

## КОНЦЕПЦИЯ И ХАРАКТЕРИСТИКИ (ОСОБЕННОСТИ) МЕЖДУНАРОДНЫХ СДЕЛОК\*

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В последние три десятилетия в России наблюдается рост международного сотрудничества в различных сферах жизни. Соответственно растет и количество судебных дел с участием иностранных предпринимателей и компаний. Законодательным и судебным органам приходится сталкиваться с большим количеством вопросов, требующих решения.

Текущее положение дел и тенденции в глобальной экономике зависят от международного распределения труда и от интенсификации обмена товарами и услугами производителей и потребителей из разных стран. Международный экономический цикл состоит из внешнеторговых сделок и относится к гражданскому праву. В то же время международные коммерческие сделки имеют ряд свойств и отличий, которые требуют изучения.

Кроме того, в российском законодательстве нет официального определения международного контракта, что делает исследование вопроса еще более своевременным и необходимым.

*Ключевые слова:* международный контракт, сделка, соглашение о внешней торговле, обмен товарами и услугами.

Current trends in the global economy are depending on the international division of labor and, as a consequence of the intensification of exchanges of goods and services between producers and consumers from different countries. International economic cycle is made of foreign trade transactions in nature close to civil law. At the same time, international commercial transaction has a number of features and differences.

In our article we made an attempt to give a review of the main features and concepts of international transactions and documents regulating them.

The term "international commercial transaction" is not used in the current Russian law. The concept of "foreign economic contract" is used mainly in normative acts. In the Civil Code, the term "international contract" is used.

Note that the Russian legislation does not have a legal definition of international contract. The concept of "international contract" in paragraph 3 of Art. 162, paragraph 2 of Art. 1209 of the Civil Code is mentioned only in relation to its form: non-simple written form of foreign trade transactions entail its invalidity, and its shape is always subject to Russian law, if the transaction involved a Russian legal entity or a Russian businessman.

V.A. Kanashevsky notes that the term "international contract" is collective<sup>1</sup>. This category covers not only the types of contracts such as international sale, financial leasing, international transportation, property rent, insurance, etc., but also a one-side deal, such as power of attorney. However, as the I.S. Zykin notes: "Practically the use of the term" transaction "in the relations of foreign trade agreement is meant"<sup>2</sup>.

Various scholars have identified various characteristics of foreign trade transactions, but they most often refer to "foreign element" that is, a foreign person or entity, and have commercial (shopping) character. To sum it up, transaction is often called an international commercial transaction.

At the present stage in the Russian doctrine the definitions of foreign economic transactions can be roughly divided into four main groups.

The first definition of foreign trade transactions is associated with two factors - a person or entity involved in the transaction and goods, works or services crossing the border.

Proponents of the second definition took as a basis business of parties in different states. The term "business of a party" came out of international agreements, in particular concluded at Vienna Convention on Contracts for the International Sale of Goods

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(1980) (hereinafter - the Vienna Convention of 1980)<sup>3</sup>, the Convention UNIDROIT (International Institute for the Unification of Private Law Rome - International Institute for the Unification of Private Law) on International Financial Leasing (1988)<sup>4</sup>, and ratified by the Russian Federation, and has a special meaning: it describes not a legal entity but a principal place of business parties, permanent place of business .

The third definition presents the views of those who determine foreign economic transaction by reference to different countries that act as counterparts. I.V. Eliseev highlights two features of trade agreements - a different country of the parties in such contracts and their commercial nature. Further, the commercial nature of transaction is understood as its specific purpose, which is productive consumption of the goods, not the destruction of its (good) value<sup>5</sup>.

The fourth group consists of the views of researchers who design the concept of foreign trade transactions by reference to its public legal characteristics. According to V.A. Donut, "the foreign trade agreement is regulated by rules of Russian, foreign or international private law agreement on economic agents, one of whom is a resident of the Russian Federation or, being a resident of the Russian Federation, has a foreign trade organization, which is relevant to the conclusion or execution of the contract, which aims to establishment, amendment or termination of civil service or civil rights and responsibilities in the implementation of any kind of foreign economic activity<sup>6</sup>. "Thus, an attempt is made to define civilistic concept of "international contract" through the attraction of the public legal nature material.

