

Participation in Electronic Tenders on Bankruptcy Through an Intermediary: Law-Implementation Problems

Yelena V. Lunyeva and Zavdat F. Saphin
Kazan Federal University, Kremliovskaya Street 18, 420008 Kazan, Russian Federation

Abstract: The study covers the types of juristic agencies with regard to participation in electronic tenders on bankruptcy in the Russian Federation. It has been concluded that participation in electronic tenders through the intermediary is possible with the help of contract of commission, agency contract and mixed contract. It has been found that the most acceptable type of juristic agency in electronic tenders on bankruptcy providing an optimal balance of private and public interests is commission agency service. Agency contract in commission variant allows to reveal agent's legal relationship at the stage of filling of an application for participation in electronic tenders on bankruptcy. According to commission contract of agency, the participation in electronic tenders of the agent in the interests of principal is disclosed only after the results of electronic tenders to have been defined. It has been proved that commission agency contract promotes conscientious behavior of agent within the framework of procedure of electronic tenders on bankruptcy and makes it possible in advance to show presence or absence of interest of the principal in a debtor, creditors, administrator.

Key words: Bankruptcy, electronic tenders, contract of commission, intermediary, contract of commission agency, mixed contract, contract of agency

INTRODUCTION

The law of Russian Federation (hereinafter RF) do not contain prohibition of participation in electronic tenders on bankruptcy through professional intermediary (representative, solicitor, authorized person, commission agent, agent). Considering the existing rule known to everyone in private law "what is not prohibited by law is admitted", provided that the public and private interests are not violated, than the use of the legal mechanism under consideration becomes admissible. At the same time, the emerged gap in legal regulation enables the organizer of tenders to refuse an application to be filed by the representative on the grounds relating to making up of a document about intermediation or not to make the sales contract with the principal. The questions about the forms of legal representation and also about the necessity of tendering additional documentation concerning rendering of intermediary services and the application for taking part in electronic tenders on bankruptcy remain open-ended. It is not determined exactly the subject of law (intermediary or principal): whom the contract about earnest money is concluded with, who pays the earnest money, who the winner of the tenders is, whom the contract of debtor's property sale is concluded with.

MATERIALS AND METHODS

The Russian civil legislation provides three juridical intermediations: agency, commission and agency service. The contractual construction enabling to achieve the needed legal result in the sphere of participation in electronic tenders on bankruptcy through professional intermediary was ascertained on the basis of analysis of the researches of the Foreign (Brown, 2001; Crahay, 1991; Saintier and Scholes, 2005) and Russian (Braginsky and Vitryansky, 2002; Wohers, 2006) jurisprudents.

The methodological basis of investigation was dialectical method that allowed to understand in indissoluble unity and general relatedness the essence of juridical intermediation in electronic tenders on bankruptcy. Logical methods in the form of analysis and synthesis, induction and deduction, comparison and generalization, analogy and typology were conductive to studying the questions raised in introduction. Technical method allowed to get a clear idea of essence and significance of legal norms regulating tendering in electronic form on the disposal of property in the course of procedures applied bankruptcy case. The law and comparison method under domestic legislation was used to reveal the most effective model of agency service on participation in electronic tenders on bankruptcy.

RESULTS AND DISCUSSION

The commission contract: On the basis of contract of commission the attorney (intermediary) acts on behalf of and for account of the principal (truster) which does not contradict the merits of relations by purchasing the property of debtor at electronic tenders on bankruptcy. Rights and obligations under contract of sales of debtor's property within the framework of procedure of electronic tendering on bankruptcy arise in the principal per se, omitting the attorney. The structure of commission contract implies conclusion of the contract of pledge and also pay of earnest money on behalf of and at the expense of the principal. In case of allowing the principal to be a winner of tenders, it will be him to conclude the contract of sales of the debtor's property.

Take notice that the contract of commission contains not only the elements to be obligatory for authorization but the other conditions as well (such as, the price of intermediary services, liabilities of parties, confidentiality and so on) that are peculiar to the very contract. In this connection, the contract of commission is likely to do duty of warrant of attorney. The main thing is all the necessary essential parts of a written authorization the warrant of attorney to be reflected in the contract of commission (Garmazhapov, 2015). Therefore, by vesting appropriate powers in professional intermediary for participation in electronic tenders on bankruptcy it is more convenient not to draw up a warrant in relation to which a special form and essential requisites are required but to conclude the contract of commission in a simple written form where powers of the attorney are described in detail.

The lack of the considered contractual regulation consists in the fact that the subject of the contract of commission is made by juristic acts. As the agent of a participator of "bankruptcy" tenders, apart from the acts after which legal effects come, must also render the services of factual character (such as request for additional documents and information of the property being put up to auction on bankruptcy, etc.).

