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LEGAL REGULATION ANALYSIS OF THE OPTION CONTRACT IN THE ANGLO-AMERICAN LEGAL SYSTEM

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Abstract

This article provides a historical and legal analysis of the legal regulation of the option contract institution in the Anglo-American legal system. In the common law system, contract, along with custom, precedent and other legal acts, is one of the most important and oldest regulators of public relations. It serves as a tool, used in society, for reconciling will and interests, this follows from the analysis of its characteristic basic features, specified in the Anglo-American legal tradition. The author suggests to analyze the process of formation and application of the option contract in the countries of the Anglo-American legal system. It is established that in the United States of America and Great Britain an option contract is considered as a kind of a conditional contract and an irrevocable offer. The analysis of the legal regulation of the option contract in the Anglo-American legal system establishes that the terms “option” and “option contract” are considered equivalent. The article presents the most common theories in the common law countries in the field of studying the institution of the option contract – this is the theory of a conditional contract and the theory of an irrevocable offer, the differences of which are that in the first there is a contract, the performance of which is postponed until the holder of the option exercises his right. In the second theory, the option itself serves as an offer and an agreement containing a promise not to withdraw the offer.

Keywords: Option, option contract, conditional contract, legal system.

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1. Introduction

The relevance of the study of the legal nature of the institution of the option contract in the countries of the Anglo-American legal system is caused by various reasons, including the widespread use of this contractual design in business and corporate practice.

The Anglo-American legal system, or the common law system, was historically created in England, the USA and such British dominions as Canada, Australia, New Zealand, etc.

The Anglo-American (common) law is characterized by the absence of branches, regulated by codified normative acts, and the presence, as sources of law, of a considerable number of judicial and administrative decisions-precedents that serve as models in adjudicating subsequent similar cases, under consideration of other courts and administrative authorities. In addition to such precedents, legal doctrines, legal customs, laws (statutes) serve as sources of law in the Anglo-American legal system (Zenin, 2018).

In the modern Anglo-American literature, there are multiple definitions of the concept of contract, developed, historically, under the influence of both Roman law and the common law itself.

For example, in an encyclopedic dictionary devoted exclusively to American law, the contract is characterized as "a legally recognized and legally secured agreement of the parties regarding an exchange (of material or other benefits) now or in the future". In Restatement of the Law of Contracts (Ch. I, § 1), the official text of which appeared at the federal level in 1952, and then "in a modified form was enacted in all states of the USA", the contract is interpreted as "a promise or a number of legally recognized promises of parties whose violation is the basis for filing a lawsuit" (Wheeler & Shaw, 1994, para. 4).

In the Anglo-American law, the philosophical portrait of the contract, as noted by Osakwe (2004), consists of the following twelve fundamental principles:

> *the moral basis of the contract is a promise, a promise without a counter provision is morally vain, economically meaningless and legally void, a moral promise only is considered legally void, the social function and historical mission of the contract are to regulate public relations in the market of goods, works and services, the moral task of the law of contracts consists in enforcing fulfillment of private promises and implementation of beneficial functional oversight of the contractual process, wrongfulness of the promise aim has no legal significance in determining the legal purpose of a contract, the motive of parties to the contract has no legal significance in determining the validity of the contract; the main and morally correct task of civil liability for breach of contract is to compensate for losses incurred; the contract has the force of law not only for its participants, but also for an indefinite number of third parties, and, therefore, is a mandatory (normative) source of law for the court.* (Osakwe, 2004, p. 79)

Speaking about the essence of the contract and law of contracts, operating within the framework of the common law system, it is important, among other things, to emphasize once again that an indispensable attribute of a contract in this system is, firstly, a promise as "an expression of an intention to commit an action or to refrain from acting made in such a way that the person to whom it is addressed understands that the person who made it has undertaken an obligation", or rather, an exchange of

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promises, considered by Western authors as "the main driving force of any economic system" which is "fundamentally based on free enterprise." And, secondly, the legal support of the contractual obligations of the parties arising from this mutual promise is very important (Kolpakov, 2015).

In this regard, the scholarly literature quite rightly points out that, by virtue of the tradition that has developed in the Anglo-American law, the contract law applies only to reciprocal, mutual promises, which are considered as obligations of the person and persons regarding their future behavior. In those cases where the promise on the one hand is not accompanied by a counter promise ("counter security") on the other, the contract will not have any legal consequences (Kolpakov, 2015).

The moment of conclusion of the contract in common law countries is considered the system of dispatching an acceptance.

The common law, like the law of the Romano-Germanic system, assumes that an acceptance obviously must be received by the offeree. However, in the laws of England, as well as in the United States, there is a significant exception for acceptance dispatched by mail or telegraph. The acceptance is then considered effective, and the contract, respectively, concluded at the time of dispatching the acceptance (mail-box theory). (mail-box theory). The mail-box doctrine is not applied when concluding a contract by telex; it is interpreted by the courts of the indicated states strictly restrictively (Pozdniakova & Diukarev, 2018).

