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OPERATOR MANAGEMENT SERVICES CONTRACT

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Introduction: the article is devoted to a comprehensive scientific and practical study of the management services contract and operator management services contract (operator contract), which can serve as a basis for further in-depth, detailed development of the theory of legal regulation of management relations in civil law. **Purpose:** to formulate the definition of the operator management services contract. For this purpose, the author sets the tasks to identify management objects, to distinguish the contract for the provision of management services from the related categories, and give its general description. **Methods:** empirical methods of comparison, description and interpretation, theoretical methods of formal and dialectical logic, as well as specific scientific methods, namely the juridico-dogmatic method and legal norms interpretation, were applied. **Results:** based on generalization of the most significant features of different civil law contracts, the definitions of the management services contract and operator management services contract (operator contract) are offered. For this purpose, the author defines the concepts of management and operator services for management and specifies their place in the civil law conceptual framework. **Conclusions:** the suggested definition of the operator management services contract (operator contract) is as follows: under an operator management services contract (operator contract), one party, the operator, for remuneration takes an obligation to implement their powers by giving mandatory instructions to persons carrying out the activity, to maintain it in the parameters prescribed by the terms of the contract, by law or by custom.

Keywords: management; management service; management services contract; operator management services contract; agreement on the transfer of powers; operational management; organizational relations

Information in Russian

ДОГОВОР НА ОКАЗАНИЕ ОПЕРАТОРСКИХ УСЛУГ ПО УПРАВЛЕНИЮ

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Введение: статья посвящена комплексному научно-практическому исследованию договоров на оказание услуг по управлению и на оказание операторских услуг по управлению (операторскому договору), что может послужить основой для дальнейшей углубленной, детализированной разработки теории правового регулирования общественных отношений управления в гражданском праве. **Цель:** сформулировать определение договора на оказание операторских услуг по управлению. Для достижения обозначенной цели автором ставится задача определить объекты управления, отграничить договор на оказание услуг по управлению от смежных категорий и дать его общую характеристику. **Методы:** эмпирические методы сравнения, описания, интерпретации; теоретические методы формальной и диалектической логики. Применялись частнонаучные методы: юридико-догматический и метод толкования правовых норм. **Результаты:** на основе обобщения наиболее значимых признаков отдельных гражданско-правовых договоров сформулировано определение договора на оказание услуг по управлению и его разновидности договора на оказание операторских услуг по управлению деятельностью. С этой целью сначала сформулированы понятия управления и операторских услуг по управлению в гражданском праве, определено их место в понятийных рядах гражданского права. **Выводы:** предлагается дать следующее определение договору на оказание операторских услуг по управлению деятельностью (операторскому договору): «по договору на оказание операторских услуг по управлению деятельностью (операторскому договору) одна сторона, оператор, за вознаграждение обязуется реализовать имеющиеся у нее полномочия посредством дачи обязательных указаний лицам, осуществляющим данную деятельность, для поддержания ее в параметрах, заданных условиями договора, законом либо обычаями».

Ключевые слова: управление; услуга по управлению; договор на оказание услуг по управлению; договор на оказание операторских услуг по управлению; операторский договор; оперативное управление; договор о передаче полномочий; организационные отношения

Introduction

Despite the importance of civil law relations associated with operator services (services provided by an operator), including operator services in management of the transportation process, unfortunately, contracts that regulate them remain underresearched. Firstly, it is due to the fact that the definitions of “management”, “management services contract” and other closely related terms have not been developed in civil law yet. The category “management” is traditionally considered alien to civil law, although it is often used in civil legislation. There is also no scientific explanation of the mechanism of vesting powers in the subjects of civil law.

Secondly, despite a wide range of contractual relations connected with management services, the essence and content of these services have not been comprehensively investigated yet. As a result, there are no general scientific approaches to the legal qualification of contracts for the provision of services for the management of corporations, mort-

gages, property, work, services and intellectual rights. Moreover, there is no systemic comprehension of the body of management services contracts, which adversely affects the formation of the current legislation. There have been some attempts to artificially integrate separate management services contracts into the system in such a way that they actually occupy an alien place there. As a result, the construction of the lease agreement and the contract for the provision of services, contracts for transportation and towing, etc. are confused.

Meanwhile, the potential for using the management services contract in many spheres of life, and especially in the field of transportation, is considerable. For example, it can serve as a legal means of organization and “self-organization of civil law relations for transportation” [8, p. 203], especially in a mixed transportation [11–15], for the relations between the transport infrastructure owners [16–18], etc. Hence, the contract can become the most effective means of organizing such relations [10, p. 282].