State of modern Russian law and international treaties of the Russian Federation give reason to agree with the view of I.S. Zykin and his supporters who believe that foreign economic transaction is "committed in course of doing business between the parties whose places of business are in different states." This position is supported by the following.

First, the term "business of a party" is used in a number of international agreements with Russia. However, the question of the admissibility of the definition of "international contract" by reference to international agreements aimed at regulating specific obligations remains open. These conventions although they are an integral part of the Russian legal system implicit in these terms only for the purposes of the agreement. However, the absence of other acts that allow to determine the desired concept, makes us use the provisions of international conventions.

Secondly, the category of "business of a party" is well known in the legislation of the Russian Federation. Thus, according to the Law of the Russian Federation on July 7, 1993 № 5338-1 «On International Commercial Arbitration" (hereinafter - the Law on ICA) in international commercial arbitration "may, by agreement of the parties to refer disputes from contractual and other civil law relationships arising in the foreign trade and other forms of international economic relations, if the business of at least one of the parties is overseas..."<sup>7</sup>.

Thirdly, p. 1211 of the Civil Code, which regulates the issues to be applied to the contract law uses the term "residence outside", "principal place of business outside", while the state registration of the parties is not decisive for the choice of law applicable to the contract, although it is taken into account in the choice of a "law of the country with which the contract is most closely connected."

Despite the fact that Section VI Part 3 of the Civil Code<sup>8</sup> does not specify a separate law to be applied to the external economic transactions, in fact the division of all transactions in foreign trade and in the Civil Code is preserved. Paragraph 3 of Art. 62 and Paragraph 2 of Art. 1209 of the Civil Code use the term "international contract". Note that articles 1210 - 1211 of the Civil Code and other deal with the law applicable to contracts, as to foreign trade contracts, and other agreements with a foreign element. Article 1217 of the Civil Code defines the law applicable to obligations arising from one-side transactions. Logically, it can be concluded that, because of the Civil Code, various categories - "international trade", "contract", and "deal" obviously have a different meaning. Generic for all of the above concepts is the concept of "contract", some of which are "foreign". Any "contract" is a "deal", but foreign economic transactions include only "foreign trade agreements".

Theoretical understanding allows to conclude that foreign trade transactions are transactions that mediate business, international exchange, which involve, first, the need to cross the goods, services, work over the Russian borders<sup>9</sup>.

Moreover, it seems appropriate to call these transactions - transactions, complicated by foreign element. However it is important to remember that not all transactions complicated by foreign element meet the definition of foreign economic transactions. Thus, the foreign element can appear, in particular, if one of the parties to the contract serves a foreigner, the performance of the obligations of the contract in full or

in part is in a foreign country, the contract is in respect of property located abroad, or one-way trade was made abroad, etc.

Thus, to define foreign trade transactions as a special type of transaction we need:

1. The presence of foreign economic relationship element. This refers to non-residency of one of the parties, that is, it belongs to a foreign country. Further, the membership of a foreign state is not understood as the legal identity of business, and its location.

2. Permissibility of the use of foreign and international law, and international trade and other foreign economic practices to regulate the relations arising from the transaction.

3. The use of recognized parties for settling the export-import operations in foreign currencies or in the evaluation of these currencies obligations arising from the contract<sup>10</sup>.

A distinctive feature of international legal commercial transaction is the close interaction of various system standards and legal accessories of international and national law. Trade relations involve the most unified legislation and the largest number of international agreements. In the legal regulation of foreign economic transactions there can be distinguished public law and regulation in private.

In the regulation of foreign trade transactions, in contrast to the regulation of domestic civil transactions public law plays a major role: special export-import laws, currency, tax and customs.

The most common regulation is contained in the federal law "On the basis of state regulation of foreign trade"<sup>11</sup>. Special export-import laws include regulations on quotas and licensing of foreign trade. The basis of the exchange control is formed by the RF Law "On Currency Regulation and Currency Control"<sup>12</sup>. Customs legislation is presented, in particular, in the Customs Code of the Russian Federation<sup>13</sup>, as well as in a huge number of regulations of SCC. The foundation of tax regulation of foreign transactions is Tax Code<sup>14</sup>.

Non-tariff regulation of foreign economic activities is performed under various laws and bylaws. They include Federal law "Export control"<sup>15</sup>.

