 1 of Article 706 of the Civil Code).

6) the terms of performance of civil obligations are established in the contract. So, under the loan agreement, the time of performance of duties may be provided for the moment of repayment of the debt;

7) terms of protection of civil rights, or as they are otherwise called in civil law, the statute of limitations.

Lecture 8. Ownership. General provisions.

§ 1. The concept of property rights

The concept of "property rights" in modern legal science is often used, but insufficiently developed. Despite the fact that property rights were considered in detail in Roman law, a well-established and recognized by all legal systems concept has not yet been formed. Many aspects of property law are simply postulated and have not received proper theoretical justification.

But the most unfavorable picture has developed in the Soviet legal literature. This was due to the fact that all property rights during the years of Soviet power were gradually ousted from civil law, and only the right of ownership remained. Therefore, the section on real rights was excluded from civil legislation, and many lawyers began to prove that real rights do not exist in nature, that, for example, a pledge does not relate to real rights, and that there is only the right of ownership as an absolute right1.

Currently, the situation has changed. In the Civil Code, Section II is called "The right of ownership and other property rights", the Civil Code includes a special article on the property rights of persons who are not owners (Article 195), certain types of property rights are regulated.

However, the concept and signs of property rights in the legal literature have not yet received a clear resolution. Moreover, lawyers still express doubts about the need to distinguish the category of proprietary rights2. Therefore, we will focus in more detail on the concept and signs of property rights.

The concept of property rights is inextricably linked with such concepts as thing, property, object of legal relationship, property legal relationship and others; all of them are analyzed in detail in this textbook. Therefore, we only note that property rights are a kind of property rights, the object of property law is a thing as a kind of property, the concept of the object of legal relationship is based on things and property benefits.3

Based on these initial concepts, it is possible to identify the main features of property rights:

1. Property rights are property rights, unlike personal non-property rights. This combines proprietary rights with binding rights;

2. Property rights arise with respect to an individually defined thing, in contrast to the rights of obligations and intellectual property rights, which are associated with the so-called "disembodied property". At the same time, we must not forget that binding relations also arise in relation to things. In relation to things determined by generic characteristics, property relations cannot arise, only binding rights arise.

"The object of absolute law is always individually defined. In particular, this applies to property rights, including property rights. If a thing cannot be individualized, then only a binding, but not a real, legal relationship arises in connection with it.4;

3. Property rights are absolute rights, which unites them with intellectual property rights and distinguishes them from binding rights. The owner of property rights is opposed by the obligation of everyone not to interfere with the exercise of these rights.

In our opinion, there are relative real relations (between participants in common property, between the state and an enterprise that has property on the right of economic management, etc.). However, this group of relations is few, precisely delineated and does not affect the nature of the vast majority of real rights. It concerns not the "external", but the "internal" relations of participants in property relations;

4. The following follows from this feature: the absolute nature of the protection of property rights, i.e. protection from everyone and everyone who encroaches on the property right. Hence the existence of specific means of protecting property rights with the help of special property lawsuits;

5. A sign of property rights can be considered the establishment of their law. Unlike binding rights, which may arise in cases not provided for by law (Article 380 of the Civil Code), property rights must be secured by law (paragraph 1 of Article 195 of the Civil Code).

In this case, two clarifications are needed. Firstly, the consolidation of the law does not mean that these rights in the law should be called real. It is enough that they belong to the category of property rights and are provided for by legislative acts. Their assignment to the category of real rights is carried out in the presence of signs of real rights. For example, a pledge or an easement is not called real rights in the law. The pledge is generally located in the section of the Civil Code "Law of Obligations", but this does not prevent their recognition as property rights. This situation is due to the fact that some rights act in some respects as real (the right of pledge in the relationship of the pledgee with all other persons), and in others as binding (the right of pledge in the relationship between the pledgee and the pledgor).

Secondly, the law establishes only an indication of the types of property rights that may exist in practice. Specific property rights arise, of course, on the basis of specific legal facts;

6. The right to follow. The property right follows the thing. The transfer of ownership of the property to another person is not a basis for the termination of other property rights to the property. This rule is directly enshrined in the Civil Code of the Russian Federation (paragraph 3 of Article 216). There is no such general rule in the Civil Code of the Republic of Kazakhstan. The norms regarding individual property rights are fixed: the preservation of a pledge when transferring the right to mortgaged property to another person (Article 323 of the Civil Code), the preservation of a property lease agreement when transferring ownership, the right of economic management or the right of operational management of leased property to another person (Article 559 of the Civil Code);

7. The right of advantage lies in the fact that in the competition of property and obligation law, first of all, property law must be exercised.

Scientists often express doubts about the existence of such a feature on the grounds that a pledge does not have a pre-emptive right over binding rights5. This is true, however, it does not prove the absence of such a feature in relation to the pledge as a real right, but only proves that Soviet and then Kazakh law restrict the implementation of this feature in relation to the pledge. In most other countries, the pledge requirement in bankruptcy is implemented first or out of turn. This process is also being gradually introduced in Kazakhstan. In particular, by the Law "On Bankruptcy" of January 21, 1997, the obligations secured by the pledge were transferred from the third stage when foreclosing on the debtor's property to the second stage;

8. Actual domination over the thing, i.e. the possibility of direct, without the mediation of third parties, the exercise of one's right6.

This feature is often used as the basis for the definition of property rights, and its presence is not in doubt when exercising the right of ownership, possession, land use and others. However, problems in the application of this feature arise in the implementation of a mortgage, when the property remains with the mortgagor and is outside the actual dominance of the mortgagee.

It seems to us that the concept of actual domination over a thing cannot be approached too simplistically. One statement of G. F. Shershenevich can help us here: "Property law establishes, as they say, the direct relationship of a person to a thing, not in the sense that an authorized subject should be in contact with a thing, but in the fact that in order to exercise his right to a thing, he does not need the mediation of other persons."7

When considering the case of a real estate mortgage, one can imagine that the mortgagor rents the house as collateral, staying in it to live. The pledgee has no direct influence on the thing.

However, the actual domination over the thing consists in the mortgage in limiting the rights of the owner to dispose of the thing without the consent of the mortgagee. Thus, the pledgee has, as it were, the right of veto on the disposal of the pledged thing;

9) The literature does not name another feature of property law, which is characteristic, at least, of the law of the Republic of Kazakhstan: the holder of property rights must have the powers of possession, use, disposal. Moreover, in different types of property rights, the rightholder has a different set of powers. The subjects of ownership, economic management, and operational management have a full set of powers (ownership, use, disposal), although to a different extent. The subjects of the right of ownership, land use, subsoil use, lease have the rights of ownership and use. The custodian and the mortgagee at the time of the pledge have the rights of possession. The mortgagee has the right to partially dispose of the property during the mortgage. The owner of the easement has the right to use and partially own.

One common methodological error of most researchers should be noted. When identifying signs of property rights, many authors focus on the right of ownership, possession and other pronounced property rights. Meanwhile, many signs that clearly manifest themselves in the ownership right (for example, the actual domination over the thing) almost disappear in some other property rights, for example, with a mortgage or easement.

It seems that property rights are united by one main feature — acting as an object of an individually defined thing. Of the greatest practical importance is the sign of absolute protection from everyone and everyone with the help of special, proprietary lawsuits. Actually, for the sake of this, the status of a real right is assigned to one or another right. All the other signs listed above are present in all property rights, but in some they manifest themselves strongly, even vividly, in others they take a barely noticeable amount, sometimes being present in modified forms. For example, with a mortgage, such a sign as actual domination over a thing is weakly present, but the rights of succession and advantages are strongly manifested.

In addition, the boundary between real and other property rights, in particular, binding rights, sometimes becomes shaky and mobile. This is due to the fact that property rights mainly arise from obligations, and vice versa. Even the right of ownership in most cases is based on contracts of sale, donation, barter (contracts for the transfer of property into ownership). Pledge, lease, storage, land use rights arise from pledge agreements, lease, storage, etc. Hence the controversy over whether lease, mortgage, trust management, etc. are real rights.

The vast majority of real rights are related to the binding legal relationship between the subject of such a right and the owner of the thing that is the object of real law.

Based on the identified signs of property law, we formulate a definition of property law.

Property right is an absolute property right secured by law: (1) the object of which is an individually-defined thing; (2) possessing specific means of protection against everyone and everyone with the help of special property lawsuits; (3) expressed in the right holder's possession, use or disposal rights, all together or separately, in full or in part; (4) giving the rightholder the opportunity to directly influence the thing (direct domination over the thing), including by restricting the owner or subject of another property right in the exercise of powers; (5) characterized by the presence of the following rights and advantages.

Lecture 9. The right of common property.

Property rights include only the rights directly provided for by the legislation in force in this country, i.e. a person cannot voluntarily create any other types of property rights.

This vicious circle of property rights varies in different legislative acts. In the civil law of all countries, the leading place in the system of property rights is occupied by the right of ownership, which is the central institution of the legal system of a particular country.

In addition, this system includes such property rights as the right of pledge, easements, usufruct, etc. What they have in common is that these are the rights to other people's things, securing for their bearers separate powers related to the separate powers of the owner (usually possession, use). That is, these are real rights derived from property rights.

