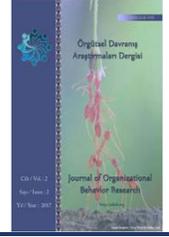




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FEATURES OF THE RUSSIAN FEDERATIONS' CIVIL LAW ON THE PROCUREMENT AND IMPROVEMENT OF THEIR IMPLEMENTATION

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ABSTRACT

In this article, ways to improve the civil law of the Russian Federation on procurement were examined. Due to the globalization and the active participation of Russian entities in foreign economic activity, an increase in the abuse of international tendering of procurement, as well as the frequent use of the foreign trade contracts of Russian legal entities with foreign counterparts of English law and the analyses of problems and proposals of their solution in the present date scientific and practical interest are revealed. So, with the increasing dynamism of business turnover (including the transition of the procurement of trading in an electronic format), the consolidation of the tender in one large-scale needs legal entities registered in different countries, but belongs to the same transnational corporation.

Keywords: *Civil Law, Legal Regulation, International Bidding, Russian Federation*

INTRODUCTION

The aim of the research is the development of effective civil-legal regulation of international trading in the Russian Federation on the basis of comparative legal analysis of regulatory procurement relationship in the UK, USA, Canada, and the integration of best practice case-regulation in the Russian Federation legislation and the improvement of private international law rules on the procurement regulation relations with the participation of TNCs to achieve the objectives of the study and solve the following tasks to identify the current gaps in the regulation of international competitive bidding in private international law and make recommendations for improving the regulatory international tender on the basis of the case law of England, USA and Canada.

LITERATURE REVIEW

Complex study of legal issues in international tenders is available. Part of the problem of determining relations with transnational corporations are represented in the economics. Public auction is usually studied in such branches of science, as an administrative and criminal law (issues of corruption), while bids without state participation considered in civil law regarding pre-contractual disputes (E.S.Barannikova, 2017).

Theoretical and methodological issues of the legal nature of trading rose in the works of Russian classics MI Braginsky, SN brother, VV Vitryansky, GF Shershenevich, as well as in the works of Russian and foreign scientists as L. In. Andreev, VV Bezbakh, OA Belyaeva VS Em, KV Kichik, R. Leenders, R. Lewis, A. Nesbaum, Vladimir Ponomarev, Alexander Romanovsky, S. Shuner, E. Farnsworth, and many others. In this case, the legal problems of international trades usually studied, in economic science for international purchases with participation of the state. Scientific studies of civil regulation of trading, as a rule, covers the issues of regulation of public procurement (M.V.Shmeleva 2013). Doctoral research on the issues of trading in general, were also performed Barannikova ES (E.S.Barannikova, 2017)V. Balakin (V.V.Balakin, 2004) SA BORDUNOVA (S.A.Bordunova 2011), AN Kucher (A.N.Kucher, 2002), YS Tursunova (Yu.S.Tursunova 2001) and others. Also, Satushieva, et al., (2018) studied legal basis of the christian issue of Russian policy in cacasus in the secnd half of 21st and early 20th centuries. In another study, Satushieva, et al., (2018) examined the specifics of the legal policy in the sphere of national and religious relations during the period of domination of the Russian Empire in Caucasus, and the results of their study showed that, they were regulated by Russian secular law.

Today's organizations need to pay attention to entrepreneurship due to growing environmental changes (Keshvarz, et al., 2017). However, the essence of international competitive bidding has not been studied so far by Russian scientists, and works dedicated to international aspects of procurement, tend to focus on economic but not legal issues (E.I.Bosin, 2007). Note also the thesis of Vladimir Bogdanov entitled "Pre-contractual relations in the Russian civil law" (V.V.Bogdanov 2011) in this paper the legal analysis at the stage of conclusion of the contract but not the tendering process as such is studied.

Estoppel at international public law is investigated by TK Dmitrieva, RA Kalamkaryan, II Lukashuk, SV Shulga et al., While the issues of application of estoppel in international private law, including those relating to the regulation of international bidding has not been extensively studied.

