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THE PACULIARITIES OF THE LEGAL REGULATION OF PRELIMINARY CONTRACTS IN UKRAINE

Present conditions under which the contractual regulation is being developed over the years as well as the number of complications of civil relations due to its growth caused the necessity to adopt new civil mechanisms which would add legal certainty to specific relationships between the subjects of civil circulation. The legal implementation of norms on the preliminary contract into the national legislation is aimed at achieving the goals mentioned above.

At the same time, the practice of application of the preliminary contracts allowed to reveal a number of theoretical issues related to specific character of the obligation to conclude a main contract which arises under the preliminary contract. It should be noted that the institution of preliminary contracts had not yet received an adequate doctrinal analysis by local scientists, which in turn led to the fact that relations arising under the conclusion of the preliminary contracts, are not fully covered by current legislation of Ukraine.

The history of preliminary contracts goes back to Roman law, where this legal happening was designed quite detailed. It should be noted that Roman contract law was not only used for regulation of economic relations in Rome, but also was widely used in future to regulate the economic relations that arose and developed due to socio-economic changes in society[1].

[1] V.O. Goncharenko, *The system of contracts of Roman and some issues of its implementation into modern civil legislation of Ukraine*, "University research note" 2005, №3(15), p. 121–125.

Thus, Roman law stated that "the conclusion of the contract may be preceeded by other contract, which establishes the obligation to conclude the main one. Such an agreement may be called preliminary. This contract – pactum de contrahendo – creates a right to demand the conclusion of the main contract, in case when one of the parties avoids its conclusion"[2]. In this case the statement of Roman lawyer, according to which "the essence of the obligation is not to turn anything into somebody possession but to create the link between persons in the sense that something should be given, made or provided to somebody" seems quite reasonable[3].

Famous soviet scientist O. Ioffe noted that due to the degree of completion all civil contracts are divided into preliminary and final, claiming that while preliminary contracts are not directly provided by law, their conclusion is not prohibited and they create a unique obligation – when a certain time expiries to conclude a main agreement. Interesting that O. Ioffe supported the idea of the possibility of compulsory signing the main contract, pointing out that "although the current legislation does not provide such an agreement, it cannot be found illegal, and, moreover, while concluded in the present circumstances, it would have legal force and could have been executed compulsorily"[4].

In general, we can agree that it is works of the scientists of the pre-revolutionary period that became the basis for adopting the rules on preliminary contracts into the Civil Code of the Soviet republics, including the Civil Code of the USSR in 1922. Analyzing the history of establishing the institute of the preliminary contracts it should be noted that legislative confirmation of rules on preliminary contracts in the Civil Code of Ukraine is historically justified.

Legal nature and peculiarities of the preliminary contract are regulated both by the Civil Code of Ukraine and the Commercial Code of Ukraine. However, the concept of the preliminary contract is only provided in the Civil Code of Ukraine. Thus, the current Civil Code

[2] B. Vinsheid, *On the obligations in Roman law*, 1875, p. 464.

[3] *Monuments of Roman Law: Law XII; Institutions of Guy; Digests of Justinian*, Moscow, 1997, p. 608.

[4] Ioffe O.S. Obligational Law. – M.: Law lit., 1975. – 880 p.

of Ukraine (art. 635) regulates the issues related to the form and content of preliminary contracts, the consequences of failure to comply the obligations by the parties of the contract, etc.[5]. In fact, the concept of the preliminary contracts was first fixed legislatively only in 2003, with the adoption of the Civil and Commercial Codes of Ukraine[6]. The Civil Code of Ukraine in Art. 635 indicates that agreements can be called preliminary when its parties are obligated within a specified period (at a certain time) to conclude the contract (main contract) on the terms set by the preliminary contract.

Thus, the essence of the preliminary contract is that its parties are obliged in the future to conclude the main agreement (on the transfer of property, on works, on services, etc.). The preliminary contract or "contract on the contract", as it is sometimes called, in practice determines the conditions under which the parties undertake certain period to conclude the main contract. This contract is primarily required to settle the relations for the emergence of which a number of actions must be taken and which are essential to be made in order to be formalized on a contractual basis. It should be noted that the Civil Code of Ukraine does not contain any restrictions on the agreement, which the parties are entitled to conclude as the preliminary. Therefore, we believe that the parties have the right to agree on the conclusion of any contract in the future.

