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Legal regulation of non-defined contractual structures in civil law of The Republic of Kazakhstan

Abstract. A free formation of a non-defined contract is one of the basic elements of the freedom of contracting in the civil law. The appreciation of the merits of a non-defined contract and the clarification of its features has a great theoretical and practical significance. The judicial practice proves that incorrect determining of a non-defined contract, i.e. when a court determines a non-defined contract, as a contract of another kind, will subsequently bring to recognition of this contract as invalid, which entails certain liability, change of tax regime and imposing of penalty for failure or non-prompt payment of taxes.

This article is concerned with the legal nature of non-defined contracts and its interrelationship with mixed contracts and the proposed solution to the dispute as to the priority in applying of legal regulation of contracts, defined and non-defined by the laws. The author analysed several kinds of non-defined contracts, commonly used in legal practice. The author also provides the concept of a non-defined contract.

Key words: freedom of contracting, law of obligations, shareholders' agreement, non-defined contract, mixed contract.

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Nedefinēto līgumisko konstrukciju tiesiskais regulējums Kazahstanas Republikas civiltiesībās

Anotācija. Nedefinēta (likumā nenosaukta) līguma brīvība ir attiecināma pie civiltiesību principa par līgumu brīvību pamatelementiem. Nedefinētā līguma būtības pareizai izpratnei, tā pazīmju noskaidrošanai, kas ļauj to pareizi kvalificēt un nošķirt no līdzīgām blakus konstrukcijām, ir liela teorētiska un praktiska nozīme. Tiesu prakse rāda, ka nepareizas nedefinētā līguma kvalifikācijas dēļ, tiesa var nepareizi kvalificēt noslēgto līgumu kā cita veida līgumu, kas savukārt var izraisīt līguma spēka neesamību, citu civiltiesiskās atbildības pasākumu kompleksa piemērošanu, izmaiņas nodokļu aprēķināšanas kārtībā un attiecīgo sankciju par nodokļu nemaksāšanu (vai nepilnīgu nomaksu) piemērošanu.

Šajā rakstā tiek apskatīta nedefinēta līguma tiesisks raksturs, tā saistība ar jaukto līgumu. Tiek analizēti daži nedefinēto līgumu veidi, kuri tiek plaši izmantoti juridiskajā praksē. Autors piedāvā konceptuālu definīciju nedefinētam līgumam un ar to saistītajām blakus kategorijām. Tiek piedāvāts risinājums kolīzijai par tiesību normu piemērošanas secību līgumiem, kuri satur gan normatīvajos aktos paredzētos, gan neparedzētos līguma elementus.

Atslēgas vārdi: līguma brīvības princips, saistību tiesības, akcionāru vienošanās, nedefinēts līgums, jaukts līgums.

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Правовое регулирование непоименованных договорных конструкций в гражданском праве Республики Казахстан

Аннотация. Свобода моделирования непоименованного договора относится к основополагающему элементу принципа свободы договора в гражданском праве. Правильное понимание существа непоименованного договора, уяснение его признаков, позволяющих провести его верную квалификацию, отграничив от смежных конструкций, имеет большую теоретическую и практическую значимость. Судебная практика показывает, что при неправильной квалификации непоименованного договора, суд, впоследствии, квалифицирует заключенный договор, как договор другого вида, что, в свою очередь, может повлечь за собой недействительность данного договора, применение комплекса иных мер гражданско-правовой ответственности, изменение порядка исчисления налогов, применение мер ответственности за неуплату (неполную уплату) налогов.

В данной статье рассмотрена правовая природа непоименованного договора, его соотношение со смешанным договором. Проанализированы некоторые виды непоименованных договоров, которые получили широкое применение в юридической практике. Автор дает понятие непоименованного договора и смежных с ним категорий. Предлагается решение коллизии о последовательности применения норм к договорам с элементами предусмотренных и не предусмотренных законодательством договоров.

Ключевые слова: принцип свободы договора, обязательственное право, акционерные соглашения, непоименованный договор, смешанный договор.

Introduction

A special interest among the existing contractual structures is directed to non-defined contracts. These contractual structures are an integral part of the freedom of entering into a contract. These contractual structures are used in different ways depending on practical convenience, significant time and cost saving and the parties' efforts. The main advantage of a non-defined contract is the possibility of the party to a civil transaction to execute an agreement. They are not restricted to any defined models by laws. Non-defined contractual structures fully meet the trends of the modern market economy [1, p.24].

