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The Implementation of Preliminary Contracts (Foreign Experience)

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ABSTRACT

The article describes the problems of comparative analysis of foreign experience governing the procedure for concluding initial contracts in accordance with the civil legislation of the Republic of Uzbekistan, the conditions of their conclusion, their scientific solutions, and some aspects of improving the legal framework for civil rights.

KEYWORDS

Agreement, incomplete contracts, pre-contract disputes, preliminary contract, memorandum, principal contract, the procedure of negotiation.

INTRODUCTION

The study of foreign experience is one of the main tools of the progressive development of all disciplines, including law. In the case of law the comparative law, which "is designed to promote the increment of knowledge" plays a major role [1]. One of the goals of the discipline

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of "comparative law" is to find in the legal systems of other countries the best and most suitable for the rule of law specific regulatory decision problems in the country [2].

Legislation of foreign countries contains provisions governing the procedure for the conclusion of preliminary contracts, although they differ in certain characteristics, the overall scheme of the conclusion of preliminary contracts in the Republic of Uzbekistan and countries such as Germany, France, USA, England has no considerable differences: the conclusion of the agreement in the previous stage contains an obligation to conclude the main contract in the future.

Thus, the German legislation does not stipulate the institute of the preliminary contract, but some specific legislation does not exclude the possibility of using the preliminary contract in particular cases. For example, the Law "On Limited Liability Companies" pre-supposes the conclusion of the preliminary agreement, according to which the parties commit themselves to conclude a foundation agreement to establish a company in the future. In judicial practice, the application of the provisions of the preliminary agreement, also provides that the Federal Court understands by the preliminary contract agreement by which the two sides (or one of the parties) agree to conclude the main contract. Here, the preliminary contract represents a debt obligation, in presence of which it induces the possible compulsion to conclude the main contract. In Germany, the turnover of civil practice delimits the so-called simple preliminary agreements (tracts), or contracts of intentions that do not induce obligations and are aimed at the conclusion of the main preliminary contract, being the basis for the relevant obligation [3].

THE MAIN PART

The Civil law in France does not exclude the possibility of concluding preliminary contracts. As the French civil lawyer Jean Morander states, if the parties have committed themselves to join the treaty in the future, then it can be called a preliminary contract. French law stipulates the conclusion of preliminary contracts in various forms: it can be a one-way contract (only one side becomes obliged to assume with respect to another party an obligation to enter an agreement on some terms, such as a treaty) or a bilateral preliminary contract (in which each of the parties undertakes an obligation to join such a specific contract). For the conclusion of certain preliminary contracts, the civil legislation of France may contain certain requirements. So, the promise to make a donation only takes effect if the investment in the form of a notarial deed and promise to agree on the establishment of a mortgage shall be valid in the case when it is given in the form of a private act [4].

In the Civil law of England, there is an institute of pending contracts. This category of English law cannot be compared with the preliminary contract, because the contract law in this country says that the agreement on reaching the agreement won't be a contract in the future. However, if there is a dispute between the parties on the interpretation of the intentions of the parties (to conclude a contract or not) in most its part it depends on the decision of the court and the presence of a precedent, because if the parties use in the offer the words preliminary contracts, they thereby agree to be bound, even if they

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specified that a formal document to be drawn up later [5].

In the US, preliminary contracts are used for the conclusion of major transactions where the parties need to distribute the risks associated with the negotiation regime. Most often, in the practice of civil turnover of the US, one can come across the two types of preliminary contracts. The first - a preliminary contract with open terms contains most of the essential terms of the transaction and the parties have the right to continue negotiations on it to reach an agreement on the conditions that remained open for discussion and that will be an integral part of the final agreement. The second type – a preliminary contract which can be the subject for consideration or otherwise the agreement on the continuation of the negotiations - fixates the agreement of the parties concerning certain future terms of the contract, but does not give them a legally binding character [6]. Another type of prior contract stipulated by the US legislation is the Interim Agreement. This agreement considered as the temporary tool of settlement of relations between the parties in the course of further negotiations. It is, as a final agreement, is quite specific in the sense that none of its provisions is subject to further discussion, but it does not contain any terms of the latest transaction.

American civic lawyer Allan Farnsworth offers to divide pre-contract agreements into several main types:

1. Pre-contract agreements with open terms should contain most of the terms of the transaction and the parties agree to be bound by these terms and conditions. But they also undertake to continue negotiations to reach an agreement on the terms which remain open and should be included in the final contract. If no agreement is reached on the open terms, the parties are considered to be bound by those terms that are included in the pre-contractual agreements, and the other terms are set in case of dispute with the court. The main purpose of such pre-contractual agreements is to affix the agreement already reached by the parties to exclude the proposal of one of the sides on their subsequent modification.
2. Agreement on the continuation of negotiations will set the agreements reached by the parties with respect to some terms of the futures contract but did not give them a legally binding character. The main purpose of such agreements - to confirm the seriousness of intentions of the parties with respect to the concordance of the terms in the future contract and confer the parties an obligation to continue negotiations, relying mainly on the terms fixed in such a pre-contractual agreement (these terms are not binding and may be modified by the parties during the negotiations). Unlike the first type of pre-contractual agreement, if the parties fail to reach an agreement on a final agreement, they are not considered to be binding by the agreed terms, and the court has no right to impose conditions on which agreement has not been reached.
3. Preliminary contract contains all the terms of the future final contract, but parties, due to some circumstances, conclude a final contract later.
4. Pre-contract agreement on negotiations, differing from considered types of pre-contractual agreements in all cases is final and legally binding on the parties, but it

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serves only as a subject of the negotiation procedure. It does not specify the terms of the future final contract as all previously mentioned pre-contract agreements [7].

