

## PRELIMINARY CONTRACT IN THE CIVIL LAW OF RUSSIA

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**Abstract:** The scientific article is aimed at studying the legal nature and signs of a preliminary contract. It is established that the scope of application of the preliminary contract is broader than that stipulated by civil law. We determined the legal regime of the preliminary contract. We analyzed the concept of a preliminary contract in Russian law and civil science. We disclosed the signs of the preliminary contract, and differentiated the preliminary contract from other civil contracts, such as: option contract, offer, contract of intent and framework contract. The authors conclude that the preliminary contract is independent in the system of civil law contracts. We considered the functions of the preliminary contract. We found some problems of applying the preliminary contract design in practice. An attempt to substantiate the essence and legal nature of contractual relations can be useful as one of the directions for improving Russian legislation and civilistic doctrine in the field of contract law. The theoretical provisions formulated in the article can be used in law enforcement practice, generalization of judicial practice, as well as in training courses "Civil Law" and "Contract Law".

**Keywords:** preliminary contract, transaction, contract law, civil law, Civil Code of the Russian Federation.

### 1 Introduction

A preliminary contract is an agreement under which the parties have an obligation to conclude a basic contract providing for the transfer of property, performance of works or provision of services in the future.

The preliminary contract gives rise to organizational and prerequisite legal relations, which are characterized by the fact that, as a result of the establishment and implementation of these relations, the relationship is established and, in certain cases, the property and legal relations are developed, because the parties enter into the main agreement aimed at transfer of property, performance of works, provision of services, etc. as a result of the conclusion and subsequent execution of the preliminary contract. However, the application of the preliminary contract is much wider.

M.I. Braginsky noted the fact that a preliminary contract may well be concluded before signing the main contract of any type. His words are confirmed by the widespread practice of concluding preliminary contracts, such as, for example, assignment contracts, mortgage contracts, etc (Braginsky, 1971).

As a rule, a preliminary contract is concluded when it is impossible to conclude the main contract due to various circumstances, and it is necessary to establish obligations between the parties.

The preliminary contract is subject to a special legal regime, because it regulates an extremely narrow circle of legal relations, and its main task is to regulate those legal relations, which, ultimately, should lead to conclusion of the main contract. However, it is erroneous to consider that the conclusion of a preliminary contract shall necessarily lead to conclusion of the main one. For example, the parties may decide not to conclude the main contract by mutual agreement; force majeure and other circumstances may occur that make the conclusion of the main contract impossible; one party may refuse to conclude the main contract, and some civil liability measures may be applied to it.

One of the distinguishing features of this contract is that its terms and conditions do not stipulate the fulfillment by the parties of any property requirements. The main purpose of the preliminary contract is to fix the provisions on the conclusion of the main contract in the future.

### 2 Methods

The preliminary contract is legally enshrined in the Civil Code of the Russian Federation (hereinafter - the CC RF). The legislator defined the preliminary contract in clause 1 of Article 429 of the CC RF, according to which the parties undertake to conclude a contract on the transfer of property, performance of works or provision of services (the main contract) under the conditions stipulated by the preliminary contract in the future. Only one article is devoted to the preliminary contract in the current CC RF; therefore, civilistic science and law enforcement practice are faced with problems associated with the application of this rule of law.

In addition to the general provision on the preliminary contract enshrined in the CC RF, Russian legislation also contains a more detailed interpretation of this agreement.

For example, some authors consider a bank account contracts as a preliminary contract, arguing that the conclusion of this contract involves legal relations related to settlement transactions with direct participation of the same parties (Maksimova, 2017).

A more explicit form of the preliminary contract is an order for the formation of a tourist product, where its parties are tourists, on the one hand, and the tour operator, as well as a person who prepares the order (contractor), on the other hand. And it is precisely the order between the tourist and the contractor, executed in writing, that will have the nature of a preliminary contract on the basis of the Federal Law "On the Basics of Tourist Activity in the Russian Federation" 1996.