Management and Management Services in Civil Law

Before we turn to operator management services contracts, it seems appropriate to give a civil law description of the term “management”. Civilists are accustomed to consider the term “management” to be alien not only to civil law itself but also to the private law as a whole. Meanwhile, the position that management can be not only public-legal but also private-legal is being justified in law. The opinion that management relations are the constituent part of the civil law subject is currently being supported not only in Russia but also in the CIS countries. In our view, the fact that management relations are included in the subject of civil law regulation is no longer in doubt. At the same time, the range of civil law management relations is much wider than management of corporate organizations. As the legal reality shows, they penetrate the whole system of civil law.

Thus, management in civil law is one of the types of private law management, which can be defined as follows: *management in civil law is a legal procedure for the targeted impact of the empowered civil law subject (the subject of management) on the property or activities of participants in civil law relations (the object of management) to achieve economic or non-proprietary benefits, which is based on the legal equality and the autonomy of the will of parties.*

An operator’s management activities in civil law can be considered as an operator service, because they: 1) have a non-material result; 2) benefit a person other than the operator¹; 3) are actions and are not reduced to exemptions and benefits; 4) the provider does not guarantee the achievement of the expected result, the performance of management actions and their consumption by the customer occur simultaneously (the property of services non-

persistence); 5) the performer and the customer are equal subjects of civil law. Relationships in the management of activities are the essence of this service and determine its specificity. Management services differ from other civil law services not only in the purpose of providing them but also in the internal content, which manifests itself in the fulfillment of the control impact, including the activities of the customers themselves. Not all activities involve constraining the rights of the customer and expanding the rights of the performer based on the customer’s good will.

An operator management service, in our opinion, represents actions of the performer (an operator, a manager) authorized through the implementation of goal-setting, organizing and regulating impacts on the object managed (things, intellectual rights, property transfer, works and services), aimed at the operational support of the parameters specified by the customer, which determine the required state of the object under control.

Management Services Contract

The management services contract can serve as the core of the system of civil law contracts whose subject is the provision of services for the management of the transportation process. In this system, as in any other, regularity of interaction of parts with the whole is manifested. At the moment, there is no legal definition of the contract for the provision of operator management services, which creates difficulties in the process of qualifying the contractual relations being developed in legal practice. Therefore, it seems logical to formulate such a definition on the basis of the most significant features. This is also necessary to do since, irrespective of the management object, this agreement incorporates the essential features of all contracts of this type.

Meanwhile, the relations on the transfer of property, on the performance of works and on the provision of services can become the object of management. Thus, contracts for the provision of operator management services can be found in the field of property transfer. These are the contracts with commercial operators in the electricity market

¹ The actions that constitute the essence of management services are often performed not only in the interests of the customer but also in the interests of the third parties (beneficiaries). This includes not only cases where the government and local self-government bodies act as customers, acting in the interests of the population. It also concerns the relations with the participation of regional operators for capital repairs in apartment buildings, road passenger transport operators, etc.

and agreements with the operator of the railway rolling stock on the provision of property for use.

Performance of work can also be an object of management. It is possible to refer contracts of the regional operator for the organization of capital repairs in multi-apartment buildings to the contracts for the provision of services for management of works.

Intellectual rights may be an object of management services too. For example, in the Regulation of the Federal Antimonopoly Service of the North-Western District of 29.06.2009 in case No. A56-35805 / 2008, the court stated: As follows from Part 3 of Art. 1242 of the Civil Code, the basis for the powers of the organization for the management of rights on a collective basis is an agreement on the transfer of powers to manage rights, signed by such an organization with the right holder. Such contract can be concluded with both right holders who are members of this organization and those who are not¹.

The object of management services can be things. The trust management agreement is among such contracts. We can consider the contract of pledge management as a novelty of civil legislation. According to Art. 356 of the Civil Code of the Russian Federation, under the contract of pledge management, the pledge administrator acting on behalf of and in the interests of all creditors who have entered into the contract, undertakes to conclude a pledge agreement with the pledgor and (or) to exercise all the rights and obligations of the pledgee under the pledge agreement, and the creditor (creditors) – to compensate the pledgor for the expenses incurred by him and to pay him remuneration, unless otherwise provided by the contract. As O. V. Ruzakova notes, in foreign law this contract is known as a contract for providing collateral management services (Collateral Management Agreement). By its legal nature, the contract of pledge management is precisely a contract for the provision of services [2].

