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Comparative Analysis of the Historical Development of the Legal Regulation of the Preliminary Contract in the Russian Federation and Some CIS Countries

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Abstract

At present, the Commonwealth of Independent States (CIS) consists of nine former Soviet republics, including the Republic of Belarus, the Republic of Kazakhstan, the Russian Federation and Ukraine (although Ukraine has a controversial status in the CIS, the CIS governing bodies continue to consider Ukraine a member state of the Commonwealth). These countries that constitute the Commonwealth of Independent States are among the largest foreign trade partners of the Russian Federation. The legislative system of these countries also has a common historical origin. Based on this, it is very important to analyze the international legal norms and the norms of national legislation governing and ensuring the sustainable development of foreign economic cooperation. In the context of close economic integration, commercial relations generate economic interdependence of countries. Trade and economic relations between organizations, associations and firms of different states are carried out through the conclusion of cross-border agreements. The most appropriate legal form of planning and fixing the intention of the parties to make a deal in the future is a preliminary contract and similar protocols of intentions. In this regard, the authors pay considerable attention to the analysis of legal regulation of pre-contractual interaction of the parties and liability for violations preceding the conclusion of the principal contract. The article deals with the wording of pre-contractual transactions and types of liability in the civil law of the Russian Federation and some countries of the Commonwealth of Independent States (CIS). Choosing the legal framework as an object of comparison is due to the objective similarity of cultural and historical grounds and the current socio-economic situation in these countries. These countries: 1) belong to the same type of culture; 2) have experienced a powerful impact of communist ideology; 3) solve similar socio-economic problems at the present stage of development. The article discusses the need to form an independent institution of pre-contractual liability in the civil law of the Russian Federation as one of the guarantees of compliance with contractual discipline. In this connection, it is useful to study the experience of foreign countries with a similar legislative system in this area.

Keywords: Pre-contractual liability, Preliminary contract, Agreement of intent, Commonwealth of Independent States (CIS), the Russian Federation, the Republic of Belarus, the Republic of Kazakhstan, Ukraine, Comparative legal analysis.

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Introduction

The developmental history of the institution of the preliminary contract is about two thousand years. The rules on the preliminary contract were adopted from Roman law by the countries of the Roman-German legal system. When considering the history of rules on the preliminary contract in the domestic legislation, one should note that the Civil Code of the RSFSR in 1922² and 1964 did not contain any rules on this type of contract. However, considerable influence was exerted by the law of the Russian Empire, as a result of which, in practice, preliminary agreements were successfully applied. Thus, the views of the post-revolutionary period researchers became the basis for the consolidation of preliminary contract norms in the civil codes of the USSR republics, part of which now constitute the Commonwealth of Independent States. We are interested in the legal analysis of the preliminary contract and its development in former Soviet republics, because the long historical period of the common legal framework brought together the legislative systems of CIS countries.

Over the past decade, the Commonwealth of Independent States has adopted a number of documents aimed at deepening and expanding integration processes in the economic sphere. For instance, in November 2008, CIS heads of government approved the Strategy of CIS economic development for the period up to 2020³, and on October 18, 2011 Free Trade Area Agreement was signed, which takes into account the rules and regulations of GATT/WTO⁴. The provisions of the above mentioned Agreement regulate the further development of mutual trade, liberalization of conditions and the abolition of existing restrictions and exemptions from the free trade regime in order to ensure free access of goods of national producers to the markets of the CIS member countries. This agreement closely connects the legal systems of CIS countries in the sphere of commercial turnover. In this regard, the study of legal features and types of contractual obligations in the legislation of CIS countries is of great interest. With the development of relations of CIS members, the issue of improving the Russian legislation and its maximum similarity with the nearest neighboring countries in order to achieve maximum efficiency of contractual and hence economic relations has become a topical one. At the present stage of business activity, the parties at the initial stage are often forced to stipulate the terms of a contract; such negotiations can be both long and short-term ones. The decision to enter into contractual relations is sometimes preceded by expensive preparatory work, sometimes highly professional expertise is necessary. In these cases, a question arises as to whether the costs incurred during the preliminary preparation of a contract will not be wasted?

In such cases, it is convenient to use the concept of the preliminary contract, which gives effective legal protection to the parties, since it is enshrined in the legislation of most CIS countries.

Thus, in our opinion, the effective legal regulation of the procedure for concluding a preliminary contract largely determines its future: the proper execution of the principal contract depends on how reasonably and in good faith the parties act at the stage of elaboration, negotiation and registration of the contract terms. However, in order to avoid confusion of the preliminary contract wording in the civil legislation of the Russian Federation and CIS countries, it is necessary to consider in detail the legal concept of the preliminary contract in the legal sources of the Russian Federation and CIS countries, whose legislation most coincides with the Russian.