With the development of market relations in Kazakhstan, new types of property rights are also emerging. In particular, the new proprietary right was constructed in the Decree on Subsoil and Subsoil Use. In this legislative act, the right of subsurface use has been fully consolidated (Chapter 3 of the Decree). This right existed before, but it has never been considered as a civil law and as a real right. In the old Code "On Subsoil and Processing of Mineral Raw Materials" of 1992, the right to use subsoil was considered within the framework of mining law according to the model of administrative legal relations. The first breakthrough in the direction of transferring these relations to the rails of civil law was made by the Decree on Oil, which introduced a contract system for the transfer of subsurface resources to subsurface use.

In the Decree on Subsoil and Subsoil Use, the right of subsoil use is built exactly on the same model as the right of land use. The further task is to translate other relations on the use of natural resources into contractual principles and to develop such property rights as forest management, water use, etc., as well as a more general legal institution — the law of nature use.

The main classification of property rights is their division into property rights and property rights of persons who are not owners (Article 195 of the Civil Code).

In Roman law, the second group of rights was called the rights to someone else's thing (jura in re aliena)8. In modern literature, they are sometimes referred to as limited proprietary rights9.

Articles 194 and 195 of the Civil Code name some types of property rights: the right of economic management, the right of operational management, the right of land use, property rights to housing. As a proprietary right, similar to the right of land use, the right of subsoil use is enshrined in the Decree on Subsoil and Subsoil Use.

Some rights are named in clause 2 of Article 118 of the Civil Code (state registration of real estate): the right to rent, mortgage (pledge), easements (the right to use someone else's property). However, these rights can be not only proprietary, but also binding.

The legal literature gives a very different set of property rights.

Usually, the list includes those rights that are explicitly called property rights in Civil Codes. Then the discrepancy begins: the list includes a variety of rights — the right of independent disposal of property belonging to the institution, a pledge or mortgage, the rights of a cooperative member to an apartment before its redemption, the rights of family members of the owner of the dwelling, the right of the actual owner, rights to water bodies, etc.

At the same time, there are statements about the inadmissibility of excessive expansion of property rights. Disputes are mainly around the right of lease. Some authors believe that the right to use property arising on the basis of a property lease agreement cannot be classified as a real right.10 Others deny the possibility of recognizing the rights of the tenant as property, except for the lease with the provision of the tenant with the right to buy out the leased property, as well as the rights of the tenant of residential premises in the state and municipal housing stock11.

Third authors state that the right to lease (especially real estate) in recent years has increasingly acquired the features of real law, although it is not formally recognized as such: the range of powers that the tenant has is very close to the powers of the owner of the real right; the tenant is endowed with the right to protect his possession even against the owner (landlord)12.

It is impossible not to pay attention to the unsystematic and chaotic nature of the formation of the list of property rights. They are called a mortgage, then only a real estate mortgage, then a pledge in general. The lease is not recognized as a real right, but the lease of an enterprise or land is recognized. The rights of the tenant of the dwelling are sometimes called property law, then even the possibility of such a decision is categorically denied. The right of water use is considered as a proprietary right, but the right of subsurface use is not mentioned in any work.

All this is due to the lack of clear criteria for the allocation of property rights or giving a self-suppressing value to only one of the criteria.

Based on the characteristics of property rights that were formulated above, we propose the following list of property rights.

Property rights can be divided into two large groups:

1. Ownership;

2. Property rights of persons who are not owners (rights to someone else's thing, limited property rights).

The rights to someone else 's thing can be classified as follows:

1) Ownership (in cases when it is independent, not related to the right of ownership and the right of use);

2) Easements;

3) The right to manage with the property of the owner:

the right of economic management;

the right of operational management;

the right to independently dispose of their property;

4) the rights that ensure the fulfillment of the obligation:

the right of pledge;

right of retention;

5) the right of nature use:

the right of land use;

the right of subsurface use;

the right of water use;

other environmental management rights;

housing rights:

the right of the tenant of the dwelling;

the rights of the family members of the owner of the dwelling to use this dwelling;

the right of lifelong residence in a dwelling belonging to another person, under a contract or by virtue of a testamentary refusal;

the right of a cooperative member to a cooperative dwelling before its redemption;

other housing rights;

7) The right to the thing transferred on the basis of contracts (other than those specified in the preceding paragraphs):

the right to the leased thing;

the right to a thing taken into trust management;

the right to a thing taken into custody;

the right to a thing transferred on the basis of rent;

the right to a thing transferred on the basis of other contracts (contract, etc.).

There are certain contradictions in this classification, since it is carried out simultaneously according to two criteria: according to the essence of property law, regardless of the scope of application (for example, an easement or a lease agreement is applied in any sphere or area of relations) and according to the scope of application of property law (environmental law, housing rights). The second criterion is rather artificial, but we had to apply it due to the importance of these areas and the large spread of property rights in these areas.

Therefore, it should be borne in mind that in the field of environmental management and in the field of housing relations, most property rights also arise on the basis of a contract (lease, housing lease, etc.), although there are exceptions (permanent land use, testamentary refusal, etc.).

Other classifications are possible. Depending on the scope of powers that the owner of the rights to someone else's thing has, these rights can be divided into three groups: the right of pledge and other rights to someone else's thing aimed at obtaining the exchange value of the object of the right; easements; the right to use someone else's thing.

The first group of rights to someone else's thing, in addition to the pledge of individually defined property, includes other rights to someone else's thing aimed at obtaining the exchange value of the object of law. In particular, this is the right to a thing arising from the right of retention. The right of retention, in addition to being a way of ensuring the fulfillment of an obligation, also refers to methods of self-defense in violation of subjective civil law. The absoluteness of the right of retention is due to the fact that the use of such a method of self-defense is permissible only in cases directly stipulated by legislative acts.

The second group of rights to someone else's thing consists of servitude-type rights (easements). The Civil Code does not use this term, except for the earlier mention of the easement in paragraph 2 of Article 118 of the Civil Code, which, with the adoption of amendments and additions to the Civil Code by the Law of the Republic of Kazakhstan dated March 2, 1998 and the presentation of this paragraph in a new edition, disappeared altogether.

The concept of "easement" appeared in the civil legislation of the Republic of Kazakhstan with the adoption of the Decree on Land, where this concept is given a specific content of one of the varieties of the right of limited use of someone else's property — the right to someone else's land. At the same time, it must be recognized that the use of the terms "easement", "servitude rights", "servitude-type rights" in relation to the right of limited use of someone else's thing is generally accepted in legal science, and it is unjustified to abandon them due to the fact that there is no general legal concept of easement in the legislation.

An easement is the right to use someone else's thing in the interest of a certain person. Describing an easement as a real right, it should be noted that it is associated with a thing, and not a subject of ownership. That is, a subjective right is established for a thing, and this right is in no way connected with the requirement of any active actions on the part of the owner of the property or another third party. But this does not affect the relationship between the subjects in any way. An easement, being an absolute right, provides for the emergence of an absolute legal relationship involving the passive obligation of all fellow citizens, including the owner of the property, to refrain from violating the right of easement.

An easement is not a derivative right from the right of ownership, although its main content is the right to use a certain subject by a certain object. But the powers of the owner and the holder of the servitude right, having similar features, at the same time have significant differences. The right to use the right of servitude is limited to a certain direction and purpose of use, as well as the extraction of only the natural properties of the thing in respect of which this right is established. At the same time, the rights of the owner have a larger scope and greater freedom.

The right of ownership and easement for the same thing, as well as all property rights for the same thing, are in conflict with each other, i.e. in contradiction and in opposition. The right of ownership in the exercise of use is inferior to the use in good faith (in a certain direction and for a certain purpose) of the owner of the easement right, i.e. in this case, the advantage is given to the easement right and the owner can use the thing insofar as it does not interfere with the implementation of the easement. At the same time, when using outside the direction defined by the easement or outside the purpose defined by it, as well as when unnecessarily harming the subject of the easement, the holder of the easement right has no advantages, moreover, he is responsible for the damage caused, and the owner of the encumbered property has the right to demand the termination of the easement.

Historically, since the time of Roman law, there are two types of easements: real (predial) and personal. Both of them relate to real rights, i.e. they have the object of the right of the serving thing itself and associate each owner of the real right with this thing. The differences between real and personal servitudes are carried out according to the order of determining the subject of servitude law, i.e. by determining the person who owns the domination over someone else's thing.

A real easement assumes the presence of two adjacent land plots. At the same time, an easement is established on one of these plots, which, as a rule, is referred to as an employee land plot. The land plot of a person who is granted the right of easement to a neighboring plot is called the dominant land plot. As a rule, the task of establishing a real easement is to increase the economic suitability of one (dominant) site due to the fact that its needs are served by certain well—known properties of another site (employee). The transfer of ownership of the dominant plot to another person entails the transfer, as a general rule, of the right of easement to the neighboring plot.

Personal easements, on the contrary, serve the interests of a certain person and are not related to the presence of neighboring plots (although they can be established in relation to neighboring plots too), they belong only to him and, as a general rule, do not pass in succession, whether it is a universal or singular inheritance or alienation. As a rule, personal easements belong to the subject of this right for life.