The Civil Code of the Republic of Kazakhstan (hereinafter – CC RK) [2] provides that citizens and legal entities are free to enter into contracts. The parties may enter into any legally defined and non-defined contract. This is provided in Art. 7 of the CC RK: "Civil rights and obligations are created by laws and also arise from actions of citizens and legal entities which, although not specified in the laws, give rise to civil rights and obligations by virtue of general fundamental principles and the spirit of civil legislation".

The contracts that are not stipulated by the laws from the time of Roman law are commonly referred to as non-defined contracts - (contractus innominate) which are quite numerous as they are broadly used in practice, and dozens of them are profoundly researched.

By way of example: E.V. Butler concludes that independent construction contracts, the agreement on carrying out of advertising activities, sponsorship contracts, information services contracts (consulting, marketing), agreements on creation and support of web-servers in the Internet, contracts for search and recruiting of employees (recruiting agreements or contracts with "A Head- Hunter") and co-investment agreements fall under the cate-

gory "non-defined contract". In his dissertation on non-standard contracts, Butler analysed the legal nature of different types of contracts, and studied the practice of their application [3]. His opinion is shared by many researchers, who studied the theory and practice of distribution contracts in civil law [4]. The same conclusion was made by some scholars, who researched the legal nature of a shareholders' agreement [5], and as an idea it is legally represented in the civil codes of the countries belonging to the continental law system.

It is worthwhile to note that some time ago a surrogacy contract was considered to be a non-defined contract. The legal nature of this contractual structure was also examined in separate research [6], with the adoption in the Code on Marriage (Matrimony) and Family and inclusion in Ch. 9 "Surrogate motherhood and application of assisted reproductive methods and technologies". In Article 1 of the Code on Marriage (Matrimony) and Family, the surrogate motherhood is carrying and giving birth to a child (children), including the cases of castling births under the contract between surrogate mother and spouses with the remuneration payment [7].

The essence of some types of non-defined contracts

In this section, we would like to consider several types of non-defined contracts, which are commonly applicable to contractual practices and to compare them with defined contracts mentioned in the CC RK.

A classic example of a non-defined contract without the other elements of defined contracts is a contract on the use of a single design element of the building for advertising purposes.

It is not a lease contract and the issue of property rights does not arise, and its object is to provide one subject with a possibility to advertise in a building or accommodation for a certain fee [3, c. 19].

According to Para. 1 Art. 540 and Para 1 Art. 541 CC RK, under the contract of property lease the landlord shall be obliged to provide the tenant for payment a property for temporary possession and use. The property lease can be transferred to other companies and other property owners of land, buildings, constructions, equipment, vehicles and other things that do not lose their natural properties in the course of their use (inconsumable things).

The Russian legal practice concerning this issue evolved on a shaky ground. Thus the Information Letter of the Supreme Arbitration Court of the Russian Federation dated on January 11, 2002 N 66 mentions "the review of dispute resolution practice of lease" and concludes that the lease of a thing is not a lease contract, but a non-defined contract as described in the Civil Code". Also the Court considered it to be another type of a contract, which subject was to provide opportunities for a fee and to advertise, e.g., on the roof of a building. Such contract is not contrary to the Civil Code, relations between the parties are governed by analogy with the provisions of the law on lease, general provisions of obligations and contracts, as well as other terms of the contract [8].

Accordingly, unlike the lease contract, this contract does not limit the parties' rights to conclude an agreement with a condition permitting to use the property not entirely but only some parts of it.

Shareholders' agreements are the effective means of legal regulation of corporate relations and belong to non-defined contracts in this area.

Shareholders' agreements can regulate a wide range of issues, depending on the size and nature of a joint-stock company (JSC), ownership structure, number and preferences of JSC. In particular:

1) to coordinate the company's management, including the adoption of the Resolution at the General Meeting of Shareholders, appointing the members of the Board of Directors and Executive Board;
2) to limit the rights of shareholders regarding the disposal of their shares, e.g. to issue a ban on the sale of shares during a certain period or the sale to a certain group of persons;
3) to settle disputes and conflicts arising between shareholders;
4) to finance the company, to allocate profit, and to make economic and strategic decisions [9, p.7].