Based on the fact that contracts within the framework of the Anglo-American law arise and are implemented only on the basis of laws and in accordance with laws, it should be concluded that the legal nature and nature of contract acts do not arise on their own due to their respective institutional and functional features, being derivative of the legal nature, of their underlying laws. It is the laws, and with them the judicial precedents, which, like the laws, as researchers rightly note, underlie the Anglo-American law of contracts, as a result of which "the law of contracts still remains fundamentally precedent-based", and, besides that, to a certain extent, the custom with which contractual acts are often closely interrelated – it is these common law sources that ultimately determine both the legal nature, character and legal framework within which the contracts, the law of contracts and contractual relations arise and develop. It is these acts that initially "lay down" a certain regulatory resource in the contract and assign a strictly defined place to it in the system of other regulatory acts.

2. Problem Statement

In this work, the author looks for a solution to a number of problems, in particular: to analyze the historical dynamics of the process of formation and establishment of the option contract in common law countries; to identify legal models of the option contract; to investigate the state of the problem of legal regulation of the option contract in the Anglo-American legal system.

It seems appropriate to analyze the process of formation and application of the institution of options law in the countries of the Anglo-American legal system using the example of the USA and Great Britain.

In the Anglo-American legal system, the terms "option" and "option contract" can be considered equivalent, they are understood as a contract under which the seller or buyer acquires the right to make the sale or purchase of any asset / security at a specified price. An option is formalized by two parties.

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The party buying the option acquires the right to choose to conduct a transaction or not, the selling party, accordingly, provides this right. The buyer pays a premium at the time the option is established (Stepanian, 2015).

If the buyer of an option decides to perform the transaction, the seller must fulfil the obligations arising from the contract. If the buyer did not express such a desire, then upon the expiration of the option, the seller contracts out of all obligations.

The issue of the legal nature of the option contract continues to be debatable. The dual nature of this institution, understood both as an irrevocable offer and as an agreement, creates certain problems for the law enforcer.

Here are the approaches to understanding the option contract that have developed in the English judicial practice:

1) the model of a bilateral agreement;

2) the model of a unilateral contract;

3) the model of a conditional contract;

4) an irrevocable offer;

5) sui generis construction (Stepanian, 2014).

3. Research Questions

It seems appropriate to analyze the process of formation and application of the institution of option law in the countries of the Anglo-Saxon legal system, using the example of the United States and Great Britain (Iunusova, 2018). The main provisions governing the conclusion of an option contract in the United States are presented in the so-called United States Code (Wheeler & Shaw, 1994).

Paragraph 87 (1) (a) of the Code stipulates that the offer is a binding option contract, if it is created in writing, signed by the offeror, it contains an assignment consideration for the offer and offers an exchange on fair terms at a reasonable time (Wheeler & Shaw, 1994).

Consequently, in the United States, an option contract is understood as an irrevocable offer with a signing by both parties and entry into force upon receipt of acceptance from one of the parties within the contractual period.

On the other hand, when the option agreement is gratuitous and drawn up in writing without a seal, it does not serve as a legally binding and, in essence, is a revocable offer.

In accordance with the said rule, an offer can be withdrawn at any time prior to its acceptance, even provided that the offeror undertakes not to withdraw it within the agreed period, unless this promise is provided with assignment consideration. When an option agreement is not a sealed contract or is not provided with an assignment consideration, it turns out to be nothing more than a revocable offer (Stepanian, 2015).

As Vasiliev notes, the option agreement has received the widest practical application in the United States, since it is actively involved in the field of traditional transactions, such as the promise of the assignment of rights, purchase and sale, exchange trading, the provision of agency services, property rental and more specific ones, such as an agreement with a lawyer on provision of services, an agreement

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between owners on joint water use, an agreement between athletes and promoters (as cited in Stepanian, 2014).

In the works of English and American authors, it is indicated that an option contract is considered to be such a contract, which is conditional on the promise not to withdraw the offer that arises after it is provided with an assignment consideration by the offeree.

In order for the offer to be considered irrevocable, it is required to be formalized as a sealed document accompanied by an assignment consideration. In some cases, the irrevocability of the offer can be directly established by law. For example, the English company law of 1985 established that a statement made to a firm to acquire its shares under specific circumstances could not be withdrawn before the expiration of the period specified in the offer.

The content of the acceptance should not differ from the offer, this is one of the main requirements for it. If the acceptance makes any additions or changes to the offer, this is equivalent to creating a new offer.

Acceptance can be carried out in any form, this includes implicative actions, except in cases where a special form of acceptance is prescribed in the offer. As a general rule, silence is not considered an acceptance. Although in certain situations it can be considered an acceptance, for example, if such a form of consent is usual, traditional in the existing relations between the parties (Stepanian, 2014).

