On the Issue of Pre-Contractual Liability Qualification

Larisa V. Shvarts

PhD in Jurisprudence, Associate Professor of Department of Law of Russian Presidential Academy of National Economy and Public Administration (North-West Institute of Management of RANEPA), Saint Petersburg, Russian Federation; shvarz7@yandex.ru

ABSTRACT

The article is devoted to the study of the existing positions in the Russian doctrine regarding the institution of pre-contractual liability. The ambiguous position of the legislator, the controversial explanations of the judges of the Supreme Court of the Russian Federation do not reduce the relevance of the problem of the unified nature of pre-contractual liability. In this article, the author points out the shortcomings of the legal regulation of determining the time and grounds for applying pre-contractual liability measures, as well as issues of determining a specific mechanism for protecting bona fide negotiators, in particular in the field of identifying the rules for calculating losses incurred.

Keywords: pre-contractual liability, contractual liability, tort liability, legal nature, conclusion of a contract, pre-contractual contacts (negotiations), assurances

The inclusion of the rules on pre-contractual liability in the domestic legal order is a completely justified and well-timed step. Ensuring the restoration of violated rights, as well as their judicial protection, is proclaimed by the Civil Code of the Russian Federation as one of the main principles of domestic civil legislation. At the same time, the violation of rights is not associated with the mandatory existence of contractual relations between the subjects of law.

This amendment introduces the general principle of imposing liability, elements of which in Russian law were previously contained in the form of provisions for certain types of contracts and were derived from the general principle of good faith and from the composition of the general tort. With the complication of civil turnover, the increase in business needs, including the development of cross-border relations, such fragmentary regulation of pre-contractual relations became insufficient, which led to the adoption of Federal Law No. 42-FZ of March 8, 2015 “On Amendments to Part One of the Civil Code of the Russian Federation”, which actually adopted the approach to pre-contractual liability common in developed legal systems.

Pre-contractual liability is extended on such components of dishonest behavior, as entering into negotiations with a deliberate absence of intention to reach agreement with the other party; providing of incomplete or inaccurate information to the other party; sudden and unjustified termination of negotiations about the conclusion of the contract (article 434.1 of the Civil Code). False representations about the circumstances can be linked to pre-contractual liability in the event of the probability of occurrence in conditions when there are no contractual obligations yet (Article 431.2 of the Civil Code of the Russian Federation).

However, as we can see, the list of grounds for applying pre-contractual liability measures is very broad and vague, and therefore the question of determining the legal nature of pre-contractual liability has become even more acute.

Thus, when determining the station of pre-contractual liability, we should consider its special nature, which consists in the impossibility of attributing it to either tort or contractual liability. According to V. S. Komaritsky, “the main difference between pre-contractual liability and contractual liability is due to the absence of a contract concluded between the subjects. In turn, pre-contractual liability differs from tort liability in its subject composition, since it always arises only between persons who are already in a pre-contractual relationship”[1].

At the same time, we should note the fact that it cannot be denied that liability under agreements (for example, a negotiation agreement) is both contractual and pre-contractual, since, on the one hand, the provisions of the law on contractual liability are applicable to them due to their full compliance with the characteristics of a civil contract, but, on the other hand, they do not relate to the basic rights and obligations that will be established by a future contract, and therefore are pre-contractual[2].

However, there is a more radical view that pre-contractual liability is a special type of civil liability that cannot be defined through the nature of contractual or non-contractual liability[3].

---

[1] *Komaritsky V. S.* Legal Regulation of Pre-Contractual Liability under the Legislation of the Russian Federation : dissertation of the candidate of legal sciences [Pravovoe regulirovanie preddogovornoi otvetstvennosti po zakonodatel’stvu Rossiiskoi Federatsii : diss. kand. yurid. nauk]. Moscow, 2016. (in rus) p. 8.

[2] See: *Komaritsky V. S.* Op. cit. p. 9, 24.

[3] See: *Idrissov Kh. V.* Problematic Issues of Pre-Contractual Liability: Doctrinal Approaches and Positions of Judicial Practice [Problemnye voprosy preddogovornoi otvetstvennosti: doktrinal’nye podkhody i pozitsii sudebnoi praktiki] // Lex russica. 2018. No. 10. p. 98-99. (In rus)

As noted earlier, the analysis of the current legislation also does not clarify the question of the qualification of these relations. The rules on pre-contractual liability are located in subsection 2 "General provisions on the contract" of Section 3 of the Civil Code of the Russian Federation, but they also establish the possibility of applying the rules on obligations resulting from harm. It seems that the location of the article 434.1 among contract law itself does not mean automatic classification of it as contractual liability as a whole and, therefore, the use of norms of Chapter 59 of the civil code is not a clear evidence of its non-contractual character. In general, this is correct, especially since contractual liability does not necessarily have to be a liability for breach of obligations[4].