In spite of a long standing history of joint-stock companies, currently, shareholders' agreements are not regulated by law in most jurisdictions. This largely depends on the specifics of national law, as well as the peculiarities of the development of the securities market.

Generally, the shareholders' agreements are usually designed to solve the questions that are not fully or completely regulated by the law or internal documents of a company. In particular cases, the shareholders' agreements are designed to reveal defects in the Statute and internal documents of the company.

From our point of view, outsourcing contracts are also non-defined contracts.

Some experts point out that the subject of an outsourcing contract has a complex content and as a rule, includes the provision a customer with an outsourcer who will perform certain functions or certain activities (will participate in the production process, production management or will perform other acts related to the production and (or) sale of goods to the customer) [10, p.28].

The feature of an outsourcing contract is that the actions of the obligated person are individualized by clarifying the characteristics of the activity (activities), personnel of outsourcer, his professional qualities (special education, profile of activities, work experience, etc.) [10, p.29].

In our opinion, the outsourcing contract concerns the transfer to a third party certain relationships or obligations. Conventionally, they may be named industrial relations, which are transferred to third parties. It is interesting to note that they may be not corporate relations.

As M.K. Suleymenov rightly points out, it is impossible to identify corporate and industrial relations [11, p. 28].

As is regulated by the civil law, the outsourcing contract is nearest to the services contract. This is stipulated in Para. 1, Art. 683 CC RK, according to which the contractor being instructed by the customer shall provide services (perform certain acts or carry out certain activities), and the customer agrees to pay for these services [2]. In this case, the paid services contract to the outsourcing contract will be a generic agreement.

Consequently, the outsourcing contract is an agreement under which one party (customer) for a fee transmits its specific functions or activities (financial, industrial, informational, service, and managerial, etc.) or business processes (marketing, organizational, industrial and technological, financial, economic, etc.) to the second party (outsourcer), which has the necessary qualified staff.

Comparison and legal nature of mixed and non-defined contracts

In order to emphasize the freedom of contracting, the legislator enshrined in legislations that parties may enter into a contract, which contains the elements of various contracts defined and stipulated by the laws (mixed agreement).

In some researchers' opinion, a mixed contract allows bringing the contractual modes, particular circumstances and needs of the parties no adverted effect to the civil regulation, e.g. the agreement on sale and purchase of a conditioner and installation will be a mixed agreement. General provisions on sale and purchase, as well as special norms of retail sale are stipulated in § 1, 2 Sec. 25 of a special part of the CC RK, and § 1, 2 Sec. 32, in place cited, alongside with the general provisions of a construction contract and special norms of consumer work as applied to the terms and conditions of any such agreement.

However, in actual practice, one can encounter with various elements provided and not provided for by the law on the types of above mentioned contracts, and it raises a question as to what their legal nature is and which norms are applicable.

In our opinion, in order to clearly understand the current problem, it is necessary to agree on a proper scientific definition of a non-defined and mixed contract and ascertain which provisions of civil law will be applicable to these contractual forms.

According to the literal sense of Article 381, CC RK, a mixed contract is a contract, which includes elements of various contracts provided by CC RK or other legal acts of the Republic of Kazakhstan. Accordingly, combining a standard contract/agreement with a non-standard into one contract does not allow considering such an agreement to be a mixed one. However, the

most preferred opinion in the legal literature is that such a contract is a mixed one. For example, D.V. Ogorodov and M.Yu. Chelisheva have classified a mixed contract in the following way: 1) a mixed contract, which combines elements of defined contracts only known in the objective law; 2) mixed contract, which combines elements of defined contracts in the objective law, and elements of non-defined contracts [12].

In the opinion of E.V. Tatarskaya's it does not make any sense in theory and practice to exclude from mixed contracts such types of contracts, which combine elements of legally defined and non-defined contracts. She pointed out that in order to consider a contract to be a mixed one it should contain elements of a contract, known in the law, and a contract that contains only the elements of non-determined, i.e. non-defined in the law [13].

The concept of a mixed contract should adequately reflect its practical content and we also support the above classification of mixed contracts. In this regard, the, analysis allows us to compose a slightly different version of Article 381, CC RK and set out the norms in the following way: "Parties may award a contract, which contains elements of various contracts as provided and not provided by the legislation (mixed agreement)".