Therefore, the contract of commission allows to participate in electronic tenders on bankruptcy via the third party. But such contractual construction restricts the intermediary in his acts on participation in "bankruptcy" tenders: he can perform actions relevant in law on behalf of or at the expense of the principal.

The contract of commission agency: The structure of commission agency seems to be not fully apt for participation in electronic tenders on bankruptcy by mesne. The subject of such contract consists, as a rule, of

a transaction of purchase and sale of the property of committent, whereas for the purchase of objects of civil rights at the electronic tenders on bankruptcy, it is necessary to do a series of the other actions as well (request information of a lot, filing of an application and the other documents, conclusion of the contract of earnest money, signing of electronic documents with digital signature and others) directly not reduced to transaction.

Moreover, the agent always acts in his own rights, not naming the committent, in whose interests he acts. Therefore, the bankrupt in the person of official receiver who he concludes the contract with implies exactly him to be a purchaser of the object of civil rights. If that is so, the set of documents including information of presence or absence of interest is to be presented in the name of the commission agent. In compliance of Item 19 Article 110 of the Federal Law (hereinafter FL) "On insolvency (bankruptcy)" the contract of sales is concluded with the winner of tender.

Therefore, the purchaser on the contract of sales of the debtor's property will be the commission agent who simply cannot delegate his powers and obligations (assignment or conversion of debt.) to the principal in the normal way. Therefore, it becomes pointless to consider the juridical intermediation with regard to electronic tenders on bankruptcy.

Major difficulties in use of the contract of commission agency in the sphere of electronic tenders on bankruptcy are caused by the fact that such intermediary contract concerns mainly the things defined by genetic features (Wolters, 2006). One knows the difficulties with the application of the contract of commission agency for the purchase and sale of the property. So, Information Mail of the Presidium of the Supreme Arbitration Court (hereinafter SAC) of the RF of November 17, 2004 No. 85 "Review of dispute resolution practice on a commission agreement" states that it is impossible for the commission agent to independently register the transfer property right to real estate and thereby to complete purchase and sale (since specificity of its legal regime).

Thus, the construction of the contract of commission agency, from our point of view, is not apt for completion of the purchase of the objects of civil rights at sales on bankruptcy through a professional intermediary. The contract of commission agency does not admit to participate in auction, tender or public bid on the disposal of the debtor's property on behalf of another person, as it does not lead to desirable legal result does not create in the presented subject of the rights and obligations on purchase and sale.

The mixed contract: In the researched field, there is no significant obstruction in use of the mixed contract of rendering consulting, information, analytical, representation and other services on participation in tenders on bankruptcy with subsequent acquiring the object of civil rights but the indicated contract has rather complex structure and includes the elements of the contracts of commission agency and paid services. It is understood that to the corresponding parts of the mixed contract it will be applied the rules of the contracts the elements of which it contains. On the basis of the indicated contract, it will be needed to give to the customer a warrant to be properly drawn up with powers to take part in the deal-making process on the purchase of the debtor's property on behalf of and in the interests of the principal by using electronic digital signature of the authorized person. It should be recognized that the mixed contract will even more complicate the complex legal regulation of the relations on representation of interests of the client in the process of the disposal of the debtor's property at electronic tenders on bankruptcy.

The agency contract: The juridical essence of agency relations consists in the fact that one subject (the agent) concurs to act to the benefit of and under the supervision of the other (the principal) (Barnes, 1978; Rosque, 1997; Dennis, 2001). The first one creates obligations for the second by his acts and/or omission to act (Bowstead, 1924). As a rule, the construction of the agency contract is used in the cases when it is impossible to manage with the traditional contracts of commission, commission agency or paid services (Grigoryeva, 2015). The agency contract is more "flexible", as makes it possible for the agent to provide not only legal but factual intermediary services. It is noted in the literature that expansion of the subject of contract of commercial agency service at the expense of the other acts (search for clients, negotiating and so on) (Crahay, 1991) has a positive influence on legal regulation or intermediary relationship (Saintier and Scholes, 2005). At the same time, acting legally and factually, the agent must "represent fairly the interests of the principal" (McCarty and Bagby, 1990). Fiducial features, characteristic for the agency contract, means all the factual acts to be based on "the highest and trustful principles of the morality" (Brown, 2001). The objective of the agency contract in the considered area is the participation in electronic tenders on bankruptcy but not the purchase of the property. It means that in this situation one cannot manage without a special confidence of the principal in the agent.