Thus, taking an intermediate position between contractual and tort liability[5], it should be noted that pre-contractual liability in the general sense can be considered both as a means of protection and as a measure of liability. The measures of liability are the recovery of losses, penalties and moral damage, and the means of protection can include all other coercive measures (for example, compulsion to conclude a contract). In the context of this study, such an opinion is justified, since "the basis for applying such liability is the commission by a person of actions interpreted as pre-contractual violations. Thus, in the context of Article 8 of the Civil Code of the Russian Federation, the grounds for liability are actions that entail harm to another person"[6].

At the same time, it is necessary to clearly determine the moment of occurrence of pre-contractual liability in order to calculate potential pre-contractual violations, since the beginning of a pre-contractual relationship does not yet indicate the possibility of pre-contractual liability. When considering the procedure for agreeing on the terms of an international commercial contract, O. V. Muratova says that in modern conditions, pre-contractual relations arise most often not as a result of an offer to conclude a contract on certain conditions, but from the moment of manifestation of the intention to conclude a contract, from the offer to enter into negotiations[7].

According to I. Z. Ayusheva, in the classical sense, pre-contractual liability can be discussed only in cases where the intention of the subjects to conclude a contract is clear, but this intention was not followed by any specific actions[8].

V. V. Bogdanov also recognizes the intention of one party to conclude an agreement for the beginning of pre-contractual relations (for example, the intention may be expressed in the discussion of the terms of the upcoming transaction), where the unlawful refusal of the other party to conclude the contract will be the basis for the occurrence of pre-contractual liability[9]. The presented opinion is logical, because the main goal of liability at the pre-contractual stage is to protect the party interested in concluding the contract from the unfair behavior of the other party.

To expand the understanding of the legal nature of pre-contractual liability, special attention should be paid to the traditional scheme of concluding an "offer — acceptance" contract. An offer, which means a proposition to conclude a contract under certain conditions, must reflect the clear intention of the offeror to sign the contract in the future. In turn, the acceptance must contain an explicit assurance of the acceptor to conclude the contract on the proposed terms.

However, some scholars believe that the offer and acceptance is a one-way deal, criticizing the requirement for the essential terms in the text of the offer and supporting the suggestion to empower the court to determine the essential terms of the agreement in resolving the dispute about recognition of it as unconcluded[10].

This perspective is based on a misinterpretation of existing rules, because article 443 of the Civil Code states that "the response of consent to conclude a contract on terms other than proposed in the

---

[4] See: *Khokhlov V. A.* General Provisions on Obligations : Textbook [Obshchie polozheniya ob obyazatel'stvakh : uchebnoe posobie]. Moscow : Statut, 2015. p. 235-238. (in rus)

[5] *Bogdanov D. E.* Evolution of Civil Liability from the Position of Justice: Comparative Legal Aspect : monograph [Ehvolyutsiya grazhdansko-pravovoi otvetstvennosti s pozitsii spravedlivosti: sravnitel'no-pravovoi aspect : monografiya]. Moscow : Prospect, 2016 p. 209. (in rus)

[6] *Komaritsky V. S.* Op. cit. p. 56-57.

[7] See: *Muratova O. V.* On the Issue of Qualification of Pre-Contractual Relations in International Commercial Turnover [K voprosu o kvalifikatsii preddogovornykh otnoshenii v mezhdunarodnom kommercheskom oborote] // Zhurnal rossiyskogo prava. [Journal of Russian law] 2018. No. 6. p. 117. (in rus)

[8] See: *Ayusheeva I. Z.* Pre-Contractual Liability: Novelties of Civil Legislation and Judicial Practice [Preddogovornaya otvetstvennost': novelly grazhdanskogo zakonodatel'stva i sudebnoi praktiki] // Lex russica. 2017. No. 5. p. 138. (in rus)

[9] *Bogdanov V. V.* Pre-Contractual Relations in Russian Civil Law: dissertation of the candidate of legal sciences [Preddogovornye otnosheniya v rossiiskom grazhdanskom prave: diss. ...kand. yurid. nauk]. Moscow, 2011. p. 135. (in rus)

[10] See: *Aleksandrov N. G.* Law and Legality in the Period of Developed Construction of Communism [Pravo i zakonnost' v period razvitogo stroitel'stva kommunizma]. Moscow : Gosyurizdat, 1961. p. 157-158 (In rus); Civil Law : Textbook [Grazhdanskoe pravo : Uchebnik] / edited by E. A. Sukhanov. V. 1. Moscow : Volters Kluver, 2008. p. 448. (In rus)

offer, is not an acceptance"; "the answer is recognized as the refusal of the acceptance and at the same time as a new offer".

