

Some Basic Aspects Of Organizational Contracts In Modern Contract Law

Ekaterina Poduzova

The Chair of Civil Law At The Moscow State University Of Law

By The Name Of O. E. Kutafin (MSLA)

Organizational contracts are often used in Russian business environment, because these legal constructions are directed to organize privity of contract (contract relations). So organizational contract legally binds parties to settle other contracts. If you want to plan your business and contract links, it's reasonable to use organizational contracts. This aim of organizational contract makes it popular in business sphere.

Organization of privity of contract is actual in non-business sphere, in this sphere organizational contract is useful too.

I. Different concerns about definitions and types of organizational contracts remain debatable in modern Russian contract theory. Concern relatively qualification of some contracts as organizational type solves non-uniquely in modern civil law of Russian Federation.

II. If we consider one of the first definition of organizational contract in contract law made by Doctor Of Juridical Science, *Professor N. V. Vaseva*, we can see that this type of contract is defined as mutual agreement of more than one party for organization, regulating and creation of necessary conditions to enter these parties in other contractual relations¹.

Also we can see that organizational contract is a special type of contracts for organization specific legal ties between its parties². This definition is made by the founder of the concept of organizational legal relations Doctor Of Juridical Science, *Professor O. A. Krasavchikov*.

¹ Vaseva N. V. Pecuniary And Organizational Contracts // Civil Contract And It's Functions: Interuniversity Collected Works / publishing editor Krasavchikov O. A. – Sverdlovsk, 1980. P. 69. Vaseva N. V. Imushchestvennyye i organizacionnyye dogovory // Grazhdansko-pravovoy dogovor i ego funkcii: Mezhhuzovskiy sbornik nauchnyh trudov / otv. red. Krasavchikov O. A. – Sverdlovsk, 1980. S. 69.

² Soviet Civil Law: Text-book. V I. / under the editorship of Krasavchikov O. A. – M., 1985. P. 445. Sovetskoe grazhdanskoe pravo: Uchebnik. T I. / pod red. Krasavchikova O. A. – M., 1985. S. 445.

It's important to note that commitment to organize legal ties between parties is brought to notice in some other scientific definitions of organizational contract³.

Besides, quite a few law scholars consider that organizational contract is focused on management activity between parties of this special contract⁴.

You can see another opinion in some scientific works. For example, organizational contract is binding its parties to perform joint actions for accrue of special civil obligation between parties of the contact or between somebody else⁵.

Organizational contract is also named as framework contract⁶, framework contract is qualified as the type of organizational contract in another conception⁷.

III. As I think, organizational contract legally binds parties to settle a basic contract (or several basic contracts), and some conditions of basic contract are contained in organizational contract. Also parties are legally bound to perform some acts promoting to settle one or several basic contracts⁸.

Organizational contract has two main features, they are a special goal of organizational contract and its special subject-matter. These features we should take into account in case, when we need to qualify a contract as organizational contract.

³ Puginskiy B. I. Commercial Law Of Russia. – M., 2005. P. 277. Puginskiy B. I. Kommercheskoe pravo Rossii. – M., 2005. S. 277. Civil Law. Text-book / under the editorship of Suhanov E. A. – M., 2006. P. 182. Grazhdanskoe pravo. Uchebnik. T. III / pod red. Suhanova E. A. – M., 2006. S. 182; Danilova L. Ya. Organizational Civil Contracts // Russian Laws: experience, analyze, practice. P. 13-14. Danilova L.Ya. Organizacionnye grazhdansko-pravovye dogovory // Zakony Rossii: opyt, analiz, praktika. 2009. № 1. S. 13–14.

⁴ Haritonova Yu. S. // Legal Regulation Of Social-Economical Relations During Period Of Reform / under the editorship of Fatkudinova Z. M., Ahmetianovoy Z. A. – Kazan', 2004. P. 217. Haritonova Yu. S. // Pravovoe regulirovanie social'no-ekonomicheskikh otnosheniy v usloviyah reform / pod nauch. red. Fatkudinova Z. M., Ahmetianovoy Z. A. – Kazan', 2004. S. 217.

⁵ Morozov S. Yu. The System Of Transport Organizational Contracts: dissertation PhD. – M., 2011. P. 132. Morozov S.Yu. Sistema transportnyh organizacionnyh dogovorov: dissertaciya... dokt. jurid. nauk. – M., 2011. S. 132.

⁶ Efimova L. G. Framework Contracts. – M., 2006. P. 3. Efimova L. G. Ramochnye (organizacionnye) dogovory. – M., 2006. S. 3.

⁷ Morozov S. Yu. Op. cit. P. 242, 250. Poduzova E. B. Organizational Contracts In Civil Law. – M.: Prospekt, 2014. P. 24. Poduzova E. B. Organizacionnye dogovory v grazhdanskom prave. – M.: Prospekt, 2014. S. 24.

