Salavat Dilmukhametov, *Dr. iur.***,** *senior lecturer*
Caspian University
Almaty, Kazakhstan

Non-defined contract: the concept and constitutive attributes

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Abstract. The structure of the non-defined contract meets the modern requirements of a market economy. The benefit of this structure is that it allows creating an inexhaustible number of different varieties of contracts thus exploiting to the full the potential of freedom of a contract. In law enforcement practice, due to a novelty of the contractual structure, difficulties arise in the qualification of a non-defined contract. If the non-defined contract is incorrectly qualified, it is later identified as a contract of a different type; such that, an incorrect legal regime is applied that may result in an unjust decrease in the autonomy of the parties, invalidity of the contract or the application of a set of other measures of civil liability. The article discusses the characteristic features of non-defined contracts, which are crucial in distinguishing them from defined contracts and allow for the qualification of the terms of the agreement in order to determine the type of contract.

Key words: non-defined contract, subject of the contract, uniqueness, legitimacy, objects of civil circulation.

Салават Дильмухаметов, *Dr. iur., сеньор-лектор*
Каспийский Университет
Алматы, Казахстан

Непоименованный договор: понятие и конститутивные признаки

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Аннотация. Конструкция непоименованного договора отвечает современным требованиям рыночной экономики. Преимуществом данной конструкции является, то что она позволяет создавать неисчерпаемое количество различных разновидностей договоров, раскрывая более полно потенциал свободы договора. В правоприменительной практике, из-за новшества самой договорной конструкции, возникают сложности в квалификации непоименованного договора. При неправильной квалификации непоименованного договора он впоследствии идентифицируется, как договор иного вида, в результате чего применяется неправильный правовой режим, который может повлечь несправедливое уменьшение автономии воли сторон, недействительность договора или применение комплекса иных мер гражданско-правовой ответственности. В статье рассматриваются основные признаки непоименованных договоров, которые имеют решающие значение при разграничении их от поименованных договоров и позволяют провести квалификацию условий соглашения в целях определения разновидности договора.

Ключевые слова: непоименованный договор, предмет договора, уникальность, правомерность, объекты гражданского оборота.

A non-defined contract is an agreement, in relation to which the law does not provide for positive civil-law regulation (requirements for form, material conditions, rights and obligations of the parties, etc.) even if it was mentioned in normative legal acts [1, 116].

To determine the legal essence of the contract, it is necessary to carry out its individualization through the analysis of its conditions and comparison with the statutory system of contracts.

The eventual result of the individualization of the contract is the determination of the exact version of the contract in order to apply the appropriate legal regime to it.

If, at the individualization of the contract, it is determined that the contract is defined, then for this type or subtype of the contract its special legal regime should be applied. If, at the individualization of the contract, it is determined that its individual

characteristics are new and not suitable for the defined contract prescribed by law, then such agreement is non-defined. The general legal regime is applicable to it.

In other words, the legal essence of the contract is determined by a set of individual characteristics and, in the process of individualization of a contract, it is necessary to determine these characteristics in the first turn.

Some scholars refer to the individual characteristics of the contract: subjects, the object, the subject of the legal relationship, the nature of the distribution of rights and obligations between the parties (one-sided or reciprocal), the compensatory nature or gratuitousness, the moment of entering into a contract (consensual or real), etc [2, 84].

One believes that the criterion of the subject of the contract may affect the conclusion, for example, a commercial or consumer contract, but this criterion does not allow meaningfully determining what specific type of a non-defined contract was concluded. Likewise, this refers to the compensatory nature or gratuitousness, the reality or consensual nature of the contract and all other civil rights of the similar dichotomous classifications, known in the science.

In our opinion, the individuality of a non-defined contract lies in its subject matter. In turn, the above-mentioned dichotomous divisions of contracts are auxiliary criteria when characterizing the substantial part of the contract.

The subject matter of the contract is an essential condition of any contract, since, without its indication, the contract is deemed void; the role of the subject is to determine the type of contract [3, 27].