Therefore, a holistic understanding of Articles 435 and 443 of the Civil Code of the Russian Federation makes it obvious that the proposition will be considered an offer provided that the following criteria are met simultaneously: it shall be addressed to one or more specific persons (with the exception of public offers); it shall be specific and express the intention of the offeror to conclude a contract. The last two features of the offer are key in all legal systems. Acceptance of the "offer", which does not contain specific terms of the contract, leads to the fact that the parties agree on the establishment of relations, without determining their specific subject.

After the introduction of the Institute of assurances and legal construction of pre-contractual liability in domestic law, some scholars began to distinguish pre-contractual contacts of the parties (negotiations) as a separate stage of the contract. For example, S. Yu. Kazachenok, reasoning about the legal nature of assurances laid down by the legislator, comes to the conclusion that "when the provision of information does not become part of the contract and the other party bears certain losses, based on the fact that it relied on it and it was unreliable, then, in fact, we are talking about tort liability. And only if the assurances (guarantees) were part of the contract, we can talk about contractual liability"[11]. On the basis of the above statement we can conclude that the author's position on the question of the formulation of pre-contractual liability tends to the faction of followers of the dual nature of the responsibility under study.

It should be noted that the opposite point of view, which criticizes the approach according to which pre-contractual contacts of the parties belong to one of the stages of concluding a contract, is also reasonably expressed in science. O. V. Muratova concludes that pre-contractual relations should be considered not as a stage of concluding a contract, but as an independent legal relationship in the civil law system that arises between potential transaction participants[12].

Another important point to consider in this context is the fundamental principles of Russian civil law and their relationship to pre-contractual liability.

According to Article 1 of the Civil Code of the Russian Federation, these are the principle of freedom of contract and the principle of good faith of participants in civil legal relations. At the same time, the norm on negotiations at the conclusion of a contract is based on both principles. In our point of view, pre-contractual liability is a necessary restriction of the principle of freedom of contract in the context of the prohibition on the entry into negotiations of unscrupulous entrepreneurs who initially do not plan to conclude a contract, but pursue other goals (for example, causing harm to a potential counterparty). At the same time, the legislator establishes a requirement for the bona fide conduct of legal entities as a whole, accordingly, good faith is an essential condition in the negotiation process.

It is also impossible to ignore such a problem as the lack of a specific mechanism for applying pre-contractual liability. In the general provisions (Articles 431.2 and 434.1 of the Civil Code of the Russian Federation) the legislator, in fact, established a certain possibility of protecting bona fide participants in negotiations, but did not specify the structure of this protection, in particular, in the field of identifying the rules for determining and calculating losses suffered by a bona fide participant in negotiations.

It is obvious that in practice there are inevitable difficulties with a new mechanism for the application of protective rules of the civil code, therefore, the Plenum of the Supreme Court delineated the task to set some guidelines for judicial practice concerning pre-contractual liability.

In this sense, a significant event was the adoption of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 24.03.2016 No. 7 "On the application by courts of certain provisions of the Civil Code of the Russian Federation on liability for breach of obligations". First, in paragraph 1 of clause 19 the Plenum of the Supreme Court resolved the question of the application of Chapter 59 of the civil code, specifying that the provisions of this Chapter shall apply to the relations on compensation for losses caused by dishonest conduct of negotiations in all matters not regulated by article 434.1 of the civil code.

Secondly, paragraph 20 clearly shows the position of the Supreme Court of the Russian Federation on issues of good faith in negotiations: "... a party that conducts or interrupts negotiations on the conclusion of a contract in bad faith, is obliged to compensate the other party for the losses caused by this;.the victim shall be put in the position in which it would have been if it had not entered into negotiations with an unscrupulous counterparty."

---

[11] *Kazachenok S. Yu.* Procedure of Pre-Contractual Relations between the Parties to an Entrepreneurial Agreement as a Stage of Concluding a Contract [Protsedura preddogovornykh vzaimootnoshenii mezhdu storonami predprinimatel'skogo dogovora kak stadiya zaklyucheniya dogovora] // Entrepreneurial Law [Predprinimatelskoye pravo]. 2019. No. 1. p. 40-41. (in rus)

[12] See: *Muratova O. V.* Op. cit. p. 115-123.