⁸ Ref.: Poduzova E. B. Op. cit.

The goal of organizational contract is organization of privity of contract, that means commission of actions to settle another contract or to organize negotiations. These actions are making an offer, sending an acceptance, inviting an interpreter for negotiations.

So under organizational contract parties settle another contract or several contracts, which is named a basic contract or basic contracts. As supplementary to parties, performing organizational contract, commit actions to organize negotiations, for example, they collect information, rent meeting area, invite an interpreter for negotiations.

The special goal of organizational contract means contract negotiation according to the basic contract. So some conditions of basic contract or contracts must be negotiated and included in organizational contract.

If the goal of certain organizational contract is organization of negotiations, this organizational contract must contain certain actions for organization of negotiations.

All persons at Russian civil law can settle organizational contracts, so natural individuals, business entities can use this construction.

The form of organizational contract is written form, because only written form can guarantee parties' interests to settle basic contract or several basic contracts or to organize negotiations.

The organizational contract creates special legal relations, which are named organizational legal relations.

Organizational legal relations coordinates other relations which are named organizable relations. This definition is made by the founder of the concept of organizational legal relations Doctor Of Juridical Science, *Professor O. A. Krasavchikov*⁹.

For example, a preliminary agreement creates relations to settle and perform a basic contract through offer and acceptance. As can be seen from the above relations to settle and perform a basic contract through offer and acceptance are qualified as organizable relations. Organizational legal relations are non-property. While as organizable legal relations are, generally, pecuniary.

The essence of organizational relations is organizational activity, for example, activity to settle a basic contract, activity to organize negotiations. This essence doesn't mean activity for property holdings. Property

⁹ Ref.: Krasavchikov O. A. Civil organizational relations // Soviet state and law. 1966. № 10. Anthology of Ural civil science. – M., 2003. P. 159. Krasavchikov O. A. Grazhdanskie organizacionno-pravovye otnosheniya // Sovetskoe gosudarstvo i pravo. 1966. № 10. Antologiya ural'skoj civilistiki. – M., 2003. S. 159.

holdings are the goal of organizable relations, as an example, relations of performing a basic contract.

It's important to mention that organizational activity of all parties of organizational relations has only one goal, this goal is to organize other relations. By comparison, activity of parties of pecuniary relations, such as buy and sell relations, has different goal. So the aim of activity of buyer is to get certain goods and the aim of activity of bargainor is to get certain sum of money for these goods.

IV. It's important to mention that organizational contract has some types. In my opinion preliminary contract, framework contract, agreement to organize negotiation¹⁰ are the types of organizational contract.

According to article 429 of Russian Civil Code preliminary contract legally binds its parties to settle a new contract (basic contract) in a certain period of time.

If you want to hold to secure your opportunity to settle a certain contract with certain conditions you can use preliminary contract. The priorities of this contract are to hold to secure to settle a contract with a certain condition about price.

It's very important to note that preliminary contract must contain all essential conditions of basic contract.

Besides, essential condition of any contract is its subject. Also, for example, condition about price of a contract is an essential condition of sale of real estate contract, condition about certain period of time is an essential condition of contract of construction work.

It's interesting to note that construction of preliminary contract has longtime developmental history.

In articles 1679–1690 of Consolidated Civil Statutes, which was carried in 1832, we can find a special construction, that is a contract to sell in the future. This contract had some features of modern preliminary contract.

Under the contract to sell in the future one party was obliged to sell to another party movable or immovable property on the certain date. The price clause was included in the contract to sell in the future. The form of contract to sell in the future was written.

¹⁰ Ref.: Maleina M. N. Agreement To Organize Negotiations // Russian Laws: experience, analyze, practice. P. 22–24. Maleina M. N. Soglashenie o procedure peregovorov (peregovornyh procedurah) // Zakony Rossii: opyt, analiz, praktika. 2011. № 5. S. 22–24.

So under the contract to sell in the future one party was obliged to settle with another party a basic contract of movable or immovable property sale on the certain date.

It's understood that another party couldn't protect its interests in the court if the basic contract of movable or immovable property sale wasn't settled.

The Russian Civil Code, which was carried in 1922 didn't contain general rules about preliminary contracts. But It contained special legal constructions named preliminary contract of sale building (see articles 182-a, 182-b, 182-v) and preliminary loan for consumption agreement (see articles 218, 219).

Under the preliminary contract of sale building both parties were obliged to settle a basic contract of sale building in 6 months period. If one party abandoned obligation to settle the basic contract, another party could lodge a lawsuit for settling the basic contract of sale building. It's interesting to note that a party of preliminary loan for consumption agreement didn't hold a right to lodge a lawsuit for settling the basic contract.