This is also established by the Kazakh legislature. In accordance with paragraph 1 of Art. 393 of the CC of the RK, a contract is regarded as being concluded when the parties have reached agreement on all the material conditions, in the form required by the type of contract in question. Essential conditions are the conditions of the contract's subject matter, the conditions that are recognized as essential by legislation and are necessary for contracts of this type, as well as all those terms concerning which an agreement must be reached upon the request of one of the parties [4].

Conditions that are recognized as essential by legislation and are necessary for contracts of this type refer only to the defined contractual constructions. The conditions when an agreement should be reached on the request of one of the parties, with the exception of the subject matter of the contract, are additional essential conditions, so they may not exist.

In this regard, the only stable essential condition for a non-defined contract is its subject matter.

However, the Kazakh legislature did not disclose what is meant by the subject matter of the contract.

There is also no norm in the GCC [5] that indicates what is relevant to the subject matter of the contract. As K. Zweigert and H. Kötz point out, it is useless to look for norms in the GCC that would testify to the principal interest of the legislature to the social function of the contract, its content or consequences. The creators of the GCC did not consider this necessary [6, 6].

The Latvian legislator has considered this point. According to Section 1412 of the Civil Law of Latvia, the subject of a legal transaction may be both an action and abstention from it, and as an action aimed at establishing or transferring a proprietary right, and action for any other purpose. Everything that is established by Section 1412 and subsequent articles on the subject of the legal transaction extends to the subject matter of the contract (Section 1542 of the Civil Law of Latvia) [7].

According to A.A. Akhmedov, a non-defined contract is an agreement in respect of which at least one of the qualifying features of the direction, subject or object of the contract is not regulated by normative legal acts [8, 57].

In our opinion, the direction and object of the contract are included in the subject of the contract.

G.F. Shershenevich emphasizes that the content of the contact, or, as wrongly expressed by our law, the subject matter of the contract.is the legal consequence to which the will of two or more persons is oriented. The achievement of this goal implies, first, the validity of the contract, i.e. the availability of all the conditions under which the state power is ready to give legal assurance to the contract [9, 8].

In the literature, orientation is also understood as the target setting of the contract [10, 43]. In this regard, orientation is the purpose of the contract, which in turn is part of the subject matter.

The object of the contract may include all transferable objects of civil rights. Very often in the science of civil law, the subject matter of the contract is identified with the object of the contract. For example, some authors note that any property not withdrawn from civil circulation can be an object of the contract of sale [11, 9] or the subject of the lease agreement is an individually defined thing, both movable and immovable, which does not lose its properties in the process of its use [12].

M.M. Agarkov points out that in order to avoid confusion it would be better to rationalize the terminology and to regard anything that the behavior of the obligated person is directed to as an object of law, first of all the thing; the behavior of the obligated person, characterized by certain features (transfer of a thing, payment of money, the production of a certain work, refraining from infringing on a thing, refraining from publishing someone else's literary work, etc.), is called the content of the legal relationship [13, 23].

We share this approach and because the actions of parties to the contract are oriented to the object of the contract in aggregate, they constitute the material content of the legal relationship. The subject matter of the contract is the material content from the point of view of its legal relationship.

Material and personal non-material benefits and rights can be the objects of civil rights. Material benefits and rights (property) include: things, money, including foreign currency, financial instruments, works, services, objectified results of the creative intellectual activity, firm names, trademarks and other means of individualizing products, property rights and other property (P. 1, 2 of Art. 115 of the CC of the RK) [4].

Therefore, in the opinion of M.K. Suleimenov, the property is a multi-faceted concept. It is used, in particular, to denote: 1) the totality of things and material values held by a certain person (property or another proprietary right); 2) the totality of things and property rights to receive things or other property satisfaction from other persons (assets); 3) the totality of things, property rights and obligations that characterize the property status of the carrier (assets and liabilities) [14, 13].