Regulation of foreign trade transactions in private. The main type of foreign trade contract agreement serves the international sale of goods. Regulation of this type of contract is characterized in the present uniform, as in 1991, Russia's entry into force the Vienna Convention on Contracts for the Inter-

national Sale of Goods. 1980 Vienna Convention contains the following important points:

- legal concept of an international sale of goods contract;
- procedure for the conclusion of a contract between the absent parties;
- contract form;
- the main content of the rights and obligations of Seller and Buyer;
- parties' responsibility for any failure to perform their obligations under the Contract.

Acts regulating foreign trade transactions include also such a document as the Principles of International Commercial Contracts, developed and published in 1994 UNIDROIT (International Institute for the Unification of Private Law)<sup>16</sup>. UNIDROIT Principles are not an international treaty. According to the preamble the principles set general rules for international commercial contracts. They are applicable in the following cases:

- if the parties have agreed to use them in the contract;
- when the parties have agreed that their contract will be governed by "general principles of law", "customs and usages of international trade," or similar provisions.

Thus, in one case, the International Commercial Arbitration Court at the Chamber of Commerce in Russia (hereinafter - ICAC), with reference to paragraph 2 of Art. 9 of the Vienna Convention, used as custom Principles of International Commercial Contracts UNIDROIT, which, in the opinion of the Tribunal, expressed in international legal practice. The preamble to the Principles states that they can be used to interpret or supplement international uniform law instruments<sup>17</sup>.

Furthermore, Principles can be used: to address the issue that arises in the case where it is impossible to establish the relevant rule of the applicable law, to interpret or supplement international uniform law instruments, as a model for national and international legislation.

The main Principle content is reduced to the following provisions:

- freedom of parties to enter the contract and to determine its conditions;
- optionality of the written form of the contract;
- connection with the treaty and the possibility of change or termination only in accordance with its terms or by agreement of the parties;
- priority mandatory rules of the applicable law (national, international, supranational) over those principles;

- right of the parties, except as expressly provided in the Principles cases, to waive any of the provisions or change the action;

- principles interpretation takes into account an international character and goals, including the achievement of uniformity in their application;

- obligation for the parties to act in good faith and in accordance with the standards of fair dealing in international trade;

- relatedness of the parties to any usage to which they have agreed and to any practices which they have established between themselves, as well as any usage that is widely known and regularly observed by parties to international traffic in the trade, except in cases where the application of such usage would be unreasonable.

In foreign trade trade customs are actively used, most of which are unified and objectified in the form of documents developed by the most authoritative international organizations, including non-governmental. Among those are international rules for the interpretation of trade terms, developed under the auspices of the International Chamber of Commerce (more commonly known as INCOTERMS)<sup>18</sup>.

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Since practices are not codified, parties often have to prove their existence. In one of the cases considered by the ICAC<sup>19</sup>, the respondent did not recognize the claim on the grounds that the delivered goods do not conform to the specifications provided by the contract, and therefore the contract price to the plaintiff should be discounted. The defendant in this case relied on the existing business custom, which is used in the field of international trade, which could not be provided in the contract. However, the defendant failed to support the use of the practice in such cases, the international trade in the species product markdowns goods is not provided. ICAC said markdowns are provided neither by Vienna Convention, nor by Russian law.

In addition to national law, international treaties, international trade practices, the contract shall apply the rules defining previous practice of the relationship of the contract (eg, routine). Thus, in accordance with Part 2 of Art. 431 of the Civil Code, unless the treaty itself can not determine its content, it "must be clarified really common will of the parties with regard to the purpose of the contract". This takes into account all relevant circumstances, including pre-contract negotiations and correspondence, practice es-

tablished in the mutual relations of the parties, business practices, the subsequent conduct of the parties. "Apparently, practice is established in the relationship of the parties of the contract, in determining the content of its terms and conditions set by the legislator, even in the Russian business practices"<sup>20</sup>.

In international trade different types of documents are actively used. Among them are the documents developed by the European Economic Commission of the UN General Conditions of Sale of Goods between Organizations of CMEA member countries 1968-1988<sup>21</sup>. That is Manual of the international counter-trade agreements<sup>22</sup>, as well as other standard contracts for various types of commercial transactions (more than 30).