As follows, the contracts with the elements defined and non-defined contracts will be considered non-defined mixed contracts. In our view, this may provide a general system for practical understanding of the system of defined and non-defined contracts.

Based on the proposed wording of Article 381, CC RK and varying the degree of regulation of different elements of civil contracts by the laws of the Republic of Kazakhstan, one can construct the following classification:

1) defined contracts (e.g., a swap contract);
2) mixed contracts with the elements provided by the law (e.g., a rental contract with the right to repurchase);
3) non-defined mixed contracts with the elements provided and not provided by the law (e.g., a rental contract of IT equipment, followed by the creation and support of web-server in the Internet);
4) non-defined contracts (e.g. shareholders' agreement).

Meanwhile, it should be noted that there are the following differences between the parties on the issue of legal regulation of some elements of q contract or a complete contract:

a) a defined contract is an agreement with the content of only one known defined species (type) of the contract under objective law.
b) a mixed contract with defined elements is an agreement, which contains at least two well-known defined species (types) of the contract under objective law.
c) a mixed contract with defined and non-defined elements is an agreement, which contains at least one known defined species (type) of the contract and non-defined element (s) under objective law.
d) a non-defined contract will be an agreement that is out of phase with known species (types) of the contract under objective law and found to conform to law by operation of freedom of contracting and general terms of contract (obligation) law.

The defined element of a contract is essentially a defined contract under objective law with reciprocal rights and obligations inherent to given type of the contract.

Reciprocal rights and obligations inherent to given species (type) of the contract are rights and obligations qualifying to the elements of obligations stipulated by special norms of law and regulated only by the given type of a contract.

A non-defined element of the contract is appendant to reciprocal rights and obligations vested in the parties of a contract and alien to the given type of a contract, as well as of any defined type of a contract under the law.

The application of civil law regulations to the non-defined contracts

The development of the concept of a defined contract in legislation is slower than the needs of business. This is inevitable, because every legislative act in civil-law relations, takes time to become accepted and established in general legal practice. Economic life and business operations are always wider than legal forms established in the law. Thereby, even modern civil law has contracts, which are not

legislatively regulated (non-defined contracts) [14, p.45].

Investigating general provisions of the contractual law, some researches assert that the recognition of the disputed legal relations in non-defined contracts means misregulating not only the specification but also the type of a contract [15, p. 409]. Thus, the following legal provisions should be applied to non-defined contracts depending on the hierarchy of applicable laws:

1) the analogy of statute;
2) general norms of obligations (contractual) law;
3) general norms of civil law including the analogy of law.

Some researches suggested the following application order:

1) general norms of obligations (contractual) law;
2) subtitled norms of a defined contract;
3) general norms of civil law including the analogy of law [16, p.246; 17].

In view of the hierarchical approach to the system of contractual rules and sequential transfer from an ad hoc provisions to general ones (indicator of a system) and sub-division of contractual structures into sub-types (type, subtype, species, subspecies), the author supports the opinion of the authors, who use this system.

In this case the collision of priority in application of legal provisions to contracts with elements defined and non-defined is settled. The legal provisions of relevant types of contracts should be applied to the elements of a defined contract, and elements of non-defined contracts should be regulated by provisions, regulating analogical or similar contracts.

Conclusion

In summary, we would like to recall the statement of a well-known legal scholar K.P. Pobedonossev, who pointed out more than a hundred years ago that the number and types of property rights are strictly defined; and all of them fall under the category of property, possession, use and disposal. The creation of further types and characteristics is impossible or extremely complicated, and the centuries will pass and then a completely new type of proprietary relation, which was hidden in social life, will arise and be defined. In contrast, in the field of contractual rights there is a constant movement, and the types of contractual rights change, increase and multiply according to the need of civil life [18].

In this regard and with due regard to current market economies, sustainable development of entrepreneurial relations and process of globalization, penetration of foreign law elements from other law families, in particular creation and arising of new, not known before, contractual forms and types, alien for a local legal system, the above discussed issues are topical and urgent.

In this way, a proper legal regulation of non-defined contractual structures plays an important role in improving contractual discipline, improves entrepreneurial development and investment relations, attracts foreign capital and in general strengthens the economy of a state.

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