In addition, according to clause 1 of Article 429.2 of the CC RF, preliminary contracts include an option to conclude a contract in the financial sector, where one of the entities, paying a fee specified in the contract, subsequently receives the right to buy or sell an exchange asset, and the other party receives this fee accordingly and incurs the corresponding obligations on the purchase or sale of an exchange asset.

Current legislation divides civil law contracts into non-gratuitous, as well as gratuitous ones. Based on the earlier concept of a preliminary contract, we can conclude that it belongs to the category of gratuitous contracts, because neither party has any obligations to provide something to another party when it is executed.

Taking into account the wording "undertake to conclude", contained in the concept of a preliminary contract, we conclude that it is consensual. In addition, we can classify the preliminary contract as causal. Thus, causation shall be understood as the economic purpose of the transaction that has legal significance, that is, the transaction direction fixed by agreement of the parties, on interdependent grants, mediated by this transaction, in whole or in part, or the transaction direction on making a grant in the absence of a counter-grant.

### 3 Results and Discussion

In the scientific circles, the question of whether the preliminary contract is an independent civil law construction, or whether it is an integral part of the contract concluded subsequently, is often raised (Savelyev, 2017).

The preliminary contract is independent for the following reasons. Firstly, the provisions on the preliminary contract are contained in a separate norm of the CC RF. Secondly, the conclusion of the preliminary contract occurs before the conclusion of the main contract. Thirdly, the conclusion of the preliminary contract does not fully guarantee the conclusion of a subsequent main contract. Fourth, the subject and legal consequences of the preliminary contract will not be similar to the subject of the main contract.

Summing up the above, we can confidently say that, by its legal nature, the preliminary contract is independent, and contains in its structure the scope of the rights and obligations of the parties regarding conclusion of the main contract, as well as provides for liability, if it is not concluded.

Like other contractual designs, the preliminary contract has a number of distinctive features, namely:

- stipulates an obligation of a non-property nature, which involves further conclusion of the main contract;
- stipulates the possibility of the parties to determine the essential terms and conditions of the transaction as part of the main contract;
- consists in the form, in which it is supposed to conclude the main contract, and if the form of the main contract is not defined, then in writing;
- stipulates the possibility of the parties to use coercive measures to conclude the main contract (Zhukov, 2016).

In addition to signs, the preliminary contract has a number of functions. The initiative function implies the ability of the parties to determine the range of rights and obligations included in the preliminary contract, using equality of parties, legal personality, as well as dispositiveness. The program-coordinating function of the preliminary contract implies a particular model of behavior that the parties will use. The regulatory function reveals the essence of the preliminary contract as a regulator of legal relations between the parties. The information function is used by both parties to the contract and third parties. Given the fact that the contractual design establishes a certain model of behavior of its parties, it contains information on the range of their rights, duties, and responsibility, which allows them not violating these requirements, as well as ensuring that they are not violated by the opposite counterparty. In case of their violation, the authorized bodies use all the information contained in the contract for the full and comprehensive resolution of the existing dispute. The security function allows the parties to the contract using the previously provided security and incentive measures aimed at concluding the main contract. And finally, the protective function is intended for the party, whose rights have been violated, and consists in the possibility of their restoration in the manner established by the contract, as well as applicable law (Burkova, 2016).

In the course of summarizing the existing judicial practice, the Supreme Court has found that the preliminary contract is concluded by the parties primarily in order to subsequently conclude the main contract on the terms and conditions specified in it. Under no circumstances the result of concluding a preliminary contract may be represented by the emergence of property obligations, including the transfer of ownership from one party to another, performance of works, provision of services, etc. Subsequently, this position was reflected in the Decision of the Judicial Collegium for Civil Cases of the Supreme Court of the Russian Federation.

The issue of the place of the preliminary contract in the system of civil law contracts remains a controversial issue in the civil law doctrine (Dung & Thang, 2009).

By its legal nature, the preliminary contract is similar to an option contract, an offer, a contract of intent and a framework contract; however, one should not match these civil law contract, but rather distinguish them on the contrary (Korovkina, 2015).