Judiciary Law confirms the possibility of participation in the tenders on bankruptcy through the third person on

the basis of the concluded agency contract. Thus, in Determination of the SAC of the RF on September 25, 2013 in the Case No. A03-16717/2012 it includes the conclusion that neither the norms of the FL "On insolvency (bankruptcy)", nor the norms of the Civil code of the RF do not contain ban on participation in tenders through the agent (Anonymous, 2013).

In the Russian legislation, there exist two models of the agency contract: the contract of guarantee and commission. It stands to reason that the indicated types of agency services are characterized by different nature of legal ties which "the juridical regime and obligations followed from each party depend on" (Closset and Silence, 1967). Ambiguous is the situation on the determination of the stage of participation in tenders on bankruptcy at which it is necessary to expand the agency relations to sustain the legal procedure on tendering: before application for participation (guarantee agency service) or after signing of the protocol on the results of auction, tender or public bid (commission agency service).

Commission agency service is based on the fact that the agent acts in his own name but at the expense of the principal. Under such conditions application for participation in electronic tenders on bankruptcy is filed by the agent in his own name, the earnest money is paid by the agent (considering that the principal provides for the applied cost). Notwithstanding that the agent acts in the interests of the principal, his acts are objectified beyond as though the first acts in his own interests and as an independent subject of civil legal relationship. In consideration of the other persons (the organizer of tenders, the rest of the participants of tenders, creditors and so on) the agent takes part in electronic tenders on bankruptcy with the aim to acquire the object of the civil rights to his own possession and not for somebody else. In this case, the winner of tenders is recognized the agent but not the principal. But, who is the person the sales contract is concluded with the agent or principal?

Judicial practice on this issue is ambiguous. One justice considers that the winner (the agent) after sizing up of the tenders informed that he acted in compliance with the agency contract, then the contract of purchase and sale is to be concluded with the principal (Anonymous, 2013, 2014a, b). The other, adhering to the diametrically opposite legal position, believe justly that the agent's filing of the application in tenders in his own name and at his own expense is indicative of the agent's agent on participation in tenders, in spite of the concluded agency contract being available, therefore, the agent becomes the party of the contract of sales.

As a matter of fact “the scheme” of participation in tenders on bankruptcy with the help of commission agency service does not contradict to Civil Law norms about the agency contract but contradict bankruptcy law where it is clearly specified that the purchaser to the contract of sales must be only the winner of tenders. Therefore, since the winner has been considered to be the agent, then the contract of sale can be concluded only by the agent but not by the principal.

By expansion of the agency relationship on participation in electronic tenders on bankruptcy after signing the protocol of their results it is observed the violation of the principle of honesty of the parties of the agency contract. Notification of the organizer of tenders that the winner acted in the interests and by order of the agent after summation of tendering may affect “transparency” and independence of commercial deal, as information about the degree of interest in the debtor, creditors, tender administrator is given in respect to the agent but not to the principal.

The order agency service implies that the agent acts on behalf of and at the expense of the principal. It means that the application for participation in the electronic tenders on bankruptcy is filed by the agent in the name of the principal, the contract of the earnest money is concluded by the agent also in the name of the principal, the earnest money is paid by the principal. Therefore, the participator of electronic tenders is recognized the principal. Under the identified conditions the organizer of tenders is immediately notified that the applicant has the status of the agent and acts for the benefit of the others, which promotes the honest behavior of the intermediary. As a result, it is withdrawn the problem of choice of the subject of the civil legal relationship, who the contract of the purchase and sale of the bankrupt’s property is to be concluded with. Priority right to conclude the sales contract appears only in the principal which conforms fully to the legal object of the juridical intermediation in “bankruptcy” tenders. Such model of the contract regulation considers both the private and the public interests, as participation of the principal in the electronic tenders on bankruptcy through the agent with the revelation of information is already at the stage of filing the application. Legitimacy of the agency contract of order type for participation in the procedure of the disposal of the debtor’s property is confirmed by the absence of litigation over legality of bankruptcy tendering according to the contract and the transactions of sales of the objects of the civil rights closed on their basis.

Summary: The most effective type of juridical intermediation for participation in electronic tenders on

bankruptcy is contract order, though it is also possible to use the construction of the contract of commission and also the mixed contract comprising the elements of the contracts of order and paid services. The agency contract in the variant of order is not only conducive of fair behavior of the agent within the framework of the procedure of electronic tendering on bankruptcy but makes it possible in advance (at the stage of filing application) to show the presence or absence the interest of the principal in the debtor, creditors, adjudicatory administrator.

CONCLUSION

Thus, to take part in electronic auctions on bankruptcy via mediator it is acceptable to use different types of juridical intermediation with different structure of legal ties between the representative and the principal. By application of the concrete model of the juridical intermediation it is necessary to remember about the interests of the debtor, creditors and the other participators of electronic tenders.

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