It is important to note that these provisions currently apply to real contracts as well. Contradictory assessments were caused by the Resolution of the Plenum of the Supreme Court of the Russian Federation of December 25, 2018 No. 49 "On certain issues of Application of the General Provisions of the Civil Code of the Russian Federation on the conclusion and interpretation of a contract", which contains clarifications on the cases when the contract is considered concluded and how the formal non-compliance affects the validity of such a transaction. According to paragraph 4, "in case when in accordance with paragraph 2 of article 433 of the Civil Code of the Russian Federation the contract is considered concluded from the moment of the transfer of property (real contract), it should be noted that this circumstance does not relieve the parties from the duty to act in good faith in negotiations on the conclusion of such contract. The rules of Article 434.1 of the Civil Code of the Russian Federation are also applicable to negotiations on the conclusion of a real contract. In particular, if after the negotiations the real contract was not concluded, the party that conducted or interrupted these negotiations in bad faith is obliged to compensate the other party for the losses caused by this (paragraph 3 of Article 434.1 of the Civil Code of the Russian Federation)."

Third, the Plenum of the Supreme Court of the Russian Federation made an important note: the employer reimburses the harm caused by unscrupulous behavior of his employee on pre-contractual stage, according to the rules of article 1068 of the civil code.

Nevertheless, there are still a lot of unresolved issues. For example, it is not clear what will be reimbursed to the negotiating party if the other party acts in bad faith. For example, will the first party be able to receive compensation for income from the failed sale of goods or compensation for other loss of benefit?

It is unclear what is meant by expenses in connection with loss of ability to conclude a contract with a third party: whether it includes the loss incurred by the person in connection with the failure to conclude a contract with another person (for example, loss of income from the failed sale of goods); whether an abstract opportunity to enter into a contract with any third party shall be the subject of compensation, or it shall still be required to prove the existence of a real possibility of concluding an agreement with a particular subject of civil turnover? Moreover, it seems even more difficult to determine the amount of such expenses.

The compensation for the disclosure of confidential information obtained during negotiations, or the use of it for one's own purposes provided for by law also requires clarification.

References

1. Aleksandrov, N. G. Law and Legality in the Period of Developed Construction of Communism [Pravo i zakonnost' v period razvitogo stroitel'stva kommunizma]. M. : Gosyurizdat. 1961. 271 p. (In rus)
2. Ayusheeva, I. Z. Pre-Contractual Liability: Novelties of Civil Legislation and Judicial Practice [Preddogovornaya otvetstvennost': novelly grazhdanskogo zakonodatel'stva i sudebnoi praktiki] // Lex russica. 2017. No. 5. Pp. 136147. (In rus)
3. Bogdanov, V. V. Pre-Contractual Relations in Russian Civil Law: Diss. ...Cand. of Law Sciences [Preddogovornye otnosheniya v rossiiskom grazhdanskom prave: diss. .kand. yurid. nauk]. M., 2011. 155 p. (In rus)
4. Bogdanov, D. E. Evolution of Civil Liability from the Position of Justice: Comparative Legal Aspect : monograph [Ehvolyutsiya grazhdansko-pravovoi otvetstvennosti s pozitsii spravedlivosti: sravnitel'no-pravovoi aspect : monografiya]. M. : Prospect. 2016. 304 p. (In rus)
5. Civil Law : Tutorial. T. 1 [Grazhdanskoe pravo : Uchebnik. T. 1] / Under the editorship of E. A. Sukhanov. M. : Volters Kluver. 2008. 720 p. (In rus)
6. Idrissov, Kh. V. Problematic Issues of Pre-Contractual Liability: Doctrinal Approaches and Positions of Judicial Practice [Problemnye voprosy preddogovornoi otvetstvennosti: doktrinal'nye podkhody i pozitsii sudebnoi praktiki] // Lex russica. 2018. No. 10. Pp. 98–105. (In rus)
7. Kazachenok, S. Yu. Procedure of Pre-Contractual Relations between the Parties to an Entrepreneurial Agreement as a Stage of Concluding a Contract [Protsedura preddogovornykh vzaimootnoshenii mezhdu storonami predprinimatel'skogo dogovora kak stadiya zaklyucheniya dogovora] // Entrepreneurial Law. 2019. No. 1. Pp. 3945. (In rus)
8. Komaritsky, V. S. Legal Regulation of Pre-Contractual Liability under the Legislation of the Russian Federation : Diss. ...Cand. of Law Sciences [Pravovoe regulirovanie preddogovornoi otvetstvennosti po zakonodatel'stvu Rossiiskoi Federatsii : diss. .kand. yurid. nauk]. M., 2016. 205 p. (In rus)
9. Muratova, O. V. On the Issue of Qualification of Pre-Contractual Relations in International Commercial Turnover [K voprosu o kvalifikatsii preddogovornykh otnoshenii v mezhdunarodnom kommercheskom oborote] // Journal of Russian law. 2018. No. 6. Pp. 115–123. (In rus)
10. Khokhlov, V. A. General Provisions on Obligations : Textbook [Obshchie polozheniya ob obyazatel'stvakh : uchebnoe posobie.]. M. : Statute. 2015. 286 p. (In rus)