The list of servitude rights is not exhaustive, since any right of a person to use someone else's thing, if there is an indication of a legislative act on the cases, conditions and limits under which the owner is obliged to allow the use of his property by other certain persons (i.e. if such a right is given absoluteness and independence from the rights of the owner, and if this right is limited in the scope and purpose of use up to some one natural property of a thing), will refer to an easement in a broad sense.

A land easement is the most striking example of the right of limited use of someone else's property, although certain types of it or their definitions provided for by legislation are controversial.

The legal definition of a land easement is given by a Decree on land, according to which an easement recognizes the right of citizens and legal entities to a limited purpose use of a land plot that is on the right of private ownership or the right of land use from other persons, i.e. limited purpose use of someone else's land plot.

The Law on Housing Relations introduced new types of easement rights, in particular, the right of access to a room belonging to a condominium member on the right of separate (individual) ownership for the repair or replacement of the common property of the condominium, which can only be made from the premises of such an owner (real easement). Of course, the owner of the adjacent premises has the same right.

New servitude-type rights have not yet been widely reflected in property turnover, the practice of legal regulation has not developed sufficiently in relation to these rights and its coverage requires their separate study in the future. At the same time, it should be noted that the legal regulation of these easements is in many ways similar to the legal regulation of land easements, since they belong to a single group of property rights united by a single socio-economic and legal nature of origin, the same scope and content of the powers.

The third group of rights to someone else's thing includes the rights to use someone else's thing, which have significantly larger amounts of right of use than easements. Such rights include the right of lease, the right of loan (gratuitous use of property), the right of land use, the right of subsurface use, the right of lifelong residence in a residential building, the right of the custodian in the establishment of sequestration, the right of the owner before the acquisition of property on the basis of the statute of limitations and some other rights.

The right to use the property rights of this group is quite wide. In some cases, it may even approach the owner's use rights in terms of volume. In particular, with the right of lease, the right of land use, the right of subsurface use, the right of ownership exists on a par with these rights without the right of use, i.e. the owner does not have the right to use his property.

In some cases, the rights to someone else's thing of this group give the right to the rightholder to use the property on an equal basis with the owner. These rights, in particular, include the rights of family members to use housing on an equal basis with the owner, unless the contract with the owner stipulates any restrictions in use. Of course, the right of a family member to use housing is constructed in the legislation as an absolute right, and it refers to the rights to someone else's thing. Thus, in accordance with art. 22 of the Law on Housing Relations, family members are granted the right to protect their rights from its violation by third parties, including from the owner.

The rights to someone else's thing of the considered group may be limited in the scope, limits or purpose of the right of use. In addition, there are restrictions on the nature of the rights of the rightholder, the dependence of the granting of the right to use someone else's property on the person who is endowed with a certain property right. Since the identity of the person in whose interest the use is established is essential for the acquisition of the right to use someone else's property, then the death of a citizen-rightholder or the liquidation (and in some cases reorganization) of the rightholder — legal entity may entail the termination of the right to someone else's thing

Examples of these rights are the right to live in a residential building for life, as well as the right to use someone else's property provided by virtue of a testamentary refusal. The right of lifelong residence in a dwelling may also arise due to the establishment of certain types of rental relations.

Lecture 10. Acquisition of property rights and other proprietary rights.

§ 1. The concept and content of property rights

Property law as an institution of civil law. Property relations are regulated by the norms of various branches of law. Civil law occupies one of the important places in this. Property law is the central institution of civil law in general and property law in particular.

To understand the role and significance of property rights, it is important to note some general provisions on property rights. They are contained in various regulatory legal acts of the Republic of Kazakhstan, but they relate to the subject of regulation of civil law[1].

The Constitution of the Republic of Kazakhstan of 1995 was put into effect after the adoption of the general part of the Civil Code of the Republic of Kazakhstan. Amendments and additions to the Civil Code practically did not affect the basics of legal regulation of property relations. We can talk about a certain stability in the sphere of constitutional provisions and the main postulates of the Civil Code on property rights. These include:

1) recognition and equal protection of state and private property (clause 1 of Article 6 of the Constitution);

2) attribution of land (land plots), subsoil, and other natural resources to objects of state, and land - and private property (paragraph 3 of Article 6 of the Constitution);

3) the possibility for citizens to have in private ownership any legally acquired property and its free use for any legitimate business activity (paragraphs 1 and 4 of Article 26 of the Constitution);

4) guaranteeing property and the right to inherit it by law (paragraph 2 of Article 26 of the Constitution);

5) compulsory alienation of property for state needs takes place in exceptional cases provided for by law, and subject to its equivalent compensation. Deprivation of property is possible only by a court decision (paragraph 3 of Article 26 of the Constitution).

In addition, two more constitutional guarantees of property rights can be distinguished: a) the prohibition on restricting the guarantee of property rights and its inheritance (paragraph 3 of Article 39 of the Constitution) and b) the regime of property and other property rights is determined by law (subp. 2) paragraph 3 of Article 61 of the Constitution).

Among the principal provisions of the Civil Code on the right of ownership are the following provisions:

1) determination of the content of the property right by means of the possibility of the authorized person to perform any actions in relation to the thing belonging to him (paragraph 3 of Article 188);

2) introduction to the Civil Code of the classification of things into movable and immovable (Article 117). Although this classification is not directly specified in the norms of the second section of the Civil Code, it has had a significant impact on the content of legal regulation. For example, a novel in the regulation of common property - a condominium (Clause 6 of Article 209 of the Civil Code), features of the acquisition of ownership of immovable and movable property, etc.;

3) consolidation of the acquisition limitation period as a method of acquiring property rights (Article 240 of the Civil Code). This innovation is essential for the regulation of property relations, which consists in recognizing the legal consequences of illegal possession of a thing;

4) the Civil Code sets out an exhaustive list of grounds for compulsory, that is, against his will, seizure of property from the owner, (paragraph 2 of Article 249). In fact, we are talking about greater stability in securing things for subjects of civil turnover;

5) full compensation of the property losses of the owner from the termination of his right (Articles 257 and 266). Thus, the Civil Code has fixed an important provision that is designed to guarantee the stability and security of property relations;

6) a detailed system of ways to protect property rights. This includes such traditional methods of protection as vindication and negatory lawsuits (Articles 260-264 of the Civil Code), a claim for recognition of property rights (Article 259 of the Civil Code), as well as claims for the protection of the interests of the owner upon termination of his rights on the grounds provided by law, and invalidation of acts of state bodies and officials violating the rights of the owner and other proprietary rights (Articles 266 and 267 of the Civil Code[2]).

Other novels of the Civil Code of the Republic of Kazakhstan are of a private nature[3]. For example, this applies to the provisions of the Civil Code on the correlation and opposition of public and private property (objects, subjects, types of subjective rights), the formation of a single property right for all subjects and objects of civil turnover.

Analysis of the structural elements of the second section of the Civil Code of the Republic of Kazakhstan allows us to conclude about the complexity of the normative provisions of the Code regarding property rights and other property rights. First of all, this is manifested in the fact that various legal regimes are established for the ownership of the state and the property rights of other entities (individuals and legal entities). The differences are particularly evident in two points: a) the rules on the acquisition and termination of property rights allow the State to acquire property rights in a shorter period than other entities; b) two subjective property rights (the right of economic management and the right of land use) can be used only within the framework of state property rights.

The main structural elements of the institute of property rights are the rules on the general provisions of property rights (Chapter 8 of the Civil Code), common property (Chapter 11 of the Civil Code), acquisition and termination of property rights (Chapters 13 and 14 of the Civil Code, respectively), rules on the protection of property rights (Chapter 15 of the Civil Code).

The Civil Code of the Republic of Kazakhstan has a significant number of reference provisions, therefore special laws and other regulations play an important role in the regulatory regulation of property relations.

They can be distinguished either by the objects of regulation (for example, ownership of land plots is regulated by the Land Code, forests - in the Forest Code, subsoil plots - in the Law on Subsoil and Subsoil Use, etc.). There are separate laws that comprehensively regulate property issues not only by objects, but by subjects of possession.

For example, the Law on State Property has as its subject State property (property). Most of its norms are devoted to the implementation, acquisition and termination of rights to the property of the state and state legal entities.

However, there are rules that regulate the acquisition and termination of rights (including property rights) from individuals. For example, the right of ownership of private individuals is terminated as a result of requisition (articles 37-53 of the Law on State Property), nationalization (articles 54-60), forced alienation of a land plot or other immovable property in connection with the seizure of a land plot for state needs (articles 61-69). Conversely, State property can be acquired by private individuals as a result of privatization (articles 95-113 of the Law on State Property) and other methods. The Law also contains norms that can be attributed to restrictions on the right of ownership (other property rights) belonging to individuals and non-state legal entities (articles 187-195 of the Law on State Property on Strategic Objects).

Thus, the institution of property rights in the Civil Code is represented mainly in the form of general norms. Subject regulation of property relations is carried out by other regulatory legal acts.

Subjective ownership. The right of ownership is defined as the recognized and legally protected right of a subject to own, use and dispose of property belonging to him at his discretion (clause 1 of Article 188 of the Civil Code).

Further, the law reveals the content of the three powers of the owner: the right of ownership is a legally secured opportunity to exercise the actual possession of property. The right of use is a legally secured opportunity to extract its useful natural properties from the property, as well as to receive benefits from it. The benefit can be in the form of income, increment, fruits, offspring and in other forms. The right of disposal is a legally secured opportunity to determine the legal fate of the property (clause 2 of Article 188 of the Civil Code).