The Russian Civil Code, which was carried in 1964 didn't contain any rules about preliminary contracts.

The general construction of preliminary contract was included in article 60 Fundamentals Of Legislation Of USSR And Republics, which was carried in 1991. According to these rules preliminary contract contained only subject of the basic contract, which generated some difficulties as a practical matter.

Besides, modern construction of preliminary contract eliminates some practical difficulties.

On my behalf, just construction, which contains all essential conditions of basic contract can achieve a special purpose of preliminary and organizational contracts – a purpose to organize of privity of contract – contract relations. So it is not necessary to make modifications in article 429 of Russian Civil Code.

Another type of organizational contract is a framework contract. It's important to note that framework contract is highly sought in Russian business sphere, because this construction is convenient in that situations, when parties need to plan their business by making contracts.

Framework contract is usable in two situations. The first situation is when parties want to organize of privity of contract, but they can not agree all essential conditions of basic contracts. The second situation is when parties want to organize of privity of more than one contract. We

should take note of that preliminary contract can not be used in both situations.

As far as I'm concerned, framework contract legally binds its parties to make one or several basic contracts. Framework contract contains condition about certain period of time, during which parties must settle one or more contracts, framework contract also contains condition about subject of basic contract (contracts) and some general conditions of basic contracts.

Framework contract has some distinctive features, which distinguish this contract from other organizational contracts.

Under the framework contract parties can make one or more contracts. It's interesting to note that framework contract is more useful providing to settle several basic contracts but not one basic contract.

Framework contract contains condition about subject of basic contract (contracts). It's not necessary to include in framework contract other essential conditions of basic contract (contracts). Besides, parties can not get enough information to establish all essential conditions of basic contract (contracts) in the framework contract.

Framework contract also contains general conditions of basic contracts, which will be settled under framework contract. These general conditions can be essential or unessential in the context of a certain type of basic contract or basic contracts. The aim of general conditions is to make settling of basic contracts more comfortable and swift.

All persons at Russian civil law can settle framework contracts. So natural individuals, business entities can use this construction.

The form of framework contract is written form, because only written form can guarantee parties' interests to settle basic contract or to organize negotiations.

There are some types of framework contract in Russian civil legislation, there are a contract about organization transportation of cargo (article 798 of Russian Civil Code), general (insurance) policy (article 941 of Russian Civil Code) and special general framework agreement of establishing a credit line (ref. Credit Regulations – 31 of August 1998 - № 54-P). It stands to mention that these types of framework contract are used in transport sphere, in insurance sphere and in credit sphere.

Another type of organizational contract is an agreement to organize negotiation. It's important to note that agreement to organize negotiation is highly sought in Russian business sphere.

Agreement to organize negotiation sets parties' obligations to organize negotiation to make a contract, for example, obligations to collect information, to rent meeting area, to invite an interpreter for negotiation¹¹.

Organizational contacts in Russian civil legislation are often compared with preliminary contacts in English and American Contract Law. It's important to note that preliminary contacts in English and American Contract Law have some distinctive features from organizational contacts in Russian civil legislation. These distinctive features concern essence and types of these contracts.

According to English and American doctrine of Contract Law parties that wish to avoid some of uncertainties of the regime of negotiation without moving immediately to the regime of ultimate agreement often make preliminary agreements. Preliminary agreements can be classified into various types such as agreements with open terms, agreements to negotiate, agreements to engage in transaction, stop-gap agreements¹².

A preliminary agreement with open terms sets out most of the terms of the deal, and parties agree to be bound by these terms. But they undertake to continue negotiating on other matters to reach agreement on some terms that left open but that will be contained in the ultimate agreement¹³. This agreement is also named as agreement to agree¹⁴.

An agreement to engage in a transaction involves a commitment by one or both parties to do something such a buy, sell, or lend in the future. Like an ultimate agreement, it leaves none of the terms of the deal to be negotiated. But it is preliminary in that anticipates an ultimate agreement to be made later¹⁵. Like preliminary agreement in article 429 of Civil Code of Russian Federation.

There are some other types of preliminary agreements, that are distinguished in English and American doctrine of Contract Law. They are an agreement to agree, an agreement to negotiate, an agreement to nego-

¹¹ Ref.: Maleina M. N. P. 22, 24.

¹² Farnsworth A. Precontractual liability and preliminary agreements: fair dealing and failed negotiations // *Columbia Law Review*. 1987. Vol. 87. № 2. P. 249–251.