² Postanovlenie VCIK ot 11.11.1922 «O vvedenii v dejstvie Grazhdanskogo kodeksa RSFR» [Resolution of All-Russian Central Executive Committee of November 11, 1922 “On the introduction into effect of the Civil Code of the RSFSR.”]. Resolution ceased to be in force in connection with the publication of the Decree of the Presidium of the RSFSR of December 16, 1964. Izhvestiya VCIK No. 256

³ Economic development strategy of the Commonwealth of Independent States until 2020. Approved by Decision of the Council of CIS State Heads of November 14, 2008. Retrieved from <http://economy.gov.ru/minrec/activity/sections/foreignEconomicActivity/cooperation/economicsng/S.trateg>

⁴ “Free Trade Area Agreement” (Signed in Saint Petersburg on October 18, 2011). Retrieved from http://www.rossahar.ru/netcat_files/userfiles/files/Rossahar/Documents/Dogovor%20o%20ZST.pdf

Results and Discussions

1. Preliminary Contract in the Civil Legislation of the Republic of Belarus

Turning to a more detailed analysis of the preliminary contract regulation in CIS countries, it should be noted that the civil legislation of the former Soviet republics was similar in many ways. Therefore, the Civil Code of the Russian Soviet Federative Socialist Republic (RSFSR) in 1964 did not contain any rules on preliminary contracts and, similarly, the Civil Code of the Byelorussian Soviet Socialist Republic (BSSR) in 1964 did not mention the preliminary contract. However, the possibility of its conclusion logically followed from the wording of Article 4 of the Civil Code of BSSR, which recognized the possibility of civil rights and obligations arising from transactions both provided for by law and not provided for by law, but not contradicting it. The Civil Code of the Republic of Belarus fixes the preliminary contract in Article 399. It says that “under a preliminary contract the parties shall be obliged to include in the future a contract (principal contract) on the conditions provided for by the preliminary contract.”⁵ This Article emphasizes that the parties assume the obligation to make a contract in the future due to the fact that they (parties) have an interest in the conclusion of the principal contract, but at the moment its conclusion is impossible due to the lack of some essential conditions. Using the legal framework of the preliminary contract, the participants of civil commerce can to some extent plan their economic activities. An interesting fact is that in the legal literature of the Republic of Belarus the preliminary contract is treated as a standard contractual concept. It can be applied to virtually any types of contractual commitments that have the necessary set of features being peculiar to each contract⁶. At the same time, Article 399 of the Civil Code of Belarus does not contain an indication of its universality, i.e. that the subject of the principal contract may be *the transfer of property, performance of works or provision of services*. Moreover, according to Russian legal scholars, in those cases when the legislator has a need to recognize a particular rule of contract law having a general meaning, it is limited to referring to three groups of contracts at the same time⁷. Paying attention to Article 429 of the Russian Federation Civil Code, we see that this understatement is absent.

Another significant difference is the requirement that the preliminary contract shall contain conditions enabling to determine the subject of a contract, as well as other *essential conditions* of the principal contract. This requirement was contained in the Russian legislation until the reform of the Civil Code of the Russian Federation in 2015.⁸ The mandatory nature of this provision is often criticized, because it was impossible to foresee at the stage of negotiations all essential details of the principal contract. In our view, the wording of Article 429 of the Civil Code of the Russian Federation is much more appropriate. According to it, the parties agree on the terms of the principal contract, which, *in their opinion*, will ensure the conclusion of a preliminary contract.

2. Preliminary Contract in the Civil legislation of the Republic of Kazakhstan.

Also, in our opinion, the experience of legal regulation of the preliminary contract in the Republic of Kazakhstan is of some interest. Article 390 of the Civil Code of Kazakhstan regulates this contract quite

⁵ Civil Code of the Republic of Belarus of December 7, 1998 No. 218-3 (Amended as of July 17, 2018). (1999). Published in “Vedamasci Nacyanal'naga skhodu Respubliki Belarus”, No. 7-9.

⁶ Bondarenko, N. L. (2012). Tipovye dogovornye konstrukcii v grazhdanskom prave Respubliki Belarus [Standard contractual frameworks in the civil law of the Republic of Belarus]. Aktual'nye problem grazhdanskogo prava: Ezhegodnyj sbornik nauchnyh trudov. Vyp. 1. Minsk: Mezhdunarodny juniversitet «MITSO» (in Russian)

⁷ Braginskij, M. I. & Vitryanskij, V. V. (2011). Contract law. Book 3. Contracts for the performance of work and services]. M: Statut

⁸ Federal law “On introducing of changes in part one of the Civil Code of the Russian Federation” of March 8, 2015 No. 42-FZ]. Sobranii zakonodatel'stva Rossijskoj Federacii ot 9 marta 2015 g. No. 10 (in Russian).

extensively.⁹ In contrast to the Civil Code of the Republic of Belarus it reveals the universal orientation of this type of organizational contract, namely: the transfer of property, performance of works or provision of services.