Particular attention is paid to the study of works on connecting factor in private international law (M. Boguslavsky, LA Luntz) and analysis of the legal personality of transnational corporations (P. Buckley, AM Gorodissky, D. Dunning, NY Erpyleva MI Kulagin VP Mozolin, J. Morrms, S. Ramelli, SD Wallace et al.).

The study would be incomplete without analyses of the works of scientists devoted to the legal nature of the relationship, as well as general issues of liability law (SS Alekseyev, OS Ioffe, EB Pashukanis, EA Sukhanov, GF Shershenevich) and works on economics (II Neduzhy VI Potapov, D. Whitaker).



METHODOLOGY

The research methodology is based on comparative legal analysis using the historical method and the legal modeling.

The empirical base is the normative regulation of trading by international organizations; civil law of England, USA and Canada regarding the regulation of public bidding; normative acts of the Russian Federation, regulating public procurement; acts of judicial practice, the actual material (regulations on procurement, tenders) Some TNCs; materials obtained by the author in Progress in procurement TNK International Paper, Carlsberg, Kimberly-Clark, Diageo, Metro Cash & Carry.

FINDINGS

The basic principles of the international trading and analyzing the need and importance of the legal regulation of procurement relationships with a foreign element in the examples available in the business turnover of rights abuse, turn to the recommendations for improvement of the current civil legislation of the Russian Federation. Of course, we will pay attention to the improving standards of the Civil Code, as it was the Code should contain a "system of stable rules of civil turnover in a market economy" (A.L.Makovsky, 2010).

Effective regulation of the international trading should be based on the principles of equity, fairness, rationality, equal treatment of bidders, competitiveness and economic viability, which is characteristic of civil-legal relations in general, with the exception of personal relations, be supplemented by Sec. 1 of the Civil Code article "Principles of civil law" to include any second paragraph in Sec. 1, Art. 1 "The basic principles of civil law" as follows: "the civil legislation ensures compliance with the principles of fairness, integrity, intelligence, competitiveness, economic viability and the protection of privacy in public circulation (E.S.Barannikova, 2017). The deal does not meet these guidelines may be declared void by the court. "

Novella on the need to conscientious actions of participants of civil relations, adopted in the wording of the Federal Law of 30.12.2012 number 302-FZ "On Amendments to Chapter 1, 2, 3 and 4 of the Civil Code of the Russian Federation" (Russia, 2012) Certainly, specifies the text of the Civil Code in comparison with the previous version positively, however, is not sufficient, in our opinion, because it referred to in Art. 6 and 10 principles of civil law (good faith, reasonableness, justice) should be clearly identified as the basic principles of civil legislation of the Russian Federation.

Accordingly, it appears that the revision of the first paragraph n. 1 tbsp. 2 of the Civil Code should be verified as follows: "Civil law defines the legal status of participants in civil commerce, the grounds for emergence and procedure of property rights and other proprietary rights, rights to results of intellectual activity and means of individualization (intellectual property rights), regulates relations associated with participation in corporate organizations or their management (corporate Affairs), contract, procurement and other relations, as well as other property and personal non-property relations based on equality, autonomy of will and property independence of the participants. "

The proposed clarification will help to more effectively apply of the provisions of Art. 10 of the Civil Code of the Russian Federation to international trading, since they would clearly fall within the scope of civil law. For example, if the auction organizer violated the principle of



equal treatment of bidders by placing one of the participants in a privileged position, giving him more information, the second party, the right has been violated may refer to para. 1, Art. 10 of the Civil Code of the rights abuse and restrictions of competition. However, the Civil Code does not specify that the organizer of the auction which is obliged to provide equal conditions to all bidders, with some lawyers pay attention to the inadmissibility of the privileged position in the auction for sale (K.Sklovsky, M.Smirnova, 2003).

Similarly, the application n. 2 tbsp. 15 of the Civil Code: see, for example, a participant of international trading whose rights have been violated will demand compensation for loss of profit due to failure to conclude a contract with the organizer of the auction and the parties are free to negotiate in public circulation.