The following features are characteristic of the legal concept of property rights:

1. It is built using the triad of the owner's rights, which is traditional for Soviet and post-Soviet legislation. These powers in the Civil Code of the Republic of Kazakhstan are called the rights belonging to the owner (Part 1, paragraph 2, Article 188 of the Civil Code).

2. The right of ownership is positioned as the most complete right to a thing. The law specifically formulates the rule: the owner has the right, at his discretion, to perform any actions with respect to the property belonging to him, with certain exceptions (restrictions) related to the rights and legally protected interests of other persons and the state, causing damage to the health of citizens and the environment (paragraphs 3 and 4 of Article 188 of the Civil Code).

3. The right of ownership is indefinite (paragraph 5 of Article 188 CC), in contrast to real rights to someone else's thing, which, as a rule, have a certain time frame.

4. The legislator establishes an exclusive list of grounds for the compulsory termination of property rights (paragraph 2 of Article 249 of the Civil Code of the Republic of Kazakhstan).

There are quite a lot of doctrinal definitions of property rights. Their supporters (authors) can be divided into three groups:

1) the first category includes representatives of the Soviet and post-Soviet civilistic schools, whose definitions are based on the legislative interpretation of property rights as a set of rights (powers) of possession, use and disposal. For brevity, we can call this direction a triad school[4];

2) the second group includes researchers of the problems of property rights, representatives of the Anglo-Saxon legal system. Ownership in this case is understood as a bundle of rights. If the owner owns all the rights, then he is recognized as the bearer of the full ownership right, if only some of them - then his right is incomplete. In Anglo-Saxon law, several independent ownership rights to one thing (property) may exist simultaneously. Legal doctrine, legislation and judicial practice do not know any other rights to a thing other than the right of ownership and its varieties[5];

3) representatives of the third direction understand the right of ownership as the most complete right to a thing. This group is characterized by the statement of the absolute dominance of the owner over the thing and the formulation of restrictive provisions of legislation that are designed to specify the legal capabilities of the owner. This direction is mostly represented by scientists from countries that are part of the Romano-Germanic legal system[6].

In this case, the understanding of property rights will be based on the following theoretical postulates:

a) the absolute nature of property rights. Two aspects of the absoluteness of property rights: a) the possibility of the owner, relying on the law, to remove all third parties from economic domination over the thing belonging to him; b) the unlimited right of ownership in time - indefinite. In other words, this right is valid as long as there is any thing;

b) the proprietary nature of the property right. The right of ownership directly indicates the ownership of an individually defined thing to any subject. The right of ownership always establishes a legal connection between a particular subject of law and a thing belonging to him. Unlawful interference in such an attitude is considered an offense and may entail not only civil liability, but also criminal or administrative, that is, legal liability under the norms of public law. In addition, such an understanding excludes the extension of the rules on ownership to other relations, where the object is not a thing, but other types of property (property rights, the results of creative activity and other objects);

c) the right of ownership is the most complete right of a person to a thing, which is allowed by the current law and order. In this case, the economic use of property owned by the right of ownership is based on the principle that everything is allowed that is not directly prohibited by law. Restrictions on the right of ownership must be specified in the law or indicated in the form of the rights of other subjects of law. The right of ownership is assumed to be unlimited, free from any restrictions, which, the very fact of their existence and violation, must be established in each specific case.

General provisions on the exercise of property rights. Initially, it should be noted the general theoretical provisions on the exercise of subjective rights.

The main principle of the implementation of subjective civil rights is the principle of dispositivity: the subject of law uses the subjective right belonging to him in his own interest and at his own discretion (paragraph 2 of Article 2 of the Civil Code).

The law generally defines the boundaries (limits) of the exercise of civil rights, which are designated in the form of legally protected rights and interests of other subjects of law, as well as the obligation to prevent damage to the environment (paragraph 3 of Article 8 of the Civil Code). In addition, the implementation of subjective civil rights must meet the requirements of good faith, reasonableness and justice, the moral principles of society, the rules of business ethics (paragraph 4 of Article 8 of the Civil Code of the Republic of Kazakhstan). In this case, we can talk about the presence of moral and ethical categories in the mechanism of civil law regulation, the practical application of which causes certain difficulties[7].

The legal definition of ownership has a dual character. On the one hand, paragraph 2 of Article 188 of the Civil Code of the Republic of Kazakhstan defines the content of subjective property rights through a triad of powers: possession, use and disposal of one's property. On the other hand, paragraph 3 of the same article gives the owner the opportunity to perform any actions with respect to his property, but limits are set for the use by the owner of the right belonging to him in the form of legally protected rights and interests of other subjects of law (paragraph 4 of Article 188 of the Civil Code of the RK).

Ownership rights. The legislator defines the right of ownership as a legally secured opportunity to exercise the actual possession of property (paragraph 2 of Article 188 of the Civil Code of the Republic of Kazakhstan).

Possession, which is part of the content of the subjective right of ownership, should be understood as the ability of the owner to possess the thing independently or through other persons. In the first case, the owner exercises ownership himself, the thing is in his household, enters the sphere of his direct domination. Here there is a coincidence of the meanings of such concepts as the actual owner of the thing and its owner, as well as the actual and legal beginning of ownership of the owner. In the second case, we can talk about the indirect ownership of the owner of his thing. These are situations when the owner transfers the thing into possession of another person on another property right. This ownership of the owner is derivative. In this case, the actual owner of the thing and its owner - these two signs of ownership do not coincide in one person and characterize two different subjects of law.

The right to use the thing. Part 3, paragraph 2 of Article 188 of the Civil Code of the Republic of Kazakhstan defines the right of use as a legally secured opportunity to extract its useful natural properties from the property, as well as to receive benefits from it. The benefit can be in the form of income, increment, fruits, offspring and in other forms.

When characterizing the right to use a thing, the fruits, incomes and other works of the thing that are formed in the process of realizing this right of the owner are of great importance.

The right to use means the active actions of the owner, who not only possesses the thing, but also seeks to satisfy his needs and interests with its help. Things, participating in civil turnover, can generate other things or any material goods. In civil law, such a process is commonly called increment.

In Article 123 of the Civil Code, increment is referred to as receipts received as a result of the economic use of things. This article establishes a rule according to which fruits, products and incomes - as increments of things - belong to a person who uses the property legally. This person is not designated in any way not only in the law, but also in the scientific and practical commentary to this article. "The right of use is presented as a legally secured opportunity to extract the useful properties of property through exploitation, personal or industrial consumption, as well as obtaining benefits from economic or other use of it"[8].

However, the right to increments, receipts from the thing must belong to the owner, unless otherwise provided by law or contract. For the owner exercises the right belonging to him at his discretion and in his own interest.

The Supreme Court, considering the case on the return of leased property and the recovery of rent arrears, pointed out that in accordance with paragraph 2 of Article 188 of the Civil Code, the right to own, use and dispose of property belongs to the owner. The right of ownership of the leased property, which is the subject of the claim, is registered with the registering authority for LLP "A.", therefore, LLP "B." did not have the right to own, use and dispose of the disputed property, and their presentation of claims for the return of the leased property is not justified.

It is possible to distinguish two fundamental circumstances that are important for the characterization of the legal content of the owner's right of use:

1) as a general rule, the results of using a thing belong to its owner. This should be assumed in all cases, unless otherwise established by law or contract;

2) it is possible to talk about the owner's use of his thing even when he has transferred the thing into actual or legal possession to another person. In this situation, we can talk about the extraction of industrial (civil) fruits by the owner from the thing belonging to him.

The owner's use of the thing belonging to him must be carried out in accordance with the current legislation and may depend on the legal regime that applies to this thing.

For example, for certain things, mandatory targeted use of them. Therefore, the realization by the owner of the right of use belonging to him depends and is determined by the specified circumstances. Of course, the goal of any diligent owner of a thing is to increase the value of the latter, the emergence of new things on its basis, obtaining new material goods, and so on. But it is impossible to completely exclude situations when the use of a thing will lead to the loss of the value of the thing, in full or in part. In this situation, we can talk about consumption. The latter may concern the thing as a whole, if its quality is natural, as well as its fruits and other increments. It is in this capacity that the right of the owner should be considered, when the content of the latter is revealed through the term consumption as a process of realization of this right of the owner [9]. In addition, in the process of using a thing, the owner may lose his subjective right to it altogether. These may be cases when the owner irrationally involved the thing in civil circulation and failed. The loss of a thing can occur due to accidental death and other similar situations. It is important that in all these cases, the absence of the will of the owner for the loss, loss of his thing, or its value is necessary. Otherwise, there will be either the exercise of the authority of the order, or other circumstances, for example, a malicious agreement of the parties, one of which is the owner of the thing, and similar cases.

Thus, the right of use is the opportunity of the owner, based on the law, to act in civil turnover on his own behalf and in his own interest. The owner, in exercising this right, is limited only by direct prohibitions of the law, which in some cases allow the intended use of the thing. The exercise of the right of use does not depend on the actual possession of the thing and is one of the ways to implement the subjective right of ownership in general. All increments of a thing that exist as a result of the use of a thing belong to its owner, unless otherwise provided by law or contract.