Proceeding from the text of Art. 115 of the CC of the RK, the author suggests the following structure of property: things (including money and securities); works and services; intellectual property; property rights (right of claim); liabilities or debts [14, 16].

In turn, the Latvian legislature perceived the classical reception of Roman private law, dividing things into corporal (res corporales) and incorporeal (res incorporales). Through this division, civil rights objects are formed.

Incorporeal things are different personal, proprietary rights and liability rights, as far as they are constituent parts of property (Section 841 of the Civil Law of Latvia) [7]. Corporal things are either movable or immovable, depending on whether they can or cannot be moved from one place to another without external damage (Section 841 of the Civil Law of Latvia) [7].

The German legislature has consciously chosen very narrow definition and also consciously establishes in § 903 of the BGB that only certain movable and immovable things can be property items, but not incorporeal things [15, 1521].

Certainly, this does not mean that there are no rights to inventions, industrial designs, trademarks, artworks and services in Germany and, in particular, personal rights. The granting of these rights occurs at two different levels. First of all, there are

international conventions, which Germany joined, and special national laws, such as patent law, the law on industrial design, the law on the protection of semiconductors, the law on the protection of new plant varieties, the laws on trademarks and copyrights, as well as extrajudicial and, from the point of view of development of some aspects, very problematic right of the courts, as in the case of personal rights. On the other hand, it is universally recognized that, as stated in Art. 14 of the Basic Law, the constitutional concept of property, which gives the citizen a subjective right to protect himself from the state's invasion of his private life, includes the above-mentioned and other property rights [16, 75].

In the legal literature, the concept of objects of civil (property) circulation is also used. This concept includes almost all objects of civil rights (legal relations), except for personal non-property rights, which are inalienable and therefore cannot be the objects of circulation. The concept of objects of civil (property) circulation coincides with the concept of objects of property rights. Consequently, the concept of the object of civil (civil legal) relations is wider than the object of civil circulation [17, 295].

We support this point of view; the subject matter of the contract includes various objects of civil circulation (the objects of the contract).

At the same time, we believe that the subject of a non-defined contract includes the substantive actions (inactions) of the parties to the contract, which must meet the criteria of legitimacy and uniqueness.

Substantive actions (inactions) of the parties to the contract are the specifying terms of the contract, according to which the legal essence of one variety of a defined or non-defined contract can be distinguished from another.

Therefore, under the contract of property hiring (lease), the lender undertakes to provide the tenant with property for a fee in temporary possession and use (paragraph 1 of Art. 540 of the CC of the RK) [18].

The action to provide the tenant with property for temporary possession and use, and counter payment action will be substantial. In other words, the aforementioned substantive actions form the legal essence of the lease agreement.

One can give the opposite example: the contract's term that the property is transferred together with all documents related to it (documents certifying completeness, safety, quality of property, operating procedure, etc.) cannot be attributed to substantial, since such a term does not allow establishing the specific nature of the contract.

When forming the structure of substantive actions (inactions), their focus on a particular object of civil circulation is of significant importance.

Without an exact coordination of substantive actions (inactions) and identification of civil circulation objects, a non-defined contract will be deemed to be unconcluded.

For example, under a confidentiality agreement, the substantial inaction, that is, abstention from committing an action is referred to non-disclosure of confidential information to third parties, where confidential information is the object of the contract. In order to identify the object of the contract, the information should be specified more precisely. This information can be contained in financial statements, accounting registers, business plans, contracts, etc.

Similarly, in view of their specifics, other objects of civil rights must be identified.

A special significant feature of substantial actions (inactions) of the parties to the non-defined contract is a criterion of legitimacy.

The essence of this criterion is that the substantive actions (inactions) of the parties to the non-defined contract should not contradict the mandatory norms of law, moral and public policy.

So, the condition for assigning the appropriation of entrusted property of third parties, established in the contract, will be illegal, because such a condition of the contract contradicts the norms of the criminal legislation.

