

Particulars of the competitive obligations in the civil legislation of the Republic of Kazakhstan

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Abstract. Obligations arising out of the competitive process are clearly civil law concept which is very complex and little-studied by domestic civilists. At the same time, with the development of economic relations the field of provision of goods, work and services between public and private parties of civil-law relationships require careful study of the given relationships. The author of this article has analyzed these commitments and identified their characteristics and peculiarities.

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Introduction

Chapter 46 of the Civil Code of the Republic of Kazakhstan (hereinafter referred to as CC RoK) governs obligations having received their name as a "Competitive obligations", i.e. obligations which are commonly found in competitive origin between persons who took part in the competition as performers of an assignment given by competition initiator [1]. Unlike, for example, the Civil Code of the Russian Federation which contains separate chapters on public promise of an award (Chapter 56) and public competition (Chapter 57), CC RoK doesn't expressly govern public promise of an awards not associated with the competition [2].

In countries such as Spain and Italy, this institution is not included in civil law, and commercial law [3,4].

In the United States and England commercial law recognized as a part of civil law, these obligations are regulated respectively by them [5].

In compliance with paragraph 1 of Article 910 of CC RoK competitive obligations may also be regulated by other legislative acts of the Republic of Kazakhstan. At the present time there are a large number of laws and delegated regulatory acts regulating the competitive obligations. Among them we can mention the following: Decree of the President of the Republic of Kazakhstan having the force of a law "On Privatization" dated December 23, 1995 for the development of which a number of delegated acts has been adopted; Decree of the President of the Republic of Kazakhstan having the force of a law "On mortgage of immovable property" dated December 23, 1995; Decree of the President of the Republic of Kazakhstan having the force of a law "On commodity markets" dated April 7, 1995; The law "On bankruptcy" dated January 21, 1997; The law "On public procurements" dated July 16, 1997,

the law of the Republic of Kazakhstan dated January 12, 2007 "On gambling industry" and others.

The aforementioned list of regulatory acts governing the competitive obligations is far from being comprehensive. Moreover, tender norms are also contained in the regulatory acts of not only civil but also other branches of legislation.

Materials and methods

In this article I tried to evaluate the current legislation the Republic of Kazakhstan about the competitive obligations. For this purpose, I used monographs and scientific articles of domestic and foreign researchers and analyzed the current legislation. A special attention was paid to scientific works of the Russian researchers. The reason is the similarity of legal systems.

Results and discussion

A general notion of competitive obligations is shaped by paragraph 2, Article 910 of CC RoK according to which an initiator of the obligation, based on a subject matter and initial conditions of a tender defined by the initiator, shall make an advance to uncertain or certain group of persons to participate in the obligation and undertakes at that to pay remuneration to a winner of the competition and (or) sign a contract with him/her relevant to the content of the obligation. Thus, the competitive obligation is usually aimed at signing a contract between the initiator of the tender and its winner under the terms the most favorable for the initiator as compared with the initial terms. Type of a contract being signed on the basis of tender terms shall be dependent on the subject of the tender. A basis of any competitive obligations shall be compensatory nature. For this reason, as highlighted by O.S. Ioffe, "competition can play a stimulating role when everyone who wishes to participate in it knows positively that consumed labor and creative efforts will not be lost and will be

evaluated and rewarded in exact matching with the values of created product and conditions of the competition. It is so required that relations associated with the competition are supported by a solid legal framework "[6]. Publicity of the competition is also its characteristics and publicity shall mean here "addressing to the public". Limits of this kind of publicity can be predefined so that the minimum information specified in the law would be respected. The limit criterion distinguishing civil competitions from competitions regulated by other branches is, first of all, a sectoral affiliation of the relations subject itself that develop between a person holding a competition and its participants. This allows concluding about a necessity, as a general rule, to bring beyond the framework of the civil legislation the competitions where relations constituting their subject are built on the principles of authority and subordination.

Chapter 46 of CC RoK defines in general terms participants of the competitive obligations. Along with paragraph 2, Article 910 of CC RoK the following shall act as participants: 1) the initiator of the competition; 2) persons taking part in the competition for the right to become a winner. 3) a winner of the competition, that is a person who has taken part in the competition and pronounced a winner in compliance with the conditions of the competition. A tender obligation is a generic term which combines various types which are different from each other both in terms of the grounds of its origin and its content.