¹³ Farnsworth A. Op. cit. P. 250; Schwartz A., Scott. R. E. Precontractual liability and preliminary agreements // *Harvard Law Review*. 2007. № 1. P. 663–665; O'Sullivan J. & Hilliard J. *The Law of Contract*. – New York, 2008. P. 72, 73; Creed J. M. Integrating preliminary agreements into the interference torts // *Columbia Law Review*. 2010. Vol. 110: 1253. P. 1270, 1271; Blackshaw I. *S. Sports marketing agreements: legal, fiscal and practical aspects*. The Hague, 2011. P. 29, 30.

¹⁴ O'Sullivan J. & Hilliard J. Op. cit. P. 72.

¹⁵ Farnsworth A. Op. cit. P. 251.

tiate in good faith, an agreement to use reasonable endeavours to reach agreement, an agreement to use best endeavours to reach agreement¹⁶.

Preliminary agreements are often not qualified as contracts that can be enforced in the court in English and American doctrine of Contract law, because some of them can not pass the consideration test. The consideration test means that an agreement without consideration can not be enforced in the court.

You can see in English and American doctrine of Contract law that English law has developed a doctrine of consideration to play the principal role in selecting those agreements to be given the “badge of enforceability”.

According to the classic definition, consideration is based upon the idea of “reciprocity”; that a promisee should not be able to enforce a promise unless the promisor has obtained (or been promised) something in return. It’s important to mention that past consideration is not good consideration. The courts will not enforce a promise unless something of value is given in return of the promise. Consideration is not equal to the motive of the transaction. Consideration must be sufficient but it need not be adequate. The courts do not ask whether adequate value has been given in return for the promise or whether the agreement is harsh or one-sided. Consideration must correspond to the interests of another party. According to the modern approach the function of consideration doctrine should be to reflect the intention of the parties of the contract¹⁷.

According to article 423 of Russian Civil Code all contracts are divided into two groups, they are commutative contracts and contracts of benevolence. Commutative contracts are based on the principle of consideration, contracts of benevolence are not based on this principle.

Organizational contract is included in the group of benevolence contracts, because organization of privity of contract doesn’t mean existence of consideration. But according to Russian civil legislation the absence of consideration doesn’t make a contract not be enforced in the court. Organizational contract is royalty-free but it can be enforced in the court.

If one party breaks organizational contract, another party can lodge a lawsuit to enforce performance of this contract, in other words, to enforce making one or several basic contracts. If an affected party doesn’t

¹⁶ O’Sullivan J. & Hilliard J. Op. cit. P. 74–79.

¹⁷ Ref.: O’Sullivan J. & Hilliard J. *The Law of Contract*. – New York, 2008. P. 94–98; McKendrick Ewan. *Contract law*. – New York: PALGRAVE MACMILLAN, 2013. P. 68–71.

want to make one or several basic contracts any more, this party can lodge a lawsuit about compensation of losses or about award a penalty.

V. In modern Russian contract theory there are two groups of framework contracts, they are framework contracts in a literal sense and framework contracts with open terms.

According to Russian civil theory a framework contract with open terms sets out most of the terms of the deal, and parties agree to be bound by these terms. And they undertake to continue negotiating on other matters to reach agreement on some terms that left open but that will be contained in the ultimate agreement. But at the same time according to the framework contract with open terms parties are legally bound to settle other contracts.

To my mind, contract with open terms is pecuniary and organizational at the same time. So the contract with open terms can not be qualified as organizational and framework contract.

It is also important to note that an agreement with open terms in English and American doctrine of Contract Law is not identic to the framework contract in Russian civil law and science.

VI. The question about legal nature of option contract¹⁸ is still controversial. According to the option contract one party is obliged to settle a contract with another party or with the 3-rd party and another party has a right to demand performance of this obligation.

This contract is used in financial sector. But it is planned that option contract will be used in other spheres too. For example, "Projected Law About Alteration Of Civil Code of Russian Federation Of the 7-th Of February, 2012" includes rules about appliance of option contract in other non-financial spheres.

As far as I'm concerned option contract contains organizing and pecuniary elements. It doesn't have several main features of organizational contract. So option contract can not be qualified as organizational contract.

¹⁸ Ref.: Statutes of types of derivatives. The 4-th of March 2010. Polozhenie o vidah proizvodnyh finansovyh instrumentov. Utverzhdeno prikazom Federal'noj sluzhby po finansovym ryнкam ot 04 marta 2010 g. № 10-13/pz-n.

VII. Consequently, in spite of different approaches to definition of organizational contract, the concept that this contract is focused on management activity between its parties remains undebatable.

But on my behalf, this main feature needs to be verified: organizational contract is directed to organize contract links. Other concept of organizational contract leads us to division of united construction of organizational contract. This division will lead to several practical difficulties.

These circumstances should be taken into account during creation of legal rules regulating organizational relations in Russian civil law.