Therefore, the established contract's condition for secret theft of property from third parties will be unlawful, because such a clause of the contract contradicts the norms of criminal law.

It should also be emphasized, once again, that only civil rights objects involved in transferring could be the object of a non-defined contract. For example, the condition in the contract on the proliferation of nuclear weapons will undoubtedly be illegal, since atomic weapons are withdrawn from civil circulation.

The second essential criterion is the uniqueness of the substantive actions (inactions) of the parties to the non-defined contract.

The uniqueness of substantive actions (inactions) in a non-defined contract consists in the fact that they are not provided for in the norms-definitions or in other qualifying norms that define one or another version of the defined contract.

As an example, we can cite the norm-definition from § 433 of the GCC: under the contract of sale, the seller of the thing undertakes to transfer the thing to the buyer and grant him ownership of it. The seller of any right is obliged to give the buyer this right, and if it gives a basis for ownership of a thing, then to give him the thing. The buyer is to pay the agreed purchase price to the seller and accept the purchased item [5].

Consequently, the contracts of purchase and sale include, as a minimum, contracts that (a) mediate the transfer of a thing into ownership (b) in exchange for money. From a literal reading of the data of qualifying norms, it surely follows that in cases when a particular contract does not meet these criteria and is aimed not at transferring a thing into ownership for a monetary reward, it is not contrary to the law and not vicious, but simply does not obey special rules on contracts of sale. In connection with its compliance with the qualifying standards relating to other defined contractual models, such a contract may be subordinated to another special regime (for example, barter or gift agreement) or rendered in the category of non-defined contracts (if it does not meet the qualifying criteria of any of the defined contracts) [1, 122].

Therefore, substantive inactions, expressed in non-disclosure of confidential information to third parties, are not provided for in norm-definitions or other qualifying norms that identify defined contracts in the laws of Kazakhstan, Latvia and Germany. In this regard, they are unique.

Among other things, the substantive actions (inactions) of the parties to the non-defined contract may be unique if they are aimed at objects of civil circulation that are not provided for in the relevant legal regimes of the defined contracts.

For example, an agreement on a commercial penalty is different from a monetary penalty; it is only an object of civil rights, in the form of goods and money. Unlike the civil legislation of Germany and Latvia, the civil legislation of Kazakhstan provides only a monetary penalty. In this regard, the substantive actions established in the contract at the request of the goods, in the event of non-performance or improper performance of the obligation, in particular in case of delay in execution, become unique in its content in Kazakhstan.

As noted above, known dichotomous classifications of contracts are auxiliary criteria that can characterize the subject matter of the contract. In their essence, many of them characterize the substantive actions (inactions) of the parties to the non-defined contract. For example, under mutual or unilateral actions (inactions) of the parties to a contract, it is understood whether there is a counteraction (inaction) or it is not.

Therefore, the substantive inaction of non-disclosure of confidential information to third parties can be unilateral or mutual, i.e., with counteraction (inaction), for example, by not disclosing personal data, paying bonuses, etc. In this regard, the substantive inaction of the parties to the contract can be divided into unilateral or mutual, and they can be classified into gratuitous (without counter-provision) or compensated (payment of bonuses), etc.

In view of the above-mentioned, it can be stated that the subject of a non-defined contract includes legitimate and simultaneously unique substantive actions (inactions) of the parties to the contract aimed at certain objects of civil circulation.

Proceeding from the fact that the subject of a non-defined contract is the only specifying feature that distinguishes one version of a non-defined contractual model, the concept of a non-defined contract can be formulated on the basis of this feature.

A non-defined contract is an agreement of persons that generates a legal relationship; the essential content of it is the commission or abstention from the performance of legitimate and simultaneously unique substantive actions aimed at certain objects of civil circulation.

