LEGAL CONSTRUCTION OF OUTSOURCING AGREEMENT

A. Fadeev

Institute of Economic and Legal Research of the National Academy of Sciences of Ukraine, 77, Universitetskaya Str., Donetsk 83048 Ukraine

avfbox@yandex.ru

Abstract: The features of outsourcing agreement to build its legal structure are researched. The proposed legal construction of the researched agreement is presented as an integrated system of elements of legal content taking into account the outsourcing specific. The proposed construction of the contract is based on the common law construction of agreement. The internal unity of legal construction of outsourcing agreement is revealed through the detailing of mutual will of economic entities and their arrangement about the agreement content of the agreement and its legal aim. The agreement content of parties is represented as a complex of the rights and obligations including the following specifics: the subject of agreement; the execution order the assumed obligations by the parties; the mutuality of interest in outsourcing agreements, where the functions of customer economic management by outsourcer are added; allocation of risk and responsibilities of the parties under the agreement. An universal character of this legal construction allows to use it in every concrete situation without changing its essence but with the ability to reflect the characteristics of each specific outsourcing agreement.

Keywords: outsourcing agreement, Ukraine, Ukrainian law, legal structure, legal construction, law.

Introduction

The research of outsourcing agreement as a new industrial agreement in economic activity requires the definition of its legal construction. Despite the fact that this agreement is a subspecies of the work agreement or rendering of services, the outsourcing or outstaffing agreement have essential specificity, which should be correct revealed in the agreement. Based on the fact that the legal construction of an economic agreement should holistically reflect all properties of the agreement, then to define the following essential features it should be made based on scientifically based results of analysis the outsourcing agreement.

The aim of this article is the scientific study of the characteristics of legal construction of outsourcing agreement.

According to the aim the agreement analysis was conducted taking into account the researches of Alexeyev S.S., Zhylinkova I.V., Kalenzhyan S.O., Leyst O.E., Malko A.V., Matuzov N.I., Milash V.S., F. Pavelka, which are associated with the legal phenomenon we are researching.

Method

In accordance with this goal, it was decided the following task – to determine the specifics of the outsourcing agreement and on their base to offer the legal construction of called agreement. To solve this problem we used methods of common scientific and special-scientific nature. The research methodology includes the use of the following methods: dialectical ones by disclosure of features of outsourcing agreement, deductive - by determining the elements of legal construction of outsourcing agreement. Also, the method of abstraction and generalization is used during disclosure of the contents of the legal elements of legal construction of outsourcing agreement.

Results

In the law books the legal construction considered as the structured arrangement of the legal material that is characterized by an inner unity of rights, obligations and forms of responsibility of corresponding persons (Sukhareva et al., 1998, p. 781). Alexeyev S.S. wrote that the legal construction is a specific legislative construction of regulatory material that corresponds with certain type or kind of legal relationships, legal facts and their relationship between each other. The author concludes that legal constructions are typical examples and schemes, which are formalized the legal material (2008, p. 489-490). Exploring the legal constructions,
Alexeyev S.S. wrote that by the deep research of legal material becomes obvious that the legal constructions are organic elements of the own content of law that firstly appears spontaneously in the life, and in the practice as a result of typification. It is important that the key, determinative element is its own content (or structure) when they come out of the initial state of primitive forms and are developed as a separate and peculiar phenomenon of human civilization that has its own special content... The legal construction is only one of the law structures, which has an initial meaning (Alexeyev, 2000, p. 39-40).