The authority of the order. Part 3, paragraph 2 of Article 188 of the Civil Code of the Republic of Kazakhstan defines the authority of the order as a legally secured opportunity for the owner to determine the legal fate of the property belonging to him.

The exercise by the owner of the authority of the order may consist in the following:

1) the owner has the right to alienate the thing. Alienation will take place if there are two conditions associated with the transfer of a) a thing - that is, an object of possession to another person, and b) ownership of it. For alienation, it is necessary that the person (the subject of law) in both the first and the second case be the same. In this case, the person not only transfers the thing, as it may be in the exercise of other rights of the owner, but at the same time the transfer of ownership of it is carried out. There is no emergence of another property right derived from the right of ownership, but we are talking about its loss from the relevant alienator. In this case, there really is a determination of the legal fate of a thing, since its ownership is changing.

2) the establishment of rights in property in favor of other persons. In this case, we are talking about the establishment of various encumbrances, restrictions on property rights at the will of the owner. Such restrictions on property rights are of a private-legal nature.

For example, the owner of a land plot establishes a restriction of his subjective right to it in the form of an easement, that is, the right of limited use of a thing. This easement, like any other proprietary right, subsequently follows the thing, is its encumbrance and is important not only for the owner who established it, but also for all subsequent owners of the encumbered land plot. With the help of an easement, there is a "narrowing of the dominance" of the owner and subsequently, when exercising the powers belonging to him, he cannot ignore this. Here there is an act of the owner, which determines the legal fate of the thing in the future. The right of ownership is not completely lost, but there is a restriction of the power of the owner as an authorized person. In other words, there is a change in the content of the subjective ownership of the thing and it is already different from what it was before. That is why we can talk about determining the further legal fate of the thing, that is, about the existence of an actual situation indicating the exercise by the owner of the authority to dispose of the thing.

3) destruction by the owner of the thing belonging to him. Destruction can be understood as cases when a thing does not exist, it no longer exists in nature. In this case, the owner deliberately goes to the termination of his right. This is what the owner's determination of the legal fate of a thing consists in.

The characteristic of the power of the owner's disposal in modern civilistic literature is revealed by pointing to specific actions (legal acts) that indicate the owner's disposal of the thing.

Lecture 11. Termination of property rights and other proprietary rights. Protection of property rights.

The concept of property rights restrictions. The right of ownership, being one of the types of subjective civil rights, is subject to the general rules on their implementation (Article 8 of the Civil Code, Chapter 12 of this textbook). However, being the most complete right to a thing, the right of ownership needs a more precise definition of its limits. On the one hand, they are designed to exclude the possible arbitrariness of the owner, and on the other, to specify the content of the relevant subjective right.

Limitations of the subjective right of ownership are understood as limits (boundaries) in the exercise of the subjective right of ownership of an individually defined thing, based on prohibitions established in positive law or the rights of other persons to the same thing.

The following are the most significant qualities of property rights restrictions.

Firstly, restrictions are established by law.

Secondly, in the restrictions of the property right, its elasticity is manifested. The elasticity of property rights should be understood as the ability to be freed from restrictions, being restored to its original form.

Thirdly, the essence of the limitations of the property right is the limits in its implementation. In other words, the right of ownership, being the broadest subjective property right in its content, cannot be implemented in any way, since the inherent property of each subjective right is its boundaries. This provision is valid even when it is quite difficult to identify such boundaries (limits) of law in practice.

Fourth, restrictions may depend on the legal regime of the thing, prohibitions of the positive right to certain ways of exercising property rights, as well as on the rights of other persons to the same thing. At the same time, most of the restrictions apply to immovable things.

It is important to note that the restrictive legal regulation of property relations may depend on the types of legal regulation: permissive or permissive.

The Constitution and the Civil Code of the Republic of Kazakhstan are based on a generally permissive method of regulating property relations, the essence of which can be expressed in a well-known formula: everything that is not prohibited is allowed. In this case, the laws must contain an exhaustive list of prohibitions for the owner. The absence of such implies the exercise of ownership at the discretion of the owner.

In turn, the permissive method of legal regulation of property relations was previously used in the Soviet Union. The owner was allowed only what was provided by law. In addition, the law formulated a number of prohibitions on the amount of property (things) belonging to the owner, possible ways of using it. For example, it was forbidden to use property to obtain non-labor income (Article 99 of the Civil Code of the Kazakh SSR).

In the theory of civil law, the concept and types of restrictions on property rights are the subject of scientific discussion.

A.V. Venediktov, considering the legislative definitions of property rights, testifies that the authors of most European codifications attached more importance to the "negative side" of the legal definition of property, indicating that the exclusive right of the owner extends as far as any restriction is not established[14]. In another place of his work, directly speaking about the unlimited right of ownership, the author notes that since the content of the owner's power "is not temporarily limited by the rights of third parties, it gives as complete power over the object as such power can generally be allowed in relation to it by the existing legal order"[15].

M.K. Suleimenov, arguing with the proposed construction of the right of ownership as an exclusive "domination over a thing"[16], notes its unacceptability due to the fact that the right of ownership, like any right, is limited by legislation in the interests of society. For example, the law may impose certain restrictions on the use and disposal of a thing of cultural and historical value. Secondly, the right of ownership is not a person's attitude to a thing (from which it follows - and not domination over it), but a public attitude about this thing. Further, the author emphasizes that the exercise of powers in relation to objects of property rights should take place in accordance with the procedure established by law, and not arbitrarily. This does not mean that possession, use and disposal must follow the requirements of the law. The legislator outlines only the boundaries, the limits of the exercise of property rights. Such restrictions may be environmental safety of the environment and society, public interest - the use of land for laying a railway line, telephone cable, etc. In addition, M.K. Suleimenov points out a specific property of the property right - its limitation. This property of the property right, in his opinion, manifests itself in: a) the obligation of the owner not to do anything from what he could do according to the content of the property right; b) the obligation to tolerate anything that does not meet the interests of the owner, but is necessary for the interests of society, public needs. On this basis, M.K. Suleimenov notes the inconsistency of the signs of property rights: its "exclusivity" and "limitation". The author points to the limitlessness of the right of ownership, since it extends to the thing in all directions, in all respects. The legislator establishes restrictions for practical reasons. The exercise by the owner of his powers should not violate the rights and legally protected interests of other persons and the state (paragraph 4 of Article 188 of the Civil Code). M.K. Suleimenov notes that restrictions on ownership are never assumed, they are established by virtue of a contract or law [17].

L.A. Morozova notes the possibility of restricting the right of private property by the state under the Constitutions of many countries. The author formulated some principles of such restriction: 1) the principle of the permissibility of restricting private property rights solely in the interests of the "common good" and "public interest"; 2) the principle of fair compensation by the state to the owner of property losses; 3) the principle of legality in establishing restrictions - on the basis and within the law; 4) the principle of equality of all owners in the face of such restrictions, i.e. they should be established not in relation to individual owners, but by means of general legal regulation; 5) the principle of judicial protection of the right of private property (judicial challenge of the seizure of property by the state from private property)[18]. Further, L.A. Morozova notes that the current Russian Constitution establishes only two conditions for restricting private or other property or seizing it: 1) state interests: 2) compensation for the owner of property losses. The author believes that this is clearly not enough to protect against the arbitrariness of state power. There are no guarantees such as the permissibility of alienation and restriction of property rights on the basis of the law and within its limits; equality of all owners in the face of such restrictions, the possibility of judicial challenge to the seizure of property. Without such guarantees, L.A. Morozova believes, it is impossible to achieve a balance of private and public interests, since the latter cannot be unlimited[19].

A.A. Manukyan speaks about the need to distinguish between restrictions on property rights and restrictions on individual actions of the owner. Restrictions on property rights can be established only by federal law (Part 3 of Article 55 of the Constitution of the Russian Federation and Part 2 of Article 1 of the Civil Code of the Russian Federation), while restrictions on individual actions of the owner can be established both by law and other legal acts[20].

V.P. Kamyshansky points out, "... restrictions do not exclude certain powers from the content of the property right, but narrow the possibilities of the owner in the exercise of subjective right. Restrictions are a characteristic inherent in the right of ownership. They cannot go beyond it. With the removal of restrictions on property rights, the freedom of the owner is restored to its original extent without additional regulatory acts"[21]. Further , the author identifies three groups of restrictions: 1) restrictions on property rights caused by easement, 2) norms covering pre-revolutionary Russian neighborhood law, 3) restrictions representing an institution created to ensure public interests[22]. In conclusion of his research on the concept and types of restrictions on property rights, the author notes that "... they are divided into two large groups: restrictions on the right of use and restrictions on the right of disposal. Both groups of restrictions are subject to the same goals provided for by the Civil Code of the Russian Federation (paragraph 2 of art. 1), and are of an increasingly increasing social nature"[23].

Y.G. Basin and M.K. Suleimenov believe that the concept of "encumbrance" is within the framework of the concept of "limits of the exercise of civil rights", since the limits of exercise are also a certain limitation of rights, a framework beyond which one cannot go in the exercise of the right. Encumbrance is an additional restriction of rights imposed on the owner or other holder of a real right in accordance with a contract or more specific legislation. The authors call the presence of certain rights of third parties on the property the main type of encumbrance. At the same time, all (except the right of ownership) property rights are encumbrances of the right of ownership.