Список использованных источников

1. Карапетов А.Г., Савельев А.И. Свобода договора и ее пределы. В 2-х томах. – М.: Статут, 2012. – Т. 2: Пределы свободы определения условий договора в зарубежном и российском праве. – 453 с.
2. Цыбуленко З.И., Чаусская О.А. Проблемы соответственного применения гражданско-правовых норм // Актуальные проблемы гражданского права, гражданского и арбитражного процесса: материалы научной конференции. Воронеж, 15-16 марта 2002 года/ под ред. Е.И. Носыревой, Т.Н. Сафроновой. Ч. 1: Гражданское право. – 408 с.
3. Николюкин С.В. Купля-продажа товаров во внешнеторговом обороте. – М.: Юстицинформ, 2010. – 200 с.
4. Гражданский кодекс Республики Казахстан (Общая часть) от 27 декабря 1994 года / URL: http://online.zakon.kz/Document/?doc_id=1006061#pos=1;-307 [viewed: 31.03.2019].
5. Bürgerliches Gesetzbuch vom 18. August 1896 / URL: https://www.gesetze-im-internet.de/bgb/ [viewed: 31.03.2019].
6. Цвайгерт К., Кётц Х. Введение в сравнительное правоведение в сфере частного права. В 2-х томах. – М.: Международные отношения, 2000. – Том 1. Основы: Пер. с нем. – 480 с.
7. Latvijas Republikas Civillikums 1937.gada 28. janvārī / URL: https://likumi.lv/ta/id/72415-par-latvijas-republikas-1937-gada-civillikumu [viewed: 31.03.2019].
8. Ахмедов А.Я. Непоименованные договоры в гражданском праве России: Дисс. канд. юрид. наук. – Саратов, 2014. – 199 с.
9. Шершеневич Г.Ф. Курс русского гражданского права. В 2-х томах. – М.: Российский университет дружбы народов, 1994. – Т. 2. – 460 с.
10. Красавчиков О.А. Система отдельных видов обязательств // Советская юстиция. – 1960. – № 5. – С. 40-45.
11. Гражданское право: Учебник. В 3-х томах / Отв. ред. А.П. Сергеева, Ю.К. Толстого. – М.: ТК Велби, Проспект, 2005. – Т. 2.: 4-е изд., перераб. и доп. – 848 с.
12. Кушнир И.В. Гражданское право / URL: http://be5.biz/pravo/g029/107.html [viewed: 31.03.2019].
13. Агарков М.М. Обязательство по советскому гражданскому праву/ М.М. Агарков. – М.: Юридическое издательство НКЮ СССР, 1940. – 192 с.
14. Вещные права в Республике Казахстан / Под ред. М.К. Сулейменова. – Алматы: Жеті жарғы, 1999. – 360 с.
15. Palandt Bürgerliches Gesetzbuch. Beck'sche Kurz-Kommentare. Band 7. 62. Aufl. Bearbeitet von Dr. Peter Bassenge, Prof. Dr. Uwe Diederichsen, Prof. Dr. Helmut Heinrichs, Prof. Dr. Hans Putzo, Prof. Dr. Dr. h.c. Brudermüller, Wolfgang Edenhofer, Prof. Dr. Andreas Heldrich, Hartwig Sprau, , Walter Weidenkaff. – München: Beck, 2003. – S. 3800.
16. Книпер Р. Объекты гражданских прав по законодательству Республики Казахстан и Германии (сравнительный анализ) // Объекты гражданских прав: Монография / Перевод с немецкого; Отв. ред. М.К. Сулейменов. – Алматы: Юридическая фирма «Зангер», 2008. – С. 72-80.
17. Гражданское право. В 4-х томах. Общая часть: учебник для студентов вузов / Отв. ред. Е.А. Суханов. – 3-е изд., перераб. и доп. – М.: Волтерс Клувер, 2007. – Т. 1. – 720 с.
18. Гражданский кодекс Республики Казахстан (Особенная часть) от 1 июля 1999 года / URL: https://online.zakon.kz/Document/?doc_id=1013880 [viewed: 31.03.2019].