Note the marked principle of equal treatment of tenderers, in some legal acts. The Federal Law of 21.07.2005 number 115-FZ (ed. From 03.07.2016) "On Concession Agreements" (RF, NW. 2005. № 30 (part. II). Art. 3126. 2005) enshrines the principles of non-discrimination of bidders (the principle of equal treatment), the principle of transparency of the selection procedures of the participants (n. 1, Art. 13). Similar principles and procedures provided in the draft model law of the states - participants of the CIS "On public-private partnership" (Decision 41-9 at the 41st plenary session of the Interparliamentary Assembly of the CIS countries., 11.28.2014) (V. 4, 15, 23, etc.).

It should be noted that in the science of law expressed as a point of view on the broad interpretation and application of Art. 10 of the Civil Code (L.V.Schennikova, 1999) And concerns on a wide discretion of the court using the principle of good faith in dealing with cases (M.N.Maleina, 2000). Achieving a perfect condition have been difficult, so the regulation of international bidding need to strive for "golden mean", while providing adequate protection of the rights of bona fide subjects of procurement relationships.

An alternative solution to the legal uncertainty of international trade may be considered approach formulated by D. Lomakin to offer any legal relationship, which has all the characteristics of a civil relationship and takes the civil as one of the Civil Code which does not contain an exhaustive list of legal (D.V.Lomakin, 2008).

Let us consider the problem concretization of civil law meets the requirements of modern business turnover of commercial legal entities in the regulation of procurement relationships with a foreign element. Paragraph 2 of Article 153 "The concept of the transaction" should be reworded as follows: "2. Transaction is an action agreed by the parties at the auction of the right to conclude the contract in the future."

Recognition of the nature of law-procurement ratio facilitates the application of Art. 10 and p. 5, Art. 166 of the Civil Code to the cases of abuse, as well as the application of para. 2 of Art. 307 of the Civil Code. Purchase - is "the establishment of obligations," the definition of procurement is justified as a deal pursuing a proprietary interest. There is an alternative view of the relationship between the main contract and the bid, on the basis of which this agreement is concluded: the main contract, is the result of (transaction), and trades, is a method of achieving a result, the method of concluding the basic contract (E.S.Barannikova, 2017). In this approach, the transaction and the method of achieving it cannot be separated, and achieved the same result that we seek, relating to the trading transaction - namely, provides adequate protection of the rights of bona fide subjects of procurement relationships.



In the Russian Federation, the highest judicial authority in the recognition of trades invalid the governance by the rules established for the invalidation of a transaction voidable (O.A.Belyaeva 2015), Which is also, in our opinion, proves the affiliation of trading and procurement relations as a whole to the transactions.

TNCs are the subjects of international bidding, the results of which require the division of TNK and are separate legal entities registered in different countries (in particular in the Russian Federation), and the order of responsibility for the actions of TNCs is not provided in the current legislation of the Russian Federation. As a result, the effects of abuse are eliminated in a business turnover of negotiation between the "headquarters" of TNK, TNK division and participant / organizer of tenders (depending on subject composition) without the presence of any legal instruments.

In this context, in our opinion, Art. 312, 313 of the Civil Code should be supplemented with an indication of the order of execution of obligations by third related parties, as well as the fulfillment of the obligations in favor of third parties interconnected. For example, paragraph 1 of clause 3 of Article 308 "The parties obligations" of the Civil Code may be revised to read: "3. The obligation not to create duties for people who are not participating in it as parties (for third parties), with the exception of transnational corporations in the cases provided by law. ". Adapting the English doctrine of the tender contract, propose to replace the term "preliminary agreement" to "agreement concluded in the negotiations", the term is more consistent with the requirements of the existing business practice and has a broader meaning, and also it is more convenient in practical application (E.S.Barannikova, 2017). In other words, the proposed term includes a "preliminary agreement" in its classical sense, contract tendering, and possibly other contractual preliminary character designs. In this regard, you can suggest the following expression of the Article 429 of the Civil Code:

1. "Article 429. The agreement entered into during the negotiations.
"one. Under the agreement entered into the negotiations, the parties undertake to enter into a future contract on the transfer of property, execution of works or services (main contract) under the conditions specified in the agreement.
2. Agreement entered into the negotiations must be made in writing.
3. Agreement entered during the negotiations, must contain the subject material terms of the main contract and the period within which it must be enclosed. Otherwise, the agreement is void.
4. In cases that the party has concluded an agreement in the talks, refuses to conclude the main contract, the provisions provided in paragraph 4 of Article 445 of this Code.
5. Obligations stipulated by agreement in the negotiations are terminated if before the expiration of the period within which the parties must conclude the basic contract, he will not be concluded, except for avoiding one of the parties to conclude the basic contract, or if the parties do not agree on the extension of his detention."
(E.S.Barannikova, 2017)

In order to avoid one-sided changes in the conditions agreed by the parties in the tender contract, and the consequent damage to the injured party, it is appropriate to clarify Article 446, the current version of which is mainly aimed at protecting the rights of people who are forced to conclude accession treaties and other agreements with natural monopolies. It is necessary to emphasize the importance of facts and analyses to establish the will of the parties



in the course of negotiations and trading as pre-contractual dispute, as a rule, arises when it is impossible to agree on a single version of the contract. In particular, if during the international bidding standard form of contract is not annexed to the tender documents, the dispute between the parties will arise after the selection of the winner in the auction.

Story about a limitation period of six months (Sec. 2, Art. 446 of the Civil Code, as amended), in our opinion, is not compatible with p. 4 of Art. 429 of the Civil Code. In our opinion, Article 446 of the Civil Code can be stated as follows:

1. If the parties have agreed in writing the terms of the future contract negotiations and at the end of trading, the parties apply Article 429 of this Code.
2. Terms of the contract agreed upon in accordance with para. 1 of this article, cannot be changed unilaterally.
3. In cases of transferring the disputes arising under a contract, the Court under Article 445 of this Code or by agreement of the parties the conditions under the parties which had disagreements, it is determined in accordance with the court's decision, which was adopted in view of the facts to establish the will of the parties during the talks, and trading. " (E.S.Barannikova, 2017).

In our view, the definition of trade organizer must be general in nature and include the TNC as one of the possible organizers of the auction, for example, appropriate following wording of paragraph 1 of article 447 of the Civil Code reveals as:

1. As an organizer of trading can be a purchasing or selling party, a transnational corporation in respect of its subsidiaries or a specialized organization or other person acting on the basis of a contract or a power of attorney from the main organizer of trading. "

Initiator chooses not only a form of trading, but also the order of their conduct in accordance with its position (regulations) of the purchase or the law (if the bidding due to the public interest). (E.S.Barannikova, 2017). We believe that we should not reduce the applicable form of trading, limiting their auctions, competitions and forms provided by law, as the law does not always keep pace with the development of trade. By analogy of law, other than those specified in the Civil Code of contracts, there are unnamed contracts, actively used in the business turnover (e.g., the EPC contract).

The current wording of Article 448 of the Civil Code contains the dates, which are difficult to comply with for the majority of commercial legal entities and therefore do not apply them in practice. In addition, the regulatory division of trading at the open and closed without other forms of inappropriate trading. Specify the same exhaustive list of forms of trading is difficult, as in the business turnover may appear new forms and combinations.

Of course, the bidders should be provided sufficient time for the preparation of commercial proposals (E.S.Barannikova, 2017). Since different categories of purchases, depending on their complexity, may require different time to prepare proposals, the use of the term "reasonable time" is recommended. The procurement of standard goods may be acceptable in a period of 5-10 days. And for international bidding of great complexity (e.g. construction projects) reasonable time may be 6 weeks, as stipulated in the regulations of the World Bank (Guidelines Procurement of Goods, Works and Non-Consulting Services Under IBRD Loans and IDA Credits & Grants by World Bank Borrowers).