A management service may have the activity of a legal entity as its object. In our opinion, the subject of the agreement on the transfer of powers of the executive body of a legal entity is a management service. Meanwhile, there is no uniform view on the subject of this contract. Ruling of the Presidium of the Supreme Arbitration Court of the

Russian Federation of January 23, 2007 No. 11578/06 in case No. A11-7485 / 2005-K1-4 / 498² illustrates this fact. In particular, it touches on the issue of the legal qualification of the contract between the joint-stock company and the managing organization, according to which the full powers of the sole executive body were delegated to the managing organization. This possibility is provided for in Art. 69 of the Federal Law of 26.12.1995 No. 208-FZ “On Joint Stock Companies”³. Commenting on this decision, L. A. Novoselova points to the civil law nature of this agreement, which primarily determines the scope and nature of the powers of the manager to run the current activities of the joint-stock company, the remuneration and responsibility of the manager. In other words, the contract regulates the activities of the company management. However, L. A. Novoselova did not reach an exact qualification of the legal nature of the agreement in her study. She only joined the opinion of N. V. Kozlova and V. Kondratyev that this agreement is an agreement of a special kind, not directly named in the Civil Code of the Russian Federation, the subject of which are actions to provide civil legal aid and factual services.

It is interesting that some scientists identify this agreement with the contract of trust management of property [6, pp. 405–406]. However, L. A. Novoselova and A. V. Lebedev adhere to the well-founded view that the scope of powers of the trust manager for disposition of property differs from the competence of the management company. The latter, acting as the sole executive body, cannot have the full rights to disposition of the company’s property due to the restrictions established by the legislator [7; 9].

At the same time, the similarity of the powers transfer agreement of the sole executive body and the trust management agreement is obvious. Both contracts, being reimbursable, bilateral and consensual, are aimed at the implementation of management functions, in one case of the legal entity, in the other of the property. Both should be classified as management services contracts. The implementation of the functions of the sole executive body is

¹ Regulation of the Federal Antimonopoly Service of the North-Western District of 29.06.2009 in case No. A56-35805 / 2008. Access from the reference legal system “ConsultantPlus” (accessed 15.01.2017).

² Ruling of the Presidium of the Supreme Arbitration Court of the Russian Federation of January 23, 2007 No. 11578/06 in case No. A11-7485 / 2005-K1-4 / 498. *Bulletin of the Supreme Arbitration Court of the Russian Federation*. 2007. No. 4.

³ Federal Law of 26.12.1995 No. 208-FZ “On Joint Stock Companies”. *Collection of Legislative Acts of the Russian Federation*. 1996. No. 1. Art. 1.

the management of a legal entity¹. We find support to this fact in the academic literature. T. M. Zvezdina points out directly that the powers of the managing organization (manager) in the performance of the functions of the executive body are to manage the current or operational activities of the company [4]. I. V. Belousova expresses her position even more definitely. She considers the management contract to be “an independent type of contract in corporate legal relations, which can be attributed to contracts of participation in the management of the corporation” [1, p. 120].

One of the significant features of the contract for the provision of management services is its subject. It can be defined as the actions of the manager for the management of things, intellectual rights, or activities to transfer property, perform work and provide services.

Specificity of management actions, allowing for distinguishing the contract under study from other contracts for the provision of services, is as follows:

- 1) such actions are always connected with the implementation of the full powers by the manager;
- 2) the object of management (things, intellectual rights or activities of persons for transferring property, performing works and rendering services) is always stated in the subject in addition to the actions of the manager.

This specificity allows us to distinguish the management services contract from other types of contracts for the provision of services. We should consider its relationship with the agreements providing for the possibility of empowering another person. First of all, it is the contract of commission, which provides for the transfer by the trustee of his powers to an attorney (Art. 971 of the Civil Code of the Russian Federation). The will of the person exercising the powers (an attorney, a manager) is “double” and it consists of their own will and the will of the person who transferred these powers both in the contract of commission and in the management services contract [3, p. 317].

The key feature that makes it possible to delineate these agreements is the presence or absence of an authoritative power. The attorney, unlike the manager, does not have the right to give mandatory

instructions to the trustee or third parties. Meanwhile, the operator can give mandatory instructions (directives) to either the customer or participants in the relationships that are formed within the framework of the activity he or she manages. The contract between the legal entity and the manager under which the activities of the same legal entity are transferred to management can serve as an example of the first case. As an example of the second type we can consider the contract that the operator of direct mixed transportation of goods concludes with the sender, the operator being obligated to manage the conduct of carriers, owners of transport terminals, etc. In both cases, the powers are transferred to the manager exclusively on a voluntary basis by the persons whose conduct will be managed by the administrator.