References

1. Karapetov A.G., Saveliev A.I. Freedom of contract and its limits. In 2 volumes. - M.: Statut, 2012. - V. 2: The Limits of Freedom of Determining the Terms of Contract in Foreign and Russian Law. - 453 p.
2. Tsybulenko ZI, Chausskaya O.A. Problems of Corresponding Application of Civil Laws // Actual problems of civil law, civil and arbitration process: proceedings of a scientific conference. Voronezh, March 15-16, 2002 / ed. E.I. Nosyrevoy, T.N. Safronovoy. Part 1: Civil Law. - 408 p.
3. Nikolyukin S.V. Purchase and sale of goods in foreign trade. - M.: Yustitsinform, 2010. - 200 p.
4. Civil Code of the Republic of Kazakhstan (General) dated December 27, 1994 / URL: http://online.zakon.kz/Document/?doc_id=1006061#pos=1;-307 [viewed: 03/31/2019].
5. Bürgerliches Gesetzbuch vom 18. August 1896 / URL: https://www.gesetze-im-internet.de/bgb/ [viewed: 03/31/2019].
6. Zweigert K., Kötz H. Introduction to comparative law in the field of private law. In 2 volumes. - M.: International Relations, 2000. - Volume 1. Basics: Trans. with him. - 480 p.
7. Latvijas Republikas Civillikums 1937.gada 28. janvārī / URL: https://likumi.lv/ta/id/72415-par-latvijas-republikas-1937-gada-civillikumu [viewed 03/31/2019].
8. A.Y. Akhmedov Non-defined contracts in the civil law of Russia: Diss. Cand. legal sciences. - Saratov, 2014. - 199 p.
9. Shershenevich G.F. The course of Russian civil law. In 2 volumes. - Moscow: Peoples' Friendship University of Russia, 1994. - T. 2. - 460 p.
10. Krasavchikov O.A. The system of certain types of obligations // Soviet justice. - 1960. - № 5. - p. 40-45.
11. Civil law: Textbook. In 3 volumes / Ed. ed. A.P. Sergeeva, Yu.K. Tolstoy. - M.: TK Velbi, Prospect, 2005. - V. 2.: 4th ed., Revised. and add. - 848 p.
12. Kushnir I.V. Civil law / URL: http://be5.biz/pravo/g029/107.html [viewed: 03/31/2019].
13. Agarkov M.M. Obligation under the Soviet civil law / MM. Agarkov. - M.: Legal publishing house of the National Committee of the USSR, 1940. - 192 p.
14. Real rights in the Republic of Kazakhstan / Ed. M.K. Suleimenov. - Almaty: Zheti zhary, 1999. - 360 p.
15. Palandt Bürgerliches Gesetzbuch. Beck'sche Kurz-Kommentare. Band 7. 62. Aufl. Bearbeitet von Dr. Peter Bassenge, Prof. Dr. Uwe Diederichsen, Prof. Dr. Helmut Heinrichs, Prof. Dr. Hans Putzo, Prof. Dr. Dr. h.c. Brudermüller, Wolfgang Edenhofer, Prof. Dr. Andreas Heldrich, Hartwig Sprau,, Walter Weidenkaff. - München: Beck, 2003. - S. 3800.
16. Kniper R. Objects of civil rights under the laws of the Republic of Kazakhstan and Germany (comparative analysis) // Objects of civil rights: Monograph / Translation from German; Ed. ed. M.K. Suleimenov. - Almaty: Law Firm "Zanger", 2008. - p. 72-80.
17. Civil law. In 4 volumes. General part: a textbook for university students / Ed. ed. E.A. Sukhanov. - 3rd ed., Pererab. and add. - M.: Volters Kluver, 2007. - T. 1. - 720 p.
18. Civil Code of the Republic of Kazakhstan (Special Part) dated July 1, 1999 / URL: https://online.zakon.kz/Document/?doc_id=1013880 [viewed: 03/31/2019].