The analysis of foreign legislation allows us to conclude that institution of the pre-contractual agreements in the American legislation is worked out more in detail. The Civil Code of the Republic of Uzbekistan has one norm in article 361 – which remains less considered of all. A more detailed comparison of article 361 in the Civil Code of the Republic of Uzbekistan and the norms of the foreign law on pre-contractual agreements allows discussing the potential structure of the preliminary contract in the Civil law of the Republic of Uzbekistan.

Preliminary contract on the negotiations for the foreign law is not a new institution, whereas in civil law of the Republic of Uzbekistan such a structure was not provided at any time span. The procedure of negotiations regulated by foreign legislation is an effective legal instrument for pre-contractual liability. As a striking example, in this case, can serve a German construction culpa in contrahendo (literally meaning "fault in negotiating") or quasi-contractual liability, designed by Rudolf von Jhering, and then, without being even mentioned in the Civil Code of Germany, received a rapid development in the judicial practice, forming a full-fledged institution of civil law. The basis of this construction lies the assumption that the parties entering into the negotiations conclude a contract that will presume the implementation in good faith actions aimed after the contract. Unjustified failure of negotiations, as well as pre-contractual and other unfair practices, constitute a violation of this implicit contract and involve pre-contractual liability, as a rule, in the form of compensating positive damages.

The doctrine of the German civil law shall divide the cases of pre-contractual liability into three groups, depending on the nature of the incurred damage. The first group covers cases of damage, which is not directly related to the contract (physical injury, damages caused by high risk). The second group is characterized by the damage arising out of the absence of a valid contract (non-disclosure of information, unjustified termination of negotiations). The third group apply to the cases of harm by the agreement entered into force. In this situation, a person bound by an "unwanted" contract, if pre-contractual obligations are not violated by the contracting party, would not have agreed or have concluded it under other conditions [8].

In the civil law of the Republic of Uzbekistan category culpa in contrahendo - «fault in negotiating," "pre-contractual liability", "unfair negotiation" - is one of the conditions for incurring non-contractual liability. The content of such obligations presumes the liability for breach of the duty to negotiate in good faith. The grounds for the pre-contractual liability can always be the damage caused to the other party of the pre-contractual process. Such harm includes both actual damages and lost profits. As I.B.Zokirov notes that unfair party will undertake additional disadvantageous property consequences of its behaviour. In addition, the prerequisite for pre-contractual liability will be the illegitimacy of the conduct of one party, causal link and the fault of tortfeasor [9].

Pre-contractual liability is based on the position that since the beginning of negotiations between the parties there is a special kind of

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relationship - fiduciary relations, which requires manifestations of mutual honesty. Legislation of the Republic of Uzbekistan does not establish general rules of conduct on the pre-contractual stage but regulates the conduct of the parties through the establishment of responsibility for specific misconduct. The possibility of laying pre-contractual liability on the unfair side shall be considered only in case of absence of the reaction to a protocol of disagreements after the delivery contract while evading conclusion of the basic agreement in the presence of the preliminary contract, as well as the avoidance of a party from the state registration or notarization of the contract. However, the legal system of the Republic of Uzbekistan recognizes the possibility of bringing to pre-contractual liability.

In domestic law, there is not a norm that would provide legal value to the fact of beginning of the negotiation process as a general rule. In this case, it is possible to use the preliminary contract construction of the negotiation procedure and, accordingly, implement to the Civil Code of the Republic of Uzbekistan an additional article in the following edition:

Article 361.1. Preliminary contract on the negotiation procedure

1. A preliminary contract on negotiation procedure is a contract in which the parties establish the order of negotiation. The terms of the preliminary contract on negotiations are final and are not subject to further discussion of the parties.
2. In case of violation of fixed negotiation procedure by the parties (by one of the parties), they shall be liable in accordance with acting legislation, unless otherwise provided by the contract.

This construction of the contract in the proposed wording does not generate the obligation to sign the main contract, securing negotiations as the subject of the contract. The Parties may identify the need for certain actions on a collection of information that will assist in the conclusion of the basic contract in the future, share obligations on its collection, settle and consolidate some activities and distribute costs in the course of negotiations. Inclusion in the contract of certain sanctions, for example, in the form of penalties will help to protect the aggrieved party.

It seems that the expansion of the bunch of norms on pre-contractual agreements would allow the participants of civil legal relations to have greater freedom of actions in the resolution of matters arising in their activity.

The analysis of foreign legislation within the framework of comparative law can serve as a starting point for the improvement of the institution of preliminary contracts in the Civil law of the Republic of Uzbekistan. Using the positive experience of foreign countries, in relation to the preliminary contract construction, consists of identifying the effectiveness of the norms governing legal relationship in the pre-contractual stage. Researching the norms of individual countries allows to make a more detailed elaboration of pre-contractual agreements institute in their legal systems: the selection of several types of pre-contractual arrangements will also create more flexible conditions for their conclusion.

It appears that the appropriation in the civil law of the Republic of Uzbekistan different types of preliminary agreements allows solving

certain problems of the parties to formalize their relationship.

First, it will secure the intermediate results achieved during the negotiations.

Secondly, acquire confirmation of the seriousness of the conclusion of the final (main) contract.

Third, limit the contracting party in the negotiations on the final (main) contract by prohibiting to conduct parallel negotiations with the third parties.

Fourth, set the rules for further negotiations.

Fifth, agree on the distribution of costs in the event of a failure in the negotiations, as well as agree on the amount one will have to pay to a party that refuses to conduct further negotiations.

CONCLUSION

As a conclusion, it can be stated that the ideas forwarded above, views on the content and opinions to improve the effectiveness of social and economic reforms carried out in Uzbekistan, we believe, will contribute to the improvement of the legal basis of civil rights and the enhancement of the conclusion of preliminary contracts and their scientific solutions.

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