On grounds of the origin paragraph 1 Article 910 of CC RoK distinguishes between competitive obligations arising from public promises of an award and competitive obligations arising on the basis of tendering, which, in turn, are divided into two types: tender and auction. However, we can see that a legislator distinguished another kind of competitive obligations, such as, games and betting which not always arise out of the competition.

The public promise of an award is referred to in article 911 of CC RoK "any person declared publicly about the details of an award in cash or a different form for the best performance or achieving other results must fulfill its obligation to the person who in accordance with the terms of the competition is recognized a winner". This concept was missing in all previous civil codes and the Fundamentals of civil legislation. Therefore, in the event of a dispute regarding payment of the promised awards the Court's decision could be made only on the basis of the general provisions related to obligations.

The obligation of public promise of an award for its legal nature is of non contractual nature, although it assumes an expression of a will of the

parties of the originated legal relation. Each of these expressions of the will shall present self-contained deals [7].

Particulars of the public promise of an award:

Such a promise shall be a unilateral deal and shall meet the requirements to the form of deal accomplishment.

A subject of the promise is a lawful act within the specified period of time. If time indication is not mentioned then lawful act shall be committed within a reasonable time.

The promise of an award should allow identifying a person to whom it is promised. In order to prevent cases where a person has not announced about the award, a person responded to the promise shall be entitled to require written confirmation of the promise.

An award must be defined in the promise; its size shall be fixed by agreement of the parties or, in the absence of such agreement, by a court decision.

In the case a lawful action has been committed by several persons, a person committed the lawful action first shall have a right to the award. If it is not possible to determine the first person, the award shall be divided between two or more persons equally.

Compliance of actions with the announced requirements shall be determined by a person who promised an award, unless otherwise provided in the announcement about the award.

Termination of the public promise of an award is a statement made by a person who promised the award in the same form as the back-out promise [8].

Another type of competitive obligations is auctions and tenders.

As on date tenders are surely universal mechanism that allows establishing the rule of law which takes into account both the interests of the State and private interests. Tenders having deep historical roots in Roman private law hold down their relevance and today are one of the main ways of making deals in the sale of goods or provision of work and services. Tender agreements are signed in such areas as government procurement and contracting, privatization, property disposition, provision of work and services and others.

In law literature and civil legislation of some countries, we can note the allocation of such forms of tender as auction and contest. In turn, there is a contest in the form of tender and electronic tendering gain more and more popularity as well the legislation of the Republic of Kazakhstan provides for trading through commodity markets (Article 12 of the law

"On public procurements") [9]. In all listed forms we can see that a major character is competitiveness of bidders competing for the right to sign a contract and looking to make the most advantageous offers that shall meet the terms of bidding.

With a great similarity of essence of tenders and auctions we can mark a number of differences. At first, a winner of a tender shall be a person who, based on a conclusion of a tender committee specially formed by the organizer, offered the best terms (price, time, experience, terms, etc.), and a winner of an auction shall be a person offering the highest price.

Secondly, at the time of auction participants shall be required to pay a specified amount of security deposit which is not refundable if a person did not wish to purchase any property.

Thirdly, the subject of a bidding in the manner of auction can be any movable or immovable property not withdrawn from civil circulation, including items of intellectual property, contracts and property rights, including import, export and other quotas and licenses, and the subject of a contest can be also work and services.

Fourthly, the procedure for identifying a winner of the auction and the competition is also different.

Choosing of one or another form of bidding shall be determined by the owner of saleable thing or the owner of a property right, unless otherwise provided by law.

The term "auction" is derived from the Latin word "auctio" - growth, increase, public sale. As a rule, having this form the bidding process is conducted a winner shall be a participant who offers the highest price. The applicable Article 916 of CC RoK also states about this "at the time of bidding in the manner of auction a seller shall undertake to sell the auction item to the participant of the auction who will offer the highest price for it."

In England and the United States in two common law countries is very common agency agreement, where an agent or broker for the sale of the property at public auction, the auctioneer acts [10].

Article 916 of CC RoK stipulates that at the time of competitive bidding in the manner of auction the seller shall undertake to sell the auction item to the participant of the auction who will offer the highest price for it.

A winner of the auction shall be a person having offered the "best price" or the highest price, based on the notion of the term "auction" which is derived from the Latin word "auctio" - growth, increase. Thus, auction is a form of trading where a

contract shall be signed with a person having offered the highest price for the bidding item.