Standard contracts developed by relevant industry associations selling particular goods are widely used in international trade. These are standard contracts drawn up for every single type of product (corn, cotton, timber, etc.).

These are the main concepts, definitions and features of international transactions and documents regulating them.

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<sup>3</sup> The UN Convention on Contracts for the International Sale of Goods, 1980 // *Private International Law: A Collection of Documents / Comp. K.A. Bekyashev, A.G. Khodakov*. Moscow, 1997. P. 145.

<sup>4</sup> UNIDROIT Convention on International Financial Leasing (1988) // *Private International Law: A Collection of Documents / Comp. K.A. Bekyashev, A.G. Khodakov*. Moscow, 1997. P. 343.

<sup>5</sup> *Eliseev I.V.* Civil legal regulation of the international sale of goods. S.Petersburg, 2002. P. 48.

<sup>6</sup> *Bagel V.A.* Civil legal regulation of foreign economic activity in the Russian Federation: problems of theory, law and law enforcement: Monograph. Ekaterinburg, 1999. P. 45.

<sup>7</sup> Law of the Russian Federation of 07.07.1993 № 5338-1 (amended on 03.12.2008) "On International Commercial Arbitration" // *Bulletin of the Congress of People's Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation*. 1993. № 32. Art. 1240.

<sup>8</sup> The Civil Code of the Russian Federation (Part 3) from 26.11.2003 № 146-FA (as amended on 05.06.2012) // *Collected Legislation of the Russian Federation*. 2001. № 49. P. 4552.

<sup>9</sup> *Zabelova L.B.* Private international law. Training course. Moscow, 2009.

<sup>10</sup> Chudina S.Y. Legal regulation of foreign trade transactions. Summary of the thesis: Candidate. Jurid. Science. S.Petersburg, 2004. P. 11.

<sup>11</sup> Federal Law of 08.12.2003 № 164-FL (as amended on 06.12.2011) "On the basis of state regulation of foreign trade" // Collected Legislation of the Russian Federation. 2003. 15.12 (№ 50). Art. 4850.

<sup>12</sup> Federal Law of 10.12.2003 № 173-FL (as amended on 06.12.2011) "On Currency Regulation and Currency Control" // Collected Legislation of the Russian Federation. 2003. 15.12 (№ 50). Art. 4859.

<sup>13</sup> The Customs Code of the Russian Federation of 28.05.2003 № 61-FL // Collected Legislation of the Russian Federation. 2003. 02.06 (№ 22). Art. 2066 (as amended on 2010.27.11).

<sup>14</sup> The Tax Code of the Russian Federation (Part 2) from 05.08.2000, № 117-FL // Collected Legislation of the Russian Federation. 2000. 07.08 (№ 32) Art. 3340 (as amended on 2009.28.04).

<sup>15</sup> Federal Law of 18.07.1999, № 183-FZ (as amended on 06.12.2011) "On export control" // Collected Legislation of the Russian Federation. 1999. 26.07 (№ 30). P. 3774.

<sup>16</sup> Principles of International Commercial Contracts UNIDROIT [Russian translation of the official full version

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<sup>17</sup> The Case. Number 229/1996, judgment of 05.06.1997 // Arbitration. 1997. № 9. P. 44.

<sup>18</sup> International rules for the interpretation of trade terms Incoterms 2000 // INCOTERMS: official review of the ICC publication number 560 / Follow. Ed.; Per.: Marjatta Punin // The law and business. 2005. URL: <http://store.iccwbo.org/incoterms-2000>.

<sup>19</sup> The Case. Number 478/1996, judgment of 25.06.1998 // Herald YOU. 1998. № 8. P. 30.

<sup>20</sup> Ardashev V.L., Kanashevsky V.A. The form and content of the foreign trade contract. Ekaterinburg, 2002. P. 52.

<sup>21</sup> General conditions for the supply of goods between the organizations of the CMEA 1968-1988 (PMO CMEA 1968-1988) // Contract for the International Sale of goods. Moscow, 1998. P. 53.

<sup>22</sup> UNECE Guidelines on International Treaties of the countertrade (adopted in Geneva in November 1989 at the 35th session of the Working Group on International contracts for the supply of industrial products) // Private International Law. Existing regulations. Moscow, 1997. P. 203.

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