Our attention is drawn to the reference to *Protocol of intentions* in Paragraph 7. If the Protocol of intentions (agreement of intent) does not expressly provide for the intention of the parties to give it the force of a preliminary contract, then it is not treated as a civil law contract, and its failure does not entail legal consequences. Article 429 of Russia's Civil Code does not contain similar indications. Moreover, Russian legislation does not explicitly capture the Protocol of intentions. Nor does the Civil Code of the Republic of Kazakhstan. We support the legal position of the legislator stating that an agreement of intent to conclude a contract in the future, which does not have the features of a preliminary contract, will not be an independent civil law contract since it does not entail the relevant legal consequences. Judicial practice is also solidary in this matter. For instance, according to the Decision on Appeal of Kazakhstan's Supreme Court of July 14, 2016 in Case No. 33-13559/2016, the agreement of intent to make a contract of purchase-sale of the apartment could not be recognized as the preliminary contract because of its inconsistency with the requirements of Article 390. The court indicated that the missing commitment is not to be secured by advance deposit in terms of Article 380 of the Civil Code, therefore, the amount transferred named in the agreement of intent as advance deposit does not give rise to the consequences provided in Paragraph 2 of Article 380 of the Civil Code.¹⁰ Based on this decision, we see that courts do not qualify the agreement of intent as a preliminary contract, distinguishing these categories, although having similar content and legal orientation.

Another important difference is in the Law of the Republic of Kazakhstan of July 26, 2007 No. 310-III "On state registration of rights to real estate".¹¹ In particular, Article 53 says that state registration of legal claims provides an opportunity to register legal claims, including the preliminary contract, however, in Paragraph 3 it is explained that the state registration of legal claims is accounting and does not involve suspension of state registration or establishment of encumbrance of the rights on real estate. This legal provision is contrary to the position of the Russian courts, which believe that the preliminary agreement under which the parties undertake to conclude a contract being subject to state registration in the future is not subject to state registration¹².

3. Preliminary Contract in the Civil Legislation of Ukraine.

Today, Ukraine is a country with a disputed status in the Commonwealth of Independent States. However, CIS governing bodies continue to consider Ukraine a de jure member state of the Commonwealth.¹³ In this regard, the Civil Code of Ukraine is of special interest for our study.

⁹ The Civil Code of the Republic of Kazakhstan (General part), adopted by the Supreme Council of the Republic of Kazakhstan on 27 December 1994 (amended as of July 21, 2018). Informacionnaya pravovaya sistema "Zakonodatel'stvo stran SNG"

¹⁰ Decision on Appeal by the Supreme Court of the Republic of Kazakhstan of July 14, 2016. Case No. 33-11931/2016. Retrieved from <http://sud.gov.kz/rus/content/istoriya-verhovnogo-cuda-kazahstana> (in Russian).

¹¹ Law of the Republic of Kazakhstan dated July 26, 2007 № 310-III "On state registration of rights to real estate". Oficial'naya gazeta. No. 37

¹² Information letter the Presidium of the Supreme Arbitration Court of the Russian Federation of February 16, 2001. No. 59]. Retrieved from http://www.consultant.ru/document/cons_doc_LAW_30531/

¹³ Interview with Chairman of the Executive Committee - Executive Secretary of the CIS S. Lebedev]. Retrieved from <http://www.cis.minsk.by/news.php?id=9695>

The preliminary contract in the Ukrainian legislation appeared as a result of codification of civil and economic legislation. One article in the Civil Code of Ukraine (Article 635)¹⁴ and another in the Commercial Code of Ukraine (Article 182)¹⁵ are concerned with the preliminary contract.

The definition of the preliminary contract is contained in Part 1 of Article 635 of the Civil Code: the preliminary contract is a contract, the parties to which undertake within a given time (in due time) to conclude a contract in the future (the principal contract) on the terms established by the preliminary contract. Moreover, the term within which the principal contract should be made is determined by the parties themselves in the preliminary contract (Part 1 of Article 635 of the Civil Code). However, this period may be limited by law. In particular, such restriction is established by the Commercial Code of Ukraine in the economic sphere – it should not exceed one year from the moment of concluding the preliminary contract (Part 1 of Article 182 of the Commercial Code).

The Civil Code of Ukraine also distinguishes between the preliminary contract and the agreement of intent (Protocol of intentions and the like) in Part 4 of Article 635 of the Civil Code without providing the latter with the legal force of the preliminary contract. Thus, the preliminary contract is singled out of the number of documents that can shape the results of negotiations.