The difference between the preliminary and the option contract is based, firstly, on the fact that the option is not synagogmatic, and when it is concluded, one party has only the right to demand the conclusion of the contract, and the second party has only the obligation to conclude it; and secondly, it is based on the fact that the preliminary contract does not have any obligations on the property grant, while the option involves the introduction by one party of funds that are not used towards payment of the main contract, and are not refunded, if the parties do not conclude it.

Within the framework of the offer, as in the preliminary contract, the rules regarding the essential terms and conditions of the contract are observed, but the offer is subsequently converted into the main contract, and the preliminary contract is an independent legal structure, which stipulates provisions on the main contract (Guido, 2004).

A contract of intent is not stipulated by the current civil law, which complicates the determination of its content. The main difference between the contract of intent is the lack of mandatory conditions in its structure, therefore, it is impossible to oblige one of the parties to conclude the main contract on the basis of the contract of intent even when the other party appeals to the court with such a request (Agabalaeva, 2019).

A framework contract differs from a preliminary contract in the fact that the former denotes the conditions associated with the movement of certain material assets, while the latter merely regulates the legal relationship for the conclusion of the contract in the future, which is the final result, and will regulate legal relations similar to the framework contract. Therefore, such a procedural measure as compulsion to conclude the main contract is not applicable to the framework contract.

In addition, the framework contract is a contract already concluded, which does not yet detail all the essential terms and conditions that will be made in the future.

And finally, the preliminary contract provides for the conclusion of only one main contract in the future, while the framework contract allows concluding an unlimited number of contracts on its basis.

#### 4 Summary

A preliminary contract is an agreement according to which the parties have obligations to conclude the main contract in the future. This contract is a relatively independent civil structure. The above signs of the preliminary contract reveal its legal nature. This contract is gratuitous, consensual, bilateral or multilateral, as well as casual.

Features of the preliminary contract are as follows: it is concluded to achieve several goals of the parties at once: satisfaction of existing interests, establishment of mutual rights and obligations, as well as achievement of the final result, which consists in signing the main contract.

The main contract may not always be concluded, if both parties have reached consensus on termination of the preliminary contract. In other cases, the injured party may apply sanctions to the violator, namely: apply to the court with a demand for coercion to conclude the main contract; claim damages or fine; warn about the loss of deposit or deposit payment in double size, depending on which of the subjects of legal relations has committed a violation.

There are a number of contracts that are personally trust in nature in the Russian legislation. The parties to such a contract have the right to unilaterally terminate the legal relationship that has arisen between them during conclusion and execution of the contract. For example, the principal has the right to cancel the order, and the attorney has the right to refuse it at any time in turn. A contract containing the rules on the waiver of this right is considered null and void.

Thus, it seems quite realistic to conclude such main contracts after signing the preliminary one. In practice, it is far from uncommon for one party to refuse to conclude the main contract, because even if the conclusion of the main contract takes place upon coercion of the refusing party, this party has the right to refuse to execute the main contract after its conclusion (Bondarenko, 2016). Thus, in this situation, compulsion to conclude the main contract will not inherently bring the desired result, because the desired rights and obligations of the parties will not arise,

therefore, the need to conclude the main contract, in case of refusal of one of the parties to execute it, is very doubtful.

The preliminary contract is used quite often and this is often associated with the need to obtain preliminary consent for major transactions from the antimonopoly authority. Such consent of the Federal Antimonopoly Service of Russia will be required when purchasing shares in the authorized capital of an economic entity, if the enterprises, occupying a dominant position in the market, participate in the transaction. In this case, the parties do not have the right to conclude the main contract until consent is obtained.

## 5 Conclusions

A preliminary contract as a special type of civil law contract is the basis for the occurrence of a legal relationship, the subject of which is the actions aimed at organizing contractual relations, and the object of which is the main contract to be concluded. This legal relationship is based on the rights and obligations of the parties to conclude the main contract within a certain period of time on the terms and conditions stipulated in the preliminary contract.

The preliminary contract can be used as part of the further conclusion of a huge number of contractual structures, so it is comprehensive.

Legal consolidation of the concept and the main distinguishing features of a preliminary contract allows divide it from the contracts regulating the circle of similar legal relations.

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