As per E.G. Pliev auction agents are auctioniator (client ordering bidding), auctioneer (organizer of bidding) and persons attending the bidding (bidders), although in practice and in law these terms are not used [11].

In the legislation of the Republic of Kazakhstan there is no special law governing the procedure for conducting an auction, however, there is a mention of the auction as a form of bidding in Article 916 of CC RoK and the law of the Republic of Kazakhstan "On public procurements".

In compliance with the Civil Code of RoK an auction may be held on the terms of increase or decrease in price vs. price declared by the seller.

In the first method, a winner is determined through a step-by-step increase in the price for the goods (property). Before the auction, "step of the auction" shall be declared, i.e. a monetary amount for which the price of the auction shall be reduced. As a rule, it is fixed as a percentage of the starting price. In such a case, each subsequent offer in terms of price is higher than the previous one and the last tenderer shall win. This auction is being actively used in enforcement proceedings upon implementation of the distrained assets or in case of bankruptcy procedures, privatization of State property as well as in many other cases.

In the second way we can see that a winner is determined by step-by-step downward of the initial price. However, we often see such definitions as "English" or "Dutch" auction methods. As a rule, reverse auctions are used whilst placing the Government orders, in this case if tenderer offers the price which is higher than the initial maximum price it automatically means loss in the auction. Usually starting sale price is fixed in 2-3 times higher than the mid-market rate; the organizer of bidding process reduces it himself/herself and not the bidders. The price will be reduced till the first acceptance by one of the bidders and consequently the first acceptor shall win the bid.

A study of the legal issues related to conducting of auctions has shown that to date the concept of auction process is one of the most complicated concepts. Today unification of the law on bidding process in the form of auction and making changes in the Civil Code of the Republic of Kazakhstan is very complex as well. In the Republic of Kazakhstan a process for satisfaction of public needs is implemented by a special law of the Republic of Kazakhstan "On public procurements" and to some extent the mentioned law is a priority, rather than the norms of CC of RoK.

However, such types of bidding process as online auctions cannot be governed by the Civil Code of RoK because there are gaps in the area of electronic commerce as well.

Article 915 of the Civil Code of RoK regulates the concept of tender, i.e. whilst conducting a bidding process in the tender form initiator (the Organizer) shall commit based on offered initial terms and conditions to sign a contract (as a seller, buyer, customer, contractor, landlord, tenant, etc.) with a bidder who will offer the best tender conditions to the initiator. Tender is the competition of candidates for the right to sign a contract with the initiator of the tender selection. Tender is a competitive form of placing orders for the performance of work or delivery of services under the pre-announced criteria within a stipulated time frame on the principles of competitiveness, fairness and efficiency [12].

The procedure for a contest in the form of tender can be observed in a number of regulatory acts of the law of the Republic of Kazakhstan. For example, the law of the Republic of Kazakhstan dated March 1, 2011 "On State property", Article 100 stipulates that a person who based on conclusion of the Tender Committee pre-appointed by the seller offered the best conditions shall be considered a winner, the bids shall be given in written in a closed envelope [13].

The law of the Republic of Kazakhstan dated July 21, 2007 "On public procurements" states that a tender means a public procurement through competition, thus the term "tender" and "contest" shall be the same.

Despite the fact that the concept of gaming and betting has taking a shape in the ancient Rome, it found its legal recognition in the Kazakhstani civil law more recently. For quite a long time in Russian and Soviet legal doctrine there was a provision that legal regulation of gaming and betting should be carried out within the framework of administrative and criminal jurisdiction. During the period of the Soviet power the gaming and betting was considered solely from the perspective of public law.

In the early 90 's gambling business started broadening everywhere that has become a starting point for civil regulation of relations connected with arrangement of gaming and betting and participation in them. However, regardless of the fact that gaming and betting as a legal institution was defined in the Civil Code of the Republic of Kazakhstan as one of the types of obligations incurred through competition, legislative regulation by special regulatory acts has been reflected only with the adoption of the law of the Republic of Kazakhstan dated January 12, 2007 "On gambling". Taxation of gambling business is

implemented on the basis of section 16 of the Code of the Republic of Kazakhstan "On taxes and other obligatory payments to the budget" (Tax Code) dated December 10, 2008.