Thus, the preliminary contract has the following *features*:

1. Will. The contract does not manifest one person (party) will, but the will of two or more, and the will of the parties must match and meet. The local scientists express the position under which "the obligations of the parties under the preliminary contract do not have counter nature, but rather arise from the parallel expression of will of the parties, aimed at achieving equal for each party goal, which in turn makes it difficult to determine the status of creditor and debtor in the obligation under the preliminary contract"[7].

Indeed, if we consider the preliminary contract as an integral contractual relationship we can state the fact that there is not just a coinci-

[5] Civil Code of Ukraine: Law of Ukraine from 16.01.2003. № 435-IV – Art. 356.

[6] Commercial Code of Ukraine: Law of Ukraine from 16.01.2003. № 436-IV – № 19–20, № 21–22. – Art. 182.

[7] Y. Skakun, *Preliminary contracts under the civil legislation of Ukraine*, Kharkiv 2013, p. 174.

dence of will of the contracting parties aimed on the formation of the contractual relationship, there is a concurrency of this will at a certain extent, but still it seems not quite correct to say that the will of the parties in this case aimed at achieving identical goal for each of the parties. We believe that the purpose of contract is unified in all the cases as well as a relationship, generated by the agreement.

2. Aim. Scientific literature suggests that the relationship arising under the preliminary contract, by its nature and character should be defined as organizational non-property obligations, even although in some cases it is aimed at creating property obligations in the future. This position appears to be quite reasonable, since the preliminary contract creates an obligation to conclude the main contract in the future. This obligation has essentially a non-property and rather organizational character as preliminary contract mediates organization and optimization of the further formation of contractual relationship, which is the reason (purpose) of the transaction in this case. It is typical that the legal status of the contracting parties is mixed, because in some ways there is no symmetrical structure of the debtor and the creditor, available for other types of obligations. This implies that the purpose of the contract in this case is legally significant and can be qualified as essential conditions for any and all preliminary contracts. Thus, this contract aims at making its parties to conduct other contract in the future (main).

3. Essential terms. Key characteristic of the preliminary contract is that the main contract must be concluded on the terms specified in the preliminary contract. A set of essential terms covered by the preliminary contract must be fully represented when signing the main contract.

Thus, according to the Civil Code of Ukraine, the essential terms of the main contract, which were not set by the preliminary contract, are to be agreed upon due to the procedure established by the parties of the preliminary contract, if the specific order is not established by civil law. At the same time, the provisions of the Commercial Code of Ukraine are more "strict" in this sense and fix the rule that preliminary contract must contain conditions on the subject and other essential terms of the main contract. As we can see, none of these regulatory acts answers the question about the set of essential terms a preliminary contract should have in order to be qualified as valid and promote sustainable development of contractual obligations.

In general, it should be noted that preliminary contracts contain firstly, the essential terms of the preliminary contract and, secondly, the essential terms of the future main contract. When signing the main contract the parties do not agree on its content because it has already been determined by the preliminary contract and can be changed only by mutual consent or (if the failure to achieve such a consent) at the request of one of them in the court order (in case of a significant change in circumstances that guided the parties to the conclusion of the preliminary contract, under the provisions of Art. 625 of the Civil Code of Ukraine). So, the preliminary contracts may (and quite reasonably) indicate not all but only some of the essential terms of the main contract. This position is dictated by the fact that in case of the possibility to define all the essential terms of the main contract while concluding the preliminary one the need for signing the preliminary contract would no longer exist[8].

Thus, the core of the preliminary contracts contains such essential terms as the subject of the preliminary contract, the term and the subject of the main contract. Of course, the preliminary contracts should contain a term of signing the main contract, otherwise the preliminary contracts become less meaningful, and, moreover, this period should not be too long. In this case there is also a contradiction between provisions of the Civil Code of Ukraine and provisions of the Commercial Code of Ukraine. Civil Code of Ukraine does not provide the deadline for conclusion of the main contract, while the Commercial Code of Ukraine stipulates that the main contract should be concluded not later than one year after signing the preliminary contract. In practice, this question depends entirely on the nature of the subject composition of the contract and nature of relationships, whether they are civil or economic.

One of the main tasks of the preliminary contracts is to provide (stabilize) the relationships between the parties before the conclusion of the main contract, guarantee real opportunity after a certain time to acquire the rights under the same conditions that existed at the time of conclusion of the preliminary contract, even if one of the parties lost interest in such relations.

[8] O.V. Starcev, *Commercial law: text book*, Kiev 2006, p. 208.