Another feature of the management services contract that distinguishes it from the contract of commission is the nature of the actions carried out under the agreement. The attorney is obliged to perform only legal actions, while the actions of the manager may be actual or practical. Although the agency contract does not exclude the commission of acts of an actual nature, they can only be additional in relation to legal actions. As O. S. Ioffe notes, the agency contract is void if it only provides practical actions [5, pp. 510–511].

It should also be noted that the object of management is not specified in the subject matter of the contract of agency. The absence of such an indication does not prove that this contract is not entered into. A different situation develops in relation to the management services contract. If you do not specify the control object, then the contract will not have the consideration. For example, in the provision of services by the operator (operator services) to manage activities, the object of the contract should reflect not only the actions of the operator (manager) but also the activities that it manages. Thus, an essential element for this contract is the information that allows you to exactly determine the object of management. In this connection, we find the ideas of M. I. Braginsky and V. V. Vitryansky relevant. The scholars note that “the structure of the subject matter of the contract of property trust management is complex. It consists of two objects: the object of the first kind is the practical and legal actions of the trustee necessary for the management of property; the object of the second kind is the property transferred in trust” [3, p. 826].

¹ See: Ruling of the Federal Arbitration Court of the Volga District of 21.05.2009 in case No. A55-13261 / 2008. Access from the reference legal system “ConsultantPlus” (accessed 15.01.2017).

Finally, one more difference from the contract of agency should be considered. The management services contract does not provide for the transfer of powers to the administrator. Such powers are transferred under an agreement on the transfer of powers, or the manager is vested by law, decisions of meetings, constituent documents, etc. In any case, the empowerment of the manager precedes the conclusion of a management services contract. As it follows from the stated above, relations of direct representation do not arise from the management services contract. As a consequence, the relations arising from this contract cannot be divided into two different areas, which are characteristic of the contract of agency – internal (between the parties to the contract) and external (between the representative and third parties).

Most of the listed distinctive features let us separate the management services contract and the brokerage contract (Art. 1005 of the Civil Code of the Russian Federation).

It does not make sense to compare the subject of the contract under research with the subject of the trust and estate contract or with the subject of the pledge management contract, since the management services contract is a generic for these and some other contracts. It is not difficult to differentiate the management services contract from all other service contracts. It should only be added that, unlike services rendered under other civil law contracts, the management service does not contain one or two interrelated actions, but a whole complex of any actions (both practical and legal) [3, p. 829]. The legal relations arising from the management services contract are continuing, providing for the repeated performance by the manager of various actions, including one-off transactions.

When characterizing the subject of the management services contract, two other circumstances should also be noted.

First, the goal of management should be identified. In our opinion, provision of certain values of the parameters managed should be defined as such. The management is necessary in order to bring its object to the desired state, which is always determined by a set of certain parameters, the incompliance with which adversely affects it. The parameters can be established by the management services contract. However, it is quite possible that the parties to the contract fail to specify these parameters. In this case, the contract is

still recognized as valid, because the missing clauses are fully replenished. In the contract on the transfer of functions of the sole executive body, there may be no specific parameters of the activity of the legal entity which is transferred to the management. However, such a gap can be regulated under the legal norms or the provisions of constituent documents. Sometimes customs play an important role in solving this issue.

In order to more accurately specify the goal, it should also be pointed out that the activities of the manager should ensure the effective management of property or activities. At least, with respect to trust management, there is no proper performance of obligations by the trustee unless there is effective management [3, p. 827].

Second, it is necessary to specify how the powers of the manager are implemented. This occurs through the adoption of the necessary measures of a purposeful, organizing and regulatory impact on management objects. Any management is connected with the regulation, sequencing and organization. Organization in this case is a combination of the efforts of individuals, means of labor in the most optimal way for the performance of a specific task or performance of activities. Regulation is a certain intervention in the state of a managed object, providing a change in its parameters.