The main source of the civil regulation of gaming and betting is the Civil Code of RoK which establishes only general provisions on organization of gaming and betting. It shall be noted about peculiarity of designation of this concept by the Kazakhstani legislation to the chapter 46 "Competitive obligations" where paragraph 2 of Article 910 stipulates that "initiator of the competitive obligation, based on the subject determined by the initiator and reference conditions, shall propose to uncertain and certain group of persons to participate in the competitive obligation and undertakes to pay the given rewards to a winner of the competition and (or) sign with him/her a contract relevant to the content of the competitive obligation". Based on the meaning of this article it may be concluded that all of the obligations related to this chapter shall be rested upon competitive process, i.e. the obligations for which competitive source amongst persons taking part in the completion as performers of competitive assignment of the initiator of the contest is specific. However, on the assumptions of the nature of gaming and betting, it is not always possible to treat them as given types of obligations. Although, it shall be noted that a law-maker noticed that in accordance with paragraph 1 of Article 913 of the Civil Code of RoK a reason for the obligation associated with gaming is a contract. Such a contract in the context of relations foreseen by paragraph 1 of Article 913 of the Civil Code of RoK shall be documented via issuance of a lottery ticket, receipt or other document and shall be considered as signed as from the time payment by a game player the cost of a lottery ticket or other payment for participation in the gaming. Using the terms "gaming" and "betting" in the Civil Code of RoK, Kazakhstani lawmakers though do not disclose their content, obviously assuming that these concepts are well known and do not need a special definition. Only the law of the Republic of Kazakhstan dated January 12, 2007 "On gambling business" defines betting as "an agreement between the bidders themselves or with the organizer of the gambling industry signed based on risk for the outcome of the event assuming a win and where bidders do not participate" and gaming as "gambling which is an agreement between bidders themselves or with the organizer of the gambling business which is signed based on risk for the outcome of the event assuming a win and where bidders participate". However, this also didn't make clear the issue at the legislative level.

A number of authors, for example, N.P. Vasilevskaya believes that "gaming and betting obligations arise from unilateral action. The organizers of the gaming (betting) are in connection with the conditions stated in the gaming (betting) [14]. It is also noted in the legal literature that the gaming house (organizer) shall be obliged to enter into a contract for the gaming (betting) with everyone who asks for it, and thus it can be regarded as public, and the proposal itself addressed to one or more uncertain group of persons as public offer. Although, both Article 913 and Article 914 of the Civil Code of RoK don't cover direct allocation of an agreement to the public one but assume management of the general provisions on contracts.

In compliance with paragraph 2 of Article 913 of the Civil Code of RoK "persons who, in accordance with the provisions of lottery, pari-mutuel or other games are deemed to be winners must be paid by the initiator (organizer) of the gaming a winnings to the amount, form (cash or in kind) and time limits as stipulated by the terms and conditions of the gaming and if the time limit is not specified by the terms and conditions of the gaming - not later than ten days after summing up the results of the gaming". Therefore, the contract is on a paid-for basis that is noted by E.A. Sukhanov believing that "the gaming (betting) is almost always (with the exception of so-called charitable lotteries) is a commercial activity for "bookmaker" whose profit comes from the difference between the amount of risk-related fees of the "bettors" and the amount of the prize fund and the costs of organizing and conducting the gaming" [15].

Classification of gaming and betting to real or consensual contracts depends on the will of the parties of the contract and depending on the rules established by the organizers. I.V. Yeliseyev believes that most of the gaming and betting are characterized as real contracts, i.e. considered to be signed as from the moment when the players made their bets and formed the Prize Fund [14]. However, if the organizers will stipulate a condition on adequacy of expression of a will by a player and organizer in the form of agreement, then it can be classified as consensual agreement.

Thus, it can be concluded that the agreement for organization of gaming and betting is a two-way binding, public, refundable and depending on the will of their participants and the rules established by the organizers both real and consensual ones.

Conclusion

Obligations arising out of the competitive process surely require further study and systematization. Up to date, the legislation of the Republic of Kazakhstan identifies such obligations as a public promise of an award, auction, tender, gaming and betting and conducting of lotteries, pari-mutuels or other games only based on the criterion of their competitiveness and publicity, despite the fact there are differences in the manner of origin and termination of relations, in the manner of contracting, in the parties of legal relations.

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