4. Freedom of contract. The relative deformation of the contract freedom is one of the characteristic features of the preliminary contracts. Thus, the parties being free at the conclusion of the preliminary contract, at the conclusion of the main contract – usually experience significant, mutual and equivalent restriction of their freedom as the change of the conditions of the preliminary contracts before signing the main one is possible only with the consent of all parties. However, it is not excluded that one of the parties may refuse to sign the main contract, being aware of the limits of liability for such a failure.

That is why the principle of contract freedom at the conclusion of the preliminary contracts gives reason to believe that preliminary contracts, along with other contracts, is the embodiment of freedom on the grounds that the participants have the right to resort to its conclusion by mutual will while establishing certain relationships, becoming at the same time the base (internal factor) for freedom restriction at the conclusion of the main contract in future.

Thus, the preliminary contract is a specific legal phenomenon that mediates relatively separate range of relationships on signing the main contracts in the future. Application of the preliminary contracts allows establishing legal link between the parties of the future (main) contract, when the immediate conclusion is not possible or the parties do not want to create legal relations as strong as under the main contract[9]. Thus, the main reasons for the conclusion of the preliminary contracts are the following: firstly, the desire of both or one of the parties to fix intermediate results achieved during the negotiations, secondly, the need to confirm the seriousness of intentions of the parties to the main contract; thirdly, the desire of one or both parties to limit other party in the parallel negotiations regarding the main contract with third parties; fourthly, the parties wish to set rules for further negotiations; fifthly, the need to coordinate the allocation of costs in case of failure of the negotiations and agree on the amount to be paid if the party refuses to conduct further negotiations[10].

[9] V.A. Vasilyeva, *Problems of civil regulation of relations on the providing of intermediary services [monograph]*, Ivano-Frankivsk 2006, p. 409.

[10] I. Yaremova, *Some features of the the preliminary contract, issues its application*, [in:] *Current Issues of state in Ukraine through the eyes of young scientists*, 2009, p. 237–239.

Thus, the preliminary contracts should be distinguished from other related structures, used in practice, such as contract of intent and general (framework) agreements and, in fact, from the offer itself. In this regard, the Civil Code of Ukraine (Art. 635) and the Commercial Code of Ukraine (Art. 182) indicate that the contract of intent (letter of intent, etc.) if there is no will of the parties to grant him the strength of the preliminary contract, is not considered a preliminary contract and does not create any legal consequences. Other words, the contract of intent only records the desire of the parties to enter the contractual relations in the future. However, the contract of intent does not create any rights and obligations of the parties. Therefore, the refusal of one of the parties to sign the agreement provided in the contract of intent does not involve her into any legal consequences and can only affect her reputation. Thus, the legal value of the preliminary contracts and contracts of intent (protocols of intent) has significant differences: the first is dominated by obligations, and the latter shows only intention of the parties[11]. Thus, the preliminary contracts and protocols of intent must be distinguished from one another by the degree of legal connectedness of their parties. The protocol of intent captures attempts, wishes, plans, but does not imply the intent of the parties to consider them legally bounded[12].

Special attention should be given to the question of the guilty party liability for unjustified deviation from the conclusion of the main contract. In accordance with the Civil Code of Ukraine, the party unreasonably evading main contract provided by the preliminary contract must compensate the other party for damages caused by the delay, unless otherwise is provided by preliminary contract or acts of civil law. At the same time, the Commercial Code of Ukraine establishes the right to demand the other party to sign the contract in court. Apparently the Civil Code of Ukraine and the Commercial Code of Ukraine differ in regulating the consequences of unjustified evasion to conclude the main contract.

[11] A. Klimenko, *Preliminary agreement in civil relations: Theory and Practice: Dis. ...* Candidate. Legal. Sciences: 12.00.03, Kiev 2010, p. 213.

[12] I. Yaremova, *Some features of the preliminary contracts, issues of its application*, [in:] *Current Issues of state in Ukraine through the eyes of young scientists*, 2009, p. 237–239.

The peculiarity of the preliminary contract is the unity of contractual parties as the parties of the preliminary contract can only be parties of main contract. The intention to enter the main contract by a party which is not the party of the corresponding preliminary contract automatically deprives preliminary contract to be classified as such.

Key task of the preliminary contract is that it should provide (stabilize) the relationship between the parties to conclude the main contract, guarantee a real opportunity in a certain amount of time to acquire the rights due to the same conditions that existed at the time of signing the preliminary contract, even when and if one of the parties lost interest in such a legal relations.