It is reasonable to turn to the question of the general characteristics of the management services contract. This contract should be qualified as a contract for compensation. Thus, there is a special feature in the management services contract, such as the independent property value of management actions. If in some particular contract such actions are carried out along with other actions, then they must be paid separately. The contract is also consensual. However, in cases when the contract is concluded for the property management, it can be real, i. e. it is considered to be in force from the moment when such property is transferred to the manager. Each of the parties to the contract has both rights and obligations, therefore the contract should be recognized as bilateral. The existence of managerial powers excludes the multilateral nature of this agreement. In cases where several persons have decided to implement joint management, the contracts concluded by them should be classified as organizational rather than “management” contracts.

A few words should also be said about the subjects of the contract. A person who does not

have managerial power cannot act as a manager. This underlines a special status of the manager. Such powers may be transferred at most to the manager at the time of the conclusion of a management services contract. Both legal and physical persons can be the manager. They must have legal capacity. Citizens must have active legal capacity. In cases provided for by law, persons acting as managers must have a license. For example, according to Clause 51 of Part 1 of Art. 12 of the Federal Law No. 99-FZ of May 4, 2011 “On Licensing of Certain Types of Activities”¹, entrepreneurial activity in the management of multi-apartment buildings is subject to licensing. The Supreme Court of the Russian Federation in its Ruling No. 89-AD16-12 of 02.12.2016 stated that the implementation of entrepreneurial activity in the management of apartment buildings with violation of the license requirement for the proper maintenance of common property in an apartment building entails administrative responsibility in Part 2 of Art. 14.1.3 of the Code of Administrative Offenses of the Russian Federation². For certain types of management services contracts, restrictions may be imposed by the law on the category of persons entitled to act as a manager. For example, in accordance with Art. 1015 of the Civil Code unitary enterprises cannot act as a trustee.

Management services can be provided not only to the customer but also to a third person acting as a beneficiary. For example, the contract can be concluded between the operator of railway lines and the operator of rolling stock, and the shipper will act as the beneficiary.

From the above, we can offer the following definition of a management services contract:

Under a management service contract, one party (executor) undertakes, in the interests of the customer or the persons specified by him or her (beneficiaries) for the fee and at the expense of

the client (customer), to exercise the powers available to him by taking the necessary measures of purposeful, organizing and regulating impact on the management objects (things, intellectual rights or activities of persons for the transfer of property, performance of work and provision of services) for the purpose to provide the parameters prescribed by the terms of the contract, by law or by custom.

For this type of contract, it is also advisable to establish the requirement similar to that which applies to the agency contract and for the relations of representation as a whole:

Execution of actions beyond authority by the manager requires subsequent approval of them on the part of the principal – the person who granted this authority.

The confirmation of authority is due only to the will of the principal and does not need the consent of the manager.

Operator Contract

The operator management services contract (operator contract) is a variety of this contract. Here we should name two main features that make it possible to single out this contract as an independent one. Firstly, it is the object of management, i. e. the corresponding activity. Operators in practice control the activity, or to be more exact, the conduct of people within this activity. Such management is possible by giving instructions mandatory for these persons, from which they cannot arbitrarily refuse, except for the cases provided for by the Civil Code. Secondly, such management is carried out promptly. Operators should respond in a timely manner to deviations in the specified parameters of the current activity. This circumstance served as the basis for using the term “operator services” in the title. An alternative to this term could be an operational management contract. However, to avoid a terminological confusion with the notion “operational management”, which is established in civil law, we chose a different term.

It should also be noted that the content of any management activity is planning, organizing, providing information, dispatching, monitoring, and

¹ Federal Law of May 4, 2011 No. 99-FZ “On Licensing of Certain Types of Activities”. *Collection of Legislative Acts of the Russian Federation*. 2011. No. 19. Art. 2716.

² Ruling of the Supreme Court of the Russian Federation of 02.12.2016 No. 89-AD16-12. Access from the reference legal system “ConsultantPlus” (accessed 17.01.17).

regulating. These circumstances should also be reflected in the formulation of the contract for the provision of operator services.

Since this contract is a kind of contracts for the provision of management services, it has all the characteristics of the latter. However, since this contract has an activity but not a thing as an object of management, it cannot be real.

Conclusion

The following definition of the contract for the provision of operator services for the management of activities (operator contract) is offered: *under a contract for the provision of operator management services (operator contract) one party (operator) for remuneration undertakes to exercise its powers by giving obligatory instructions to persons engaged in this activity, to maintain the parameters specified under the terms of the contract, by law or by custom.*

The operator contract may impose on the operator the responsibility to perform such operational management activities as planning, organizing, providing information, dispatching, and monitoring.

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