Milash V.S. by examining the economic agreement has concluded that the common law construction of agreement in the most general view is formed from the system formed elements: 1) the act of consent; 2) the agreement content; 3) subjects who came to an agreement; 4) the purpose, for which the agreement was reached. It is noted that the common law construction of agreement becomes a specific character within a separate branch of law. The agreement connection with area of its usage, with other branch legal means, which order this branch, provide the elasticity, flexibility of agreement construction that is one of the most important conditions of its successful adaptation to basis development trends of social relations that are covered by regulating influence of law branch (Milash, 2008, p. 18-29). Thus, we can talk about the essence of legal construction of outsourcing agreement as an integrated system of connected elements of legal content that allows to the parties formalize the arrangement by model scheme to ensure realizations of interests of the customer and the outsourcer. Besides, it should be noted that the inner unity of the elements of the legal content is reached by the detailing the rights, duties and responsibility of the relations participants, which arise by the process of transferring for performing the non-core functions or business processes of the customer.

Agreeing with the statement of Zhylinkova I.V. that the legal construction should be self-sufficient, have an integral and complete character, that means to include such set of elements that would provide the possibility of its practical use and a comprehensive understanding (2010, p. 123). We believe that by the legal construction of outsourcing agreement it should be considered not only the specifics of its subject, but also the procedure of implementation by the parties the assumed obligations under the agreement. Also we should pay attention to the idea of Kalendzhyan S.O., who points that by making agreement for the development of outsourcing projects it is important to pay attention to registering, risk allocation and rewarding. The author insists that the interests of the customer and the executor of outsourcing project are directly related to the efficiency assessment of projects about the authority delegating of management (Kalendzhyan, 2003, p. 103-104). The above mentioned shows that the model (legal construction) of outsourcing agreement should be not only a set of interconnected minimum required elements of legal content, but also be a scheme that takes into account the specifics of outsourcing agreements. Based on the fact that outsourcing has different types and belongs to the different groups of economic agreements, the special attention should be paid to the originality of such agreements. For example, risk allocation by the outsourcing agreements of execution of the work or rendering of services, risks by the implementation of the outstaffing agreement.

Making the legal construction of outsourcing agreement it should be taken into account its following features:

- how the non-core functions and business processes have to be executed, i.e. which actions of the agreement parties correspond to its purpose;
- which legal regime of behavior of the agreement parties, and when it is a matter of outsourcing personal (outstaffing) it should be clearly defined the legal regime of personnel actions that temporary executes the customer task. The legal regime – is a special procedure of law regulation, which is reflected in a combination of legal means and creates the desirable social status and a specific degree of fairness or unfairness to meet the interests of legal subjects (Matuzov, Malko, 1996, p. 16-17). Thus, the legal regimes in general can be defined as the procedure of regulation, which is reflected in a various complex of legal tools that characterize the special combination of interacting permissions and prohibitions (and also positive obligations) and create a special orientation of regulation. Within each legal regime there are always involved all primary elements of the legal matter, but first of all, the elements of limited law relations - permits and prohibitions (Alexeyev, 2010, p. 264). We believe that the definition of the legal regime of participants’ behavior of outsourcing agreement is reasonable to define due to permissions, prohibitions and obligations;
- coordinating the results of parties arrangements of compulsory obligations it should be subjected the agreement goals - economic results with their legal consequences, because it is this aim that gives an opportunity to apply the general legal terms of realization of the rights and obligations of parties depending on the agreement group to which it belongs;
- customer, outsourcer and sometimes the involved personnel of outsourcer should define the mutuality of interest due to the outsourcing agreements, where the economic management functions of the customer are added. This requirement is explained due to the fact that the lack of mutual economic interests of the parties reduce the economic interests of the parties to zero, and the lack of economic interest disables the management process. The aimless activity cannot be the subject of an economic agreement. The purpose of the legal regulation of economic activity (Parliament of Ukraine, 2003), including economic agreements is the providing the growth of economic activity of business entities, entrepreneurship development, and on this basis, the increasing the efficiency of social production, its social orientation, strengthening the social economic order in the economic system of Ukraine, facilitating harmonization with other economic systems;