The specification order of the signing of the Auction results and liability for failure to sign it is of particular importance. Under the current wording of Article 448 of the Civil Code in the



case of failure to sign the protocol the bidder loses the amount of the deposit, but in practice among commercial entities distributed large tenders without providing the deposit and therefore in case of failure of the winning the auction participant to sign the protocol at the injured party is not an essential tool for compensation (damages the failure of the investment project period due to the failure to win the tender participant to sign the protocol and forced renewal Trading can be total millions of rubles (E.S.Barannikova, 2017)). Effective solution offers OA Belyaeva, pointing out that the signing of the trading protocol is the organizer of the tender commission, and the signature of the winning bidder is not required and doesn't not have legal significance for the results. (O.A.Belyaeva 2015) If this requirement is enshrined in law, and taking into account the specifics of the third inter-related persons, the problem of rejection of the previously agreed on trading conditions will be solved in many ways.

Important specification of the period of return of the deposit loser bidders, is especially important for small and medium-sized businesses.

We believe that the effect of the deposit should be extended until the conclusion of the main contract. However, the deadline to conclude the agreement can take a long time, which adversely affects the interests of small and medium-sized businesses, working invested in the provision of tender transactions. In view of the rapidly changing business practices appropriate to introduce an open list of ways to provide commercial offers, it seems that the establishment of the limitation period of one year, as amended para. 1, Art. 449 of the Civil Code is not quite logical, for the parties could already enter into a contract and fully execute it, so the use of Clause 2, Article. 449 of the Civil Code for the invalidation of the contract may lead to the destabilization of the business turnover (E.S.Barannikova, 2017). In our point of view, this period should be reduced to three months.

In the second part of the Civil Code Art. 507 advisable to move in Ch. 28 of the first part of the Civil Code, extending its provisions on dispute settlement at the conclusion of the contract as a whole, rather than just the supply agreement, setting out an article in the current edition, but removing the word "delivery" of the first and second paragraphs of the article are considered.

By considering the abuses of the international auctions related to the unlawful disclosure of confidential information, we feel justified to transfer Art. 727 of the Civil Code in the Chapter. 25, to extend the provisions of this article on liabilities as a whole, rather than on a row in particular, as in the age of digital technology and intense competition disclosure of confidential information to market players, gathered during the auction (the concept of the campaign, the formulation of a new product, IT-solutions etc.), can lead to significant losses of the injured party (for example, the use of the ideas of his rival and advance in the market, while the original customer-organizer of the tender has already incurred costs of investing in the work, but I have not yet had time to arrange intellectual property rights to them). Therefore, we suggest to state n. 5, Art.

"five. The person responsible for the illegal disclosure of confidential information received in the transaction, to third parties without the prior consent of the owner of the information. "

DISCUSSION & CONCLUSION

Thus, the improvement of civil law regulation of international trades needed. This should remain dynamic business practices and to defend the rights of not only the participants, but also the organizer of trading. As shown by the British, American and Russian judicial and



administrative practice on disputes on public procurement, the number of potential claims exceeds the amount of potential abuse, prejudice the rights of the auction organizer and prolonging the tender process, which leads to the adverse economic impact. The Concept of development of civil legislation also focused attention on eliminating the problems associated with unfair demands of contractors on the recognition of transactions void, not to fulfill its obligations (The concept of development of the civil legislation of the Russian Federation, 2009).

Excessive legal regulation, as well as the absence of a negative impact on the subjects of international bidding. For example, a regulatory requirement to ban request general contractors in public tenders of New York for the construction works (New York General Municipal Law 1912 (Wicks Law), 1912), The calculations of O. Ashenfelter leads to delay implementation of construction projects for one calendar year and an increase in budget costs by 8% (Ashenfelter O., Ashmore D., Filer R., 1997). It deserves attention and his position on the necessary participation of the economists in the discussion on trading laws.

In our opinion, the proposed Barannikova ES in his dissertation revision of civil law contains a balanced approach for solving regulatory problems purchasing relations, including in the form of international bidding.

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