One should note that the content of the preliminary contract is defined differently in the Civil Code and the Commercial Code of Ukraine. The Civil Code of Ukraine allows agreeing only on the part of essential conditions of the principal contract in the preliminary one. This conclusion follows from Part 2 of Article 635 of the Civil Code: “The essential conditions of the principal contract being not established by the preliminary contract shall be agreed in the manner prescribed by the parties in the preliminary contract if such an order is not established by the acts of civil legislation.” Taking into account the fact that the Civil Code of Ukraine recognizes the subject of the contract as the only essential condition, it can be concluded that it should be defined in the preliminary contract in a mandatory manner. At the same time, from the content of Part 2 of Article 182 of the Commercial Code of Ukraine one can make a conclusion that it is necessary to agree on the conditions “that will allow one to determine the subject matter, as well as other essential conditions of the principal contract”. So, at least the subject, price and term provided for commercial contracts should be agreed upon in the preliminary contract. The legal literature also stresses that the essential terms of the future principal contract are usually determined at the stage of the preliminary contract.¹⁶

There is no unanimity of opinion on possibility of coercion into the principal contract in judicial practice. Taking into account the provisions of Article 635 of the Civil Code of Ukraine, which refers only to the recovery of damages, in most cases, the method of protection is the return of the amount paid, recovery of moral damage and legal costs. But as practice shows, there is a need for its legislative consolidation. In fact, the person whose rights are violated does not try to get the money back. He/she wishes to get back the desired purchase, and in most cases it is real estate. There are positive court decisions when the suit for coercion into the principal contract was satisfied¹⁷. Drawing a parallel with Russia’s Civil Code, we see that coercion into the principal contract is expressly provided for in Paragraph 5 of Article 429 of the Civil Code. A number of Ukrainian researchers adhere to the position of enshrining this norm in the Civil Code of Ukraine. In particular, V. V. Lutz notes that a bilateral obligation to conclude the principal contract arises

¹⁴ The Civil Code of Ukraine of January 16, 2003 No. 435-IV (with amendments and additions as of July 12, 2018). Retrieved from http://online.zakon.kz/document/?doc_id=30418568

¹⁵ The Commercial Code of Ukraine Commercial Code of January 16, 2003 No. 436-IV]. Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/T030436.html

¹⁶ Lutz, V. V. (2006). *Kontrakti u pidpriemnic'kij diyal'nosti: Navch. Posibnik*. K.: KhrinkomInter (in Ukrainian).

¹⁷ Decision of District Court of Bogorodchany of the Ivano-Frankovsk Region of July 20, 2010. Case No. 2-573/2010. Retrieved from <https://youcontrol.com.ua/ru/catalog/court/0901/>

from the preliminary contract¹⁸. N. D. Egorov considers the preliminary contract as a separate basis for the mandatory conclusion of the contract¹⁹. Thus, the legal norms for coercion into the principal contract in the Civil Code of Ukraine need to be improved.

Conclusion

Summing up the comparative analysis of the legislative provisions of such countries as the Republic of Belarus, the Republic of Kazakhstan, and Ukraine in the field of legal regulation of the preliminary contract concept, it should be noted that, in many respects, elements relating to the definition of the preliminary contract in these countries are similar to those in Russia. The analysis leads to the conclusion that in Russia, in the Republic of Belarus, in Ukraine and in the Republic of Kazakhstan the legislation in the field of organizational and contractual relations needs to be improved.

However, we must say that the legislation of the above mentioned CIS countries expressly indicates the differences between the preliminary agreement and the agreement of intent (Protocol of intentions). While Russia's Civil Code only enshrines the negotiation process (Article 434.1 of the Civil Code), according to Paragraph 5, the parties may enter into an agreement on the *procedure* for negotiations. In this case, assimilating the norms of the Commonwealth States will help to avoid a dual understanding of the preliminary contract. The experience of the preliminary contract legal regulation in the Republic of Kazakhstan seems to us as the most successful one of all considered. It has the most similar structure with the Civil Code of the Russian Federation and additionally considers the differences of the preliminary contract from other organizational transactions.

In our opinion, the legislation of the Russian Federation should approach the issue of legal regulation of the preliminary contract in a comprehensive manner, using the practice of differentiation, comparison of different countries' experience, taking into account positive trends, which will productively address the issues of long-term planning.

¹⁸ Luts, V. V. (2006). Kontrakti u pidpriemnic'kij diyal'nosti: Navch. Posibnik. K.: KhrinkomInter

¹⁹ Egorov, N. D. (1986). [Civil-legal regulation of public relations]. L.: Izd-vo Leningradskogo un-ta

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