Certain types of property rights restrictions in the civil legislation of the Republic of Kazakhstan. The types of property rights restrictions may depend on the following circumstances. Firstly, from the legal regime of the thing. In this case, we can talk about the influence of the object of law on the subjective law itself, its content and limits. Secondly, from the presence or absence of other subjective civil rights to the same thing, and first of all real. In other words, the interests of private individuals act as restrictions on property rights. Such restrictions on property rights can be combined into one group under the general name "restrictions on property rights for the benefit of individuals". Thirdly, from the public (public) interest in the thing and, accordingly, the ownership of it. Such restrictions on property rights are no longer established for the benefit of individuals, but for everyone and have a public (public) nature - public-legal restrictions on property rights.

The effect of a thing on the limitation of ownership. Initially, it is necessary to indicate the restrictive characteristics of any classification of things contained in the Civil Code of the Republic of Kazakhstan.

Clearly restrictive is the classification of things according to their civil turnover (Article 116 of the Civil Code), which is understood as the free disposal of objects of civil law by all subjects who have rights to this property. On this basis , three categories of property rights are distinguished: 1) things withdrawn from civil circulation; 2) things restricted in civil circulation; 3) things in civil circulation.

Restrictions on the right of ownership in the first case occur by establishing a list of certain property that belongs to the public (public) domain, or act as an object of state ownership. Such objects can be referred to as public property.

Public property consists of a certain list of things withdrawn from civil circulation. Such things cannot, by virtue of their special qualities, be freely transferred to other persons. If things of this category, for one reason or another, become the property of subjects of civil turnover, then the ownership right must be terminated according to the rules of Article 252 of the Civil Code. In relation to these things, a public legal regime is established, which provides an opportunity for all persons to use the useful qualities of these things to satisfy their interests and needs to some extent, more or less. For example, visit nature reserves and other protected natural areas, have access to the coast of rivers, seas and lakes, hunt animals, engage in fishing, etc. The use of such objects permitted by law may lead to the emergence of ownership rights to certain things (for example, picking berries and plants, catching fish, hunting animals) (Article 241 of the Civil Code, Articles 88-103 of the Forest Code, Article 24 of the Law of the Republic of Kazakhstan "On the Protection, Reproduction and Use of Wildlife", etc.).

Things restricted in civil circulation may belong only to certain subjects of law and the degree of freedom to dispose of them is limited. In relation to these things, only certain types of transactions are allowed, the procedure for their conclusion, modification or termination is regulated, the circle of their possible participants is quite clearly defined. Restrictive regulation of property rights in this case is carried out:

a) by establishing a list of things restricted in civil circulation;

b) a combination of imperative and dispositive methods of legal regulation. Such duality is very indicative of this category of things.

The reasons why things are withdrawn from civil circulation, or are limited in it, are due to public, public interests, as a rule, in the field of security.

For things in civil circulation, it is characteristic that their economic use is free, as far as it is not limited by civil law prohibitions. In this case, the actions of the owner are determined by a general framework, actions within which are not subject to any restrictions and are free. Regarding such things, civil legislation should contain specific prohibitions restricting the freedom of the owner (a prohibitive version of restrictions on property rights).

The division of things into movable and immovable is essential for the restrictions of property rights. To the greatest extent, immovable things are subject to restrictions, as well as movable things that are subject to a similar legal regime. According to paragraph 2 of Article 117 of the Civil Code of the Republic of Kazakhstan, air and sea vessels subject to state registration, inland navigation vessels, river-sea navigation vessels, space objects and similar things are also equated to immovable things.

The need for such restrictions on the exercise of the right of ownership of immovable and movable things equated to them is determined by several circumstances: 1) a certain social interest, which, of course, affects the possession of this category of objects of property right, 2) the property value of these objects of property right, 3) the potential possibility of a collision of various property interests of owners, holders of other property rights to real estate in the process of exercising their rights.

Public interest in real estate, according to a very common opinion, lies in the fact that real estate, and above all land plots, form the basis of economic, household and almost any other human activity. On the other hand, land and, accordingly, privately owned land plots form the basis of the concept of the territory of a State falling under the jurisdiction of a certain State. The state, being by its nature an expression of the interests of society, strives to form the rational use of land and other real estate. In this regard, restrictive regulation allows the state to effectively control the activities of private law entities.

In addition, as a rule, any real estate borders on other real estate, and in this case it becomes important to distinguish, firstly, one real estate from another and, secondly, the rights of their owners. In this case, we are talking about the so-called neighboring property and the formation of a special block of legal norms designed to regulate relations of this kind (neighborhood law). This section is practically not represented in the civil legislation of Kazakhstan, with the exception of certain provisions [27], and it is possible to predict, especially with the approval of land ownership, the need for significant improvement of legislation in this area.

In the field of real estate, there are restrictive provisions for foreign citizens. For example, a foreign citizen may acquire ownership of a dwelling by inheritance. However, in order to preserve this right, a person must obtain the status of permanent resident in the territory of the Republic of Kazakhstan (Part 2 of Article 9 of the Law of the Republic of Kazakhstan On the Legal Status of Foreigners). Otherwise, he will need to alienate the dwelling within one year from the date of registration of ownership in the legal cadastre (paragraph 1 of Article 252 of the Civil Code).

A similar rule is provided for a citizen who is the owner of a land plot provided for farming or farming, personal subsidiary farming, afforestation, gardening and dacha construction, in case of his renunciation of citizenship of Kazakhstan. Its ownership right is subject to either alienation or re-registration into another right to the corresponding land plot (Part 2, paragraph 2 of Article 23, Article 66 of the LC).

Other classifications of things in the Civil Code of Kazakhstan are of less fundamental importance for the problem of restricting property rights.

For example, the division of things into divisible and indivisible is important in the sense that if a particular thing is considered indivisible by legislative acts, then the owner, when exercising his right, cannot ignore this circumstance. Thus, this regulatory provision of the Code restricts the owner, establishing a ban on performing any actions that may entail the division of an indivisible thing (Article 120 of the Civil Code of the Republic of Kazakhstan).

Restrictions on the ownership rights of other persons with respect to the thing. There may be real and binding rights to a thing. The owner, when exercising his right, must take into account the existence of other rights to the same thing (clause 4 of Article 188 of the Civil Code). By virtue of a direct instruction of the law, the owner is obliged to allow limited use of his property by other persons (clause 6 of Article 188 of the Civil Code).

According to paragraph 1 of Article 195 of the Civil Code, property rights, along with the right of ownership, include: 1) the right of land use; 2) the right of economic management; 3) the right of operational management; 4) the right of limited targeted use of someone else's real estate (easement); 5) other property rights provided for by the Civil Code or other legislative acts.

In turn, a thing can be the subject of a number of contracts. For example, contracts for the transfer of property (things) into ownership, contracts and hiring, some obligations to provide services (property insurance contracts, cargo transportation, storage, etc.).

The presence or absence of any rights to a thing has a certain effect on the right of ownership.

Thus, the holder of the right of land use not only receives a land plot in his actual possession, but also has the opportunity to carry out certain types of activities on it (for example, agricultural production), appropriating the fruits obtained on the right of ownership. In this case, the owner cannot own or use the land plot. At the same time, the land user has legal means of protecting his right not only in relation to all third parties, but also to the owner himself (Article 265 of the Civil Code of the Republic of Kazakhstan).

§ 2. Subjects of property rights. Private and public property

General provisions on subjects of property rights. Participants in civil legal relations are citizens, legal entities, the state, as well as administrative-territorial units (Article 1 of the Civil Code), which may possess property by right of ownership. Potentially, only state-owned enterprises and institutions (paragraph 3 of Article 36, Articles 102 and 105 of the Civil Code) that own someone else's property only on the rights of economic management and operational management cannot be owners. This statement applies both to the property received by these entities from the founder (owner) and to the property acquired as a result of their functioning (subp. 2) item 1, subp. 1) paragraph 2 of Article 19 of the Law on State Property).

For all other persons, the Civil Code establishes one right of ownership, with a single content (Article 188 of the Civil Code). The law does not establish any types of ownership rights. Instead, the legislator distinguishes between types of property, using two criteria for this:

a) from the number of authorized persons. On this basis, 1) individual and 2) common property are distinguished.

The relationship of common ownership simultaneously presupposes the presence of two conditions: a) one thing (property) as an object of law, b) several subjects of the same law[33].

Individual property always belongs to a specific person. It does not matter who this person is: a person, a legal entity or a state. It is always singular.

Citizen K. appealed to the court . with a claim for the recovery of a passenger car transferred to them as a property contribution to the authorized capital of the LLP.

The court, rejecting the claim, indicated that the car belongs to a legal entity by right of ownership. There are no relations of common ownership in this case. Ownership of K. the right to the car was terminated as a result of its acquisition by another person (paragraph 1 of Article 58 of the Civil Code).

b) from the subject of possession. In this case, private and state property are distinguished (Articles 191 and 192 of the Civil Code). Private property belongs to citizens and non-governmental legal entities, and state property belongs to the Republic of Kazakhstan and the administrative-territorial unit (republican and communal property).