A duly completed acceptance of an offer means the conclusion of a contract. Between those present, the contract is considered concluded at the time when the parties have come to an agreement on all significant issues in the form required by law, while it is more difficult to determine the moment of conclusion of an agreement between absentees due to separation of the offer, acceptance, notification of acceptance in time. As Corbin (1913) believes, an option contract can be sealed or not sealed, can be gratuitious and non-gratuitions, unilaterally binding and commutative. The practical significance of determining the moment of conclusion of the contract is that it has important legal consequences:

1) from the moment of the conclusion of the contract, the parties have rights and obligations, in particular, for some legal systems, the acquirer acquires ownership right at the time of the conclusion the contract;

2) at the time of the conclusion of the contract, the legal capacity of the persons who concluded it shall be established if doubts arise on this issue;

3) at the time of the conclusion of the contract, the legislation applicable to the contract is established, if in the process of concluding the contract, the current law was changed;

4) depending on the moment of conclusion of the contract, the issue of the place of its conclusion is also determined, which is of particular importance in international trade, since the issue of applicable law is often resolved taking into account the place of the conclusion of the contract (Stepanian, 2014).

4. Purpose of the Study

The purpose of the work is to formulate a holistic scientific concept of an option contract in the Anglo-American legal system as a type of standard contractual design, based on an analysis of the legal regulation of the option contract institution.

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5. Research Methods

The methodological basis of the study is the principles of historicism, objectivity, contradiction, systemacy. The applied principles are disclosed and implemented through the application of historical and legal, comparative legal, formal-logical, technical and legal methods, the method of system analysis, etc. In this study, these methods are expressed in a comprehensive and objective study of existing legal definitions of an option contract, highlighting its inherent relationships, determining the presence or absence of contradictions, both in the normative definitions of option contracts and in a systemic relationship with other regulatory rules of civil law.

6. Findings

In the course of the study, it was found that the most common theories in England and the USA in this area are the theory of a conditional contract and the theory of an irrevocable offer. They differ in that in the first – there is a contract, the execution of which is postponed until the moment the holder of the option exercises his right. In the second, the option itself serves as an offer and an agreement containing a promise not to withdraw the offer (Iunusova, 2017).

On this basis, in order to recognize the option contract concluded, two components are required: the promise not to withdraw the offer and consideration. This conclusion can be illustrated by excerpts from court decisions:

- An option is a continuing offer that can be withdrawn at any time prior to acceptance if it is not supported by a consideration. Provided with an appropriate consideration, the option becomes irrevocable.
- An option is a unilateral agreement binding one party from the date of the transaction, according to which one party transfers something and another party acquires something before the option is exercised by the recipient (Farnsworth, 2003).

It should be borne in mind that the very construction of an option premium as a consideration under the option agreement was invented in the Anglo-American legal system in order to circumvent the institution of a revocable offer existing in the common law (Kokorina, 2015).

The Anglo-American legal system also provides options such as sale on trial/approval, redemption, etc. (Stepanian, 2014).

A feature of the Anglo-American option is that it can be exercised on any day before the expiration of the contract.

It should be noted here that the problem of determining the term for the possible use of the right under the option agreement in the Anglo-Saxon legal family was not resolved immediately. For example, the holder of an option could wait many years until the moment of the decision whether to use it; observing whether or not the value of the specified property is growing, etc. (Stepanian, 2014).

It is widely practiced to include an option in the agreement of shareholders (participants) both as an independent provision and in the form of exercising property rights provided for by this agreement, namely: drag-along rights, catch-up clause – the right to a part of the profit from the subsequent sale of

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shares by their acquirer (possibly in the form of a call option)); tag-along rights – the "right to follow", demand rights – the right to demand a public offering of company shares under certain conditions, piggy-back rights (co-sale agreements) – the right of other shareholders to demand from the buyer of shares of another shareholder the purchase of all shares (this may be provided for in the form of a put option).

7. Conclusion

Thus, after analyzing the legal regulation of the option contract in the Anglo-Saxon legal family, it is established that the terms "option" and "option contract" are considered equivalent..

In the UK and the USA, an option contract is considered as a kind of conditional contract and an irrevocable offer.

An option contract is understood as an irrevocable offer when signed by both parties and entry into effect upon acceptance by one of the parties within the contractual period. However, it was revealed that if an option contract is gratuitous, drawn up in writing and does not contain a seal, or there is no reciprocative performance of the offer, it is not legally binding and, in essence, is a revocable offer. That said, an option contract will be considered valid only if the acceptance does not transform the conditions of the offer.

It was revealed that the peculiarity of the Anglo-American option contract is that it can be exercised in any day before the expiration of the contract.

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