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A Turning Point in the Understanding of the Legal Consequences of the Conclusion of a Preliminary Contract in Latvian Case Law

Dr. iur. **Erlens Kalniņš**
Faculty of Law, University of Latvia
Docent at the Department of Civil Law Sciences
E-mail: *erlens.kalnins@lu.lv*

Mg. iur. **Germans Pavlovskis,** *LL. M.* (Tübingen)
Faculty of Law, University of Latvia
Doctoral student at the Department of Civil Law Sciences
E-mail: *germans.pavlovskis@gmail.com*

On 5 July 2023, the Supreme Court (Senate) delivered its judgement in case No. SKC-19/2023, departing from the current case law regarding the legal understanding and legal consequences of a preliminary contract, regulated in Section 1541 of the Civil Law, recognising that both the right to claim conclusion of the main contract and the right to claim compensation for losses could arise from the preliminary contract, as well as providing other important findings, *inter alia*, regarding the possibility for the claimant to join the claim for conclusion of the main contract in one with the claim for performance of the main contract. This article provides detailed insight into this judgement by the Senate, at the same time referring to the findings made in the current case law and legal literature, as well as pointing to possible future challenges.

Keywords: preliminary contract, case law, right to claim real performance, "one step theory".

Contents

Introduction

On 5 July 2023, the Senate, in expanded composition, delivered its judgement in case No. SKC-19/2023,[1] by which it departed from its existing practice regarding the legal understanding and legal consequences of the preliminary contract, regulated in Section 1541[2] of the Civil Law[3] (hereafter – CL), recognising that both the right to claim conclusion of the main contract and the right to claim compensation for losses could arise from the preliminary contract, as well as providing other important findings, *inter alia,* regarding the claimant's right to join the claim for performance of the preliminary contract (i.e., conclusion of the main contract or recognising it as being entered into) in one with the claim for performance of the main contract (i.e., collection of the contracted purchase price).

This Senate's judgment marks departure from the finding, cultivated and maintained over a long period by Professor Kalvis Torgāns (1939–2021), that only the right of contracting parties to claim compensation for losses or, also, only expenditure, followed from the concluded preliminary contract, as the preliminary contract, allegedly, is only "a gentlemen's agreement". The existence of the right to claim conclusion of the future or the main contract, in turn, would contradict the principle of private autonomy.[4]

The Senate, referring in its reasoning to the sources of Baltic private law, the Senate's inter-war case law, findings made in the Pandect law doctrine and the present-day legal doctrines of Switzerland, Austria and Germany, as well as findings from the case law,[5] has applied not only the historical method for construing legal provisions (thereby confirming continuation of the Latvian civil law) but also the comparative method, thus, attesting also in practice to the kinship of the Latvian civil law with the Swiss, Austrian and German law and its belonging to the Germanic system of law.

To clearly highlight the significance of the Senate's judgement, the first part of the article focuses on the understanding of the preliminary contract before of the said judgement was pronounced. The second part provides a concise account of the findings, included in the Senate's judgement. The third part, in turn, points to possible future challenges related to further development of the institution of preliminary contract.

1. Understanding of the preliminary contract after restoration of Latvia's independence

In 1998, Prof. K. Torgāns noted: "An agreement between parties regarding another contract to be entered into in the future is called a preliminary contract. A preliminary contract becomes effective only after the parties have reached agreement on essential

[1] The Senate's Judgement of 05.07.2023 in case No. SKC-19/2023 (C29244819). Available: https://www.at.gov.lv/downloadlawfile/9239 [last viewed 11.03.2024].

[2] CL Section 1541 stipulates: "A preliminary contract with the purpose of entering into a