When contrasting property on this basis, the subjects of property rights have an important, but not the only significance. The differences between private and state property are also manifested in the list of objects that make up them, a feature of the rules on the implementation, acquisition, termination and protection of the relevant property. This allows us to talk about the existence in the civil legislation of Kazakhstan of certain features of the legal regime of property owned by individuals and the state.

The legal regime of private property. The legislator calls private property the property of citizens and non-state legal entities and their associations (paragraph 1 of Article 191 of the Civil Code).

The following features are characteristic of private property.

Firstly, the subjects of private property are citizens and non-state legal entities.

The law names citizens of the Republic of Kazakhstan, foreigners and stateless persons as citizens. All these subjects are united by the concept of individuals. As a general rule, these persons are subject to the national legal regime. In other words, they have the same rights and bear the same obligations as citizens of the Republic of Kazakhstan (Article 12 of the Civil Code, Article 3 of the Law of the Republic of Kazakhstan on the Legal Status of Foreigners).

It should be noted two restrictive provisions of the legislation of Kazakhstan, which relate to stateless persons, foreign citizens and legal entities in property relations:

1) private ownership of these persons may not include land plots intended for commercial agricultural production and afforestation, as well as located in the border zone and border strip of the Republic of Kazakhstan (paragraph 4 of Article 23 of the CC RK);

2) The Law of the Republic of Kazakhstan On the Legal Status of Foreigners establishes differences in the legal status of foreigners a) permanently residing and b) temporarily staying in the Republic of Kazakhstan. For the first category, there are no obstacles to owning a home by right of ownership. The latter cannot have the right of ownership of the dwelling.

It can be assumed that these legislative decisions are based not on legal motives, but on political ones, which determine such restrictions on legal personality in property relations.

Non-state legal entities will be legal entities that are not a state enterprise and a state institution (subp. 14) Article 1, Chapter 11 of the Law on State Property). This is the vast majority of legal entities, both commercial and non-commercial, created in various organizational and legal forms provided for by the Civil Code and other legislative acts.

In practice and in everyday life, this provision is not always taken into account. State and private property are not defined by legal categories, but often put an economic (or political economic) meaning into this relationship.

Lecture 12. The concept of obligation. Grounds and subjects of obligations.

Lecture 13. Fulfillment of obligations and their provision.

Lecture 14. Liability for breach of obligations and their termination.

According to the legislation of the Republic of Kazakhstan, the fulfillment of an obligation can be secured by a forfeit, a pledge, retention of the debtor’s property, a surety, a guarantee, a deposit, a guarantee contribution, and in other ways provided for by legislation or an agreement.

**1. Pledge**

A pledge is a method of securing the fulfillment of an obligation, by virtue of which the creditor (pledgee) has the right, in the event of the debtor’s failure to fulfill the obligation secured by the pledge, to receive satisfaction from the value of the pledged property primarily to other creditors of the person.

*Types of pledge*

1. Mortgage is a type of pledge in which the pledged property remains in the possession and use of the pledger or a third party. The subject of a mortgage can be enterprises, structures, buildings, structures, apartments in an apartment building, vehicles, space objects, goods in circulation, etc. The Law of the Republic of Kazakhstan dated December 23, 1995 No. 2723 “On mortgage of real estate” regulates relations arising from the use of property mortgages as a way of securing obligations.
2. Mortgage – a type of pledge in which the pledged property is transferred by the mortgagor into the possession of the mortgagee;
3. Pledge of rights, when the subject of pledge is property rights that can be alienated, in particular lease rights to enterprises, structures, buildings, structures, the right to a share in the property of a business partnership, debt claims, copyright, inventive and other property rights. At the same time, an urgent right can be pledged only until the expiration of its validity period.
4. Pledge of a bank deposit, when the subject of pledge is a bank deposit.
5. Pledge of securities when securities are the subject of pledge.
6. Pledge of things in a pawnshop.

The subject of a pledge can be any property, including things and property rights (claims), with the exception of things withdrawn from circulation, claims inextricably linked with the personality of the creditor, in particular, claims for alimony, compensation for harm caused to life or health, and other rights whose assignment to another person is prohibited by legislative acts.

The right of pledge can be extended by an agreement to property that will become the property or business of the pledger in the future. Since the pledger can only be the owner of the property or, with his consent, a person who has the right of economic management to the property (see Article 305 of the Civil Code), therefore, the pledge agreement, the parties to which extend the right of pledge to the property that will become the property of the pledger in the future, must contain the terms of the preliminary contract. Despite the fact that if a party that has entered into a preliminary agreement evades the conclusion of the agreement provided for by it, it is obliged to compensate the other party for the losses caused by this, it is necessary to have an additional way to secure the obligation before the property becomes the property of the pledgee.

The subject of a pledge may be a land plot belonging to the pledger on the basis of the right of private ownership or the right of land use. Pledgers can be individuals and non-state legal entities that have land plots on the basis of the right of private ownership or on the right of temporary compensated long-term land use. A pledge of a building (structure, structure) located on a divisible land plot means that at the same time a part of the divisible land plot or the right to land use is pledged to a part of the divisible land plot that is occupied by a building (structure, structure) and is necessary for its maintenance. A pledge of a building (structure) located on an indivisible land plot means that the entire land plot or the land use right for the entire land plot is simultaneously pledged. The pledge of a land plot or land use rights is subject to state registration in the manner established for registration of rights to real estate.

Property constituting common property can be pledged only with the consent of all owners. The right to a share in common property can be an independent subject of pledge.

The contract may impose on the pledgee the obligation to insure the pledged property transferred into his possession.

Insurance of the pledged property, which remains in the use of the pledger, shall be borne by the latter.

*Pledge registration*

Real estate pledge is subject to state registration by the body that registers rights to real estate.

Registration is subject to a change in the subject of pledge, as well as other changes in the cases established by the legislative acts of the Republic of Kazakhstan.

Changes to the collateral that are not subject to mandatory registration can be registered at the request of the participants.

*The procedure for levying execution on the subject of pledge*

The satisfaction of the claim of the pledgee from the value of the pledged property is made, unless otherwise established by this Code and other legislative acts or an agreement, in a judicial proceeding.

In the cases stipulated by the pledge agreement, legislative acts, the pledgee has the right to independently sell the pledged property out of court through an auction (auction).

**2. Guarantee and surety**

By virtue of the guarantee, the guarantor is obliged to the creditor of another person (the debtor) to be responsible for the fulfillment of the obligation of this person, in whole or in part, in solidarity with the debtor, with the exception of cases provided for by legislative acts.

By virtue of the surety, the surety undertakes to the creditor of another person (the debtor) to be responsible for the fulfillment of the obligation of this person in whole or in part subsidiary.

Guarantee or surety agreements must be made in writing. Failure to comply with the written form entails the nullity of the guarantee or surety agreement.

*Liability of the guarantor and surety*

The guarantor is liable to the creditor to the same extent as the debtor, including the payment of forfeit, remuneration (interest), legal costs for collecting the debt and other losses of the creditor caused by non-performance or improper performance of the obligation by the debtor, unless otherwise provided by the guarantee agreement.

The surety is liable to the creditor within the amount specified in the surety, unless otherwise provided by the terms of the surety. Prior to filing claims against the surety bearing subsidiary liability, the creditor must take reasonable measures to satisfy this claim by the debtor, in particular, by offsetting the counterclaim and enforcing the debtor’s property in accordance with the established procedure.

**3. Deposit**

A deposit is an amount of money issued by one of the contracting parties against payments due from it under the contract to the other party and to secure the conclusion and execution of the contract or the performance of another obligation.

An agreement on a deposit, regardless of the amount of the deposit, must be concluded in writing. Failure to comply with the written form entails the nullity of the deposit agreement.

If the obligation is terminated before the start of its performance by agreement of the parties or due to the impossibility of performance, which occurred without their fault, the deposit must be returned.

If the party who gave the deposit is responsible for the failure to fulfill the obligation, it remains with the other party, and if the party that received the deposit is responsible, it is obliged to pay the other party double the amount of the deposit. In addition, the party responsible for the failure to fulfill the obligation is obliged to compensate the other party for losses, taking into account the amount of the deposit, since the contract does not provide otherwise.

**4. Hold**

The creditor who holds the thing that is subject to transfer to the debtor or to a person specified by the debtor has the right, if the debtor fails to fulfill the obligation to pay for this thing or to reimburse the creditor for related costs and other losses, until the corresponding obligation is fulfilled. …

Withholding of the thing may also secure claims, although not related to payment for the thing or reimbursement of costs for it and other losses, but arising from an obligation, the parties to which act as entrepreneurs.

**5. Guarantee fee**

The security deposit is the amount of money transferred by the payer of the security deposit to the recipient of the security deposit in order to secure the fulfillment of the obligation to conclude an agreement during the auction or fulfillment of another obligation.

The obligation to pay the guarantee fee arises in cases provided for by legislative acts. The obligation to pay the guarantee fee also arises by agreement of the parties.

If the obligation secured by the security deposit is not fulfilled, through the fault of the payer, the security deposit remains with the other party.