- determining the price of outsourcing agreement it should foresee the equivalence of payment for services or work, i.e. intermediate results and their compensation. Taking into account that the outsourcing agreements, in most cases are long-term agreements where payment should be done for the end result of service or work, and accordingly it is paid not the process but the result. Its achievement is possible in considerable period of time. Thus, protecting the interests of the outsourcer and personnel engaged under an outstaffing agreement, the agreement price should be detailed by intermediate results;

- mutual rights and obligations of parties of the outsourcing agreement should fix, which powers of customer are delegated to outsourcer. Executing the non-core functions or business processes the outsourcer is not just involved in the management process of the customer company. The determination of such management duties is associated with the obligations formulation of outsourcer. According to Alexeyev S.S. the legal obligation is defined as a statutory measure of adequate required behavior of individuals (1999, p. 68). In the context of the researched question it should be noted "the measure of an appropriate behavior", which has a direct connection with the parties authority of outsourcing agreement;

- a high level of riskiness of outsourcing agreements for both parties requires a thorough detailing of mutual responsibilities of customer and outsourcer. Such riskiness is created by: the legal uncertainty of outsourcing agreement, incomprehensibility of functional content of outsourcing services and works, blurriness of limits of representation and responsibility and so on. The risk minimization at the expense of its distribution is caused by such needs: protection of consumers interests (threat to their interests, security breaches of client personal data, information security of the client, including banking secrecy); operational risk or the risk of a third party (refusal of service provider); reputational risk (loss of reputation due to refusal of service provider); legal risks (legal compliance - law compliance with adhering to the contracts, the rejection of the contract); concentration (excessive concentration in the branch in whole) (Pavelka, 2011, p. 74-75). Thus, between key tasks, which should be decided in the agreement, is the allocation of risks and determination of the liability of parties for the negative consequences of non-fulfillment or improper fulfillment of contractual obligations;

- as of today the absence of specific law regulation of outsourcing agreement significantly reduces the protection of rights and legal interests of its party. For example, by the conclusion of outsourcing agreement the staff don’t understand the mechanism of protection the rights and interests of outsourcer employees in the customer company. It should be paid attention to the idea of Leyts O.E., who wrote that the obligatoriness of legal norm means its protection by the state, the possibility of use of state coercive measures in the case of illegal acts (2008, p. 70). Certainly, the absence of special norms does not indicate the existence of outsourcing outside the legal field but indicates a lack of specific legal mechanisms for protection the rights and interests of the parties of the outsourcing agreement;

- an universal character of legal construction of outsourcing agreement should make possible its use in every concrete situation without changing its essence but with the ability to reflect the certain characteristics of each specific outsourcing agreement.

Thus, the legal construction of outsourcing agreement should reflect: the act of will of the parties in the external form, i.e. in the form of written document, connection of outsourcing agreement with the content of outsourcing relationships. Being a means of expressing the internal structure of the complex relationship the legal construction of outsourcing agreement should disclose it through the elements of legal content. And here it should be understood that the content of outsourcing relationships is broader than the content of outsourcing agreement because with the purpose of the origin of outsourcing relationships the outsourcing agreements are concluded.
Conclusion

Based on the proposed legal construction of Milash V.S., considering the given features of the outsourcing agreement and for the closely understanding and achieving the legal goal, we believe that the legal construction of this agreement should be as follows:

1) arrangement of the parties as an act of mutual will;
2) economic entities, which have reached an agreement;
3) agreement content as a complex of rights and obligations including the following specifics:
   - the subject of agreement (work or service);
   - the execution order the assumed obligations by the parties (the legal regime of behavior of the agreement parties, and sometimes the actions of outsourcer’s personnel who temporarily fulfills the tasks of customer);
   - the mutuality of interest in outsourcing agreements, where the functions of customer economic management by outsourcer are added. Meanwhile, it should be detailed that conditions, which show the customer powers delegated to the outsourcer;
   - allocation of risk and responsibilities of the parties under the agreement;
4) legal aim of the agreement.

References
Sukhareva, A. et al. (1998) Bolshoy yuridicheskiy slovar, Moscow: INFRA.