In case of failure to fulfill the obligation secured by the guarantee deposit, through the fault of the recipient of the guarantee deposit, or the termination of this obligation by agreement of the parties or due to the impossibility of performance, which occurred without their fault, the guarantee deposit is refundable.

**6. Penalty**

A forfeit (fine, penalty interest) is a sum of money determined by legislation or an agreement, which the debtor is obliged to pay to the creditor in case of non-fulfillment or improper fulfillment of an obligation, in particular, in case of delay in fulfillment. In civil contractual obligations, forfeit is the most commonly used method of enforcing obligations. At the same time, a claim for payment of a forfeit is issued more often than for compensation for losses. Upon the claim for payment of the penalty, the creditor is not obliged to prove the damage caused to him.

An agreement on a forfeit must be made in writing, regardless of the form of the underlying obligation. Failure to comply with the written form entails the nullity of the agreement on the penalty.

The creditor has the right to demand payment of a forfeit determined by legislation (legal penalty), regardless of whether the obligation to pay it is stipulated by the agreement of the parties.

If the forfeit (fine, penalty) payable is excessively large in comparison with the creditor’s losses, the court, at the request of the debtor, has the right to reduce the forfeit (fine, penalty), taking into account the degree of fulfillment of the obligation by the debtor and the interests of the debtor and creditor deserving attention. Since the Law has not specified to what extent this can be done, the court, when assessing what the penalty is “excessively large,” has no right to violate the interests of creditors, taking into account that the state duty has been paid, taking into account the penalty.

At the same time, according to the draft Law of the Republic of Kazakhstan “On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on the Improvement of Civil Legislation and Improvement of the Conditions for Entrepreneurial Activity Based on the Implementation of the Principles and Provisions of English and European Law”, the issue of judicial authority for reducing the amount of the contractual forfeit in commercial contracts, limiting these cases to only an explicit abuse of law. If the aforementioned law is adopted, such abuse will take place, for example, if a disproportionate penalty is “imposed” under conditions of unequal negotiating opportunities on the weaker party, and in all other cases – only in a situation where the amount of the penalty is so abnormally high that there are signs of a sham deal … It also provides that if the violation of the contract was intentional, the court is not entitled to reduce the penalty.

**7. Insurance of liability under the contract as a way to ensure the fulfillment of obligations**

In modern legal literature, the problem of the security nature of the insurance contract has not received a clear coverage and unambiguous solution; at least in the civil code, article 292, which lists the methods of securing the fulfillment of obligations, does not include an insurance contract.

At the same time, the objects of insurance, according to subparagraph 4) of paragraph 1 of Article 807, can be any property interests of citizens and legal entities, including those related to the obligation to compensate for harm caused to other persons, including as a result of violation of the contract (obligations).

Clause 5 of Article 809 of the Civil Code provides that in case of civil liability insurance, the risk of liability is insured for obligations arising from harm to life, health or property of third parties, as well as liability for obligations arising from contracts.

The introduction of cases of insurance of contractual liability is primarily due to the increased protection of the rights of the creditor as a weak side in the relevant legal relationship.

The contract of liability insurance as a result of a breach of the contract exists together with the main contract, the risk of liability for non-performance of which is insured. In the main contract, the debtor has the status of the policyholder in the insurance contract, the creditor has the status of the beneficiary, the insurer will act as the debtor under the insurance contract in relation to the creditor of the main contract. An insured event is the occurrence of civil liability for actions (inaction) that entail non-performance or improper performance of an obligation arising from the conclusion of a contract.

Thus, the guaranteeing function of the contract of liability insurance for breach of contract is fully implemented. The creditor satisfies his property interests as a person in whose favor the civil liability should be incurred. The debtor is considered to have fulfilled the obligation to compensate for losses, pay a penalty or implement other measures of responsibility related to the violation of the contract. Also, such an insurance contract guarantees the fulfillment of the obligation, first of all, to the debtor himself.

Lecture 15. Contract. General concepts.

What is a contract?

A contract is a legally binding agreement between parties to create mutual obligations that businesses and individuals use to protect their interests. Contracts outline the specific terms of engagement for a transaction. They can also dictate legal consequences if a party tries to break the agreement.

Contracts can be written or verbal. Most businesses tend to use written contracts because they are easier to reference later. Written agreements are also less ambiguous, so they are more straightforward to enforce.

Contract law, meanwhile, is the subset of laws specifically regulating how contracts are created and enforced. These laws cover things like:

* How contracts are formed
* What a document must contain to be considered a contract
* Who is eligible to enter a contract
* What consequences exist for violating contracts
* What a contract can require of signatories

Essentially, contract law explains when contracts exist, when they’re enforceable, and what the wronged party can do if the other signatory ignores the terms of the agreement.

Characteristics of a contract

There are three essential components of any contract: the offer, the acceptance, and the consideration. If all three of these characteristics aren’t present, a document is not considered a contract.

1. Offer

The offer is a clear, specific, and voluntary opportunity provided by one party to another party. The offering party, or offeror, will present particular terms to the offeree. These terms should include:

* A clear declaration of intent to enter a contract.
* The offeree’s information indicating who is eligible to accept this contract.
* What the offeror intends to provide in the contract, such as goods or services.
* The terms of the agreement, such as what the offeree will provide in return and how the exchange will take place.

2. Acceptance

Next, contacts must include a clear acceptance of the offer. Acceptance can take three forms:

* Words: Most contracts are accepted through verbal or written statements that the offeree agrees to enter the contract and abide by its terms.
* Actions: Contracts can also be accepted by taking action(s). For instance, suppose a contract states that taking an action like clicking a link or using a website constitutes acceptance. After reading the contract, people who perform those actions agree to the terms by default.
* Performance: Even if a contract doesn’t designate a specific action as constituting acceptance, it’s possible to accept a contract without words. If a restaurant receives a food shipment from a supplier and uses it to make food, the restaurant has entered an implied contract. By using the goods in its normal course of business, the restaurant and supplier can assume a contract was created, and the restaurant owes the supplier payment for that food.

3. Consideration

The consideration of a contract is the value that is being provided. This value can be:

* Financial, such as a loan
* Property, such as goods delivered
* Services, such as maintenance or protection from harm

A contract does not need to include a specific type of consideration—there’s no need for money to be involved at all. As long as the document dictates that one party will provide something of an agreed-upon value to another party, consideration exists, and the contractual form is complete.

What makes contracts valid?

There’s more to contracts than the basic structure, though. It’s perfectly possible to create a contract that meets the definition but is not legally binding. A contract is valid if it both follows the appropriate structure and meets the following requirements:

Doesn’t violate public policy

Legal agreements are only valid if they conform to the law. A contract that violates public policy or requires one party to do something illegal is automatically non-binding. For instance, if a contract requires one party to ignore local tax laws, that contract violates public policy and won’t hold up in court.

An unenforceable clause can render part or all of an agreement invalid. Some agreements have provisions stating that any terms that violate local law will be ignored, but the rest of the contract will remain standing. Still, if the violation is a fundamental part of the agreement, then the entire contract will usually be considered unenforceable.

All parties are able to consent

A fundamental part of the contracting process is confirming that all parties involved are eligible to consent. This is known as having the “capacity” to enter the contract. Certain groups are never assumed to have the capacity, including minors or adults with mental limitations.

Other parties may only have the capacity in certain circumstances. A company can enter a contract if it can prove that it’s a genuine legal entity and the person who will sign the contract is the company’s authorized signatory. Without these elements, an agreement may be considered void or voidable.

All parties understand and agree on the terms

A contract is considered binding when all parties give genuine consent to the terms. It’s only possible to provide genuine consent if the parties involved understand what the agreement means, including what they will receive and need to do.

Mistakes or misrepresentations in the contract prevent parties from giving genuine consent. Whether an error in the contract is an accidental mistake or a purposeful misrepresentation, it still means that the misled party can sue to have the contract nullified. The contract’s nullification would occur because the misled party did not understand the agreement’s actual terms and therefore could not consent to them.

When contracts require legal enforcement

Once an enforceable contract is signed, all signatories are bound to the terms of the agreement. If one party fails to live up to the terms without a valid legal defense, they have breached the contract.

There are two main ways to be in breach of contract:

1. Failure to perform as promised: If a signatory has agreed to deliver payment by a specific date and doesn’t, they have failed to fulfill their contractual obligations. This is a material breach or a failure to accomplish a core element of the contract.
2. Acting to prevent the other party from performing as promised: Suppose the offeree has agreed to deliver goods to a specific location, but the offeror refuses to let the delivery vehicles onto the property. In that case, the offeror prevents the offeree from fulfilling their obligations and is in breach of contract.

When someone breaches a contract, the other party can sue them for compensatory damages. The wronged party has usually lost something of value because of the other signatory’s actions. Contract law allows them to tally up the value of what they’ve lost and sue to have the breaching party compensate them for those losses.

Contract law is critical to modern business

Contract law is a fundamental element of maintaining business relationships and protecting your organization. Understanding what makes a contract valid and the consequences of violating an agreement can help keep your company on track and prevent legal conflict. Well-written contracts support better partnerships and mitigate risk both inside and outside your organization.

Implementing contract law can be complicated, especially if your organization manages many agreements. A functional contract lifecycle management solution can help you stay on top of different elements of contract law and ensure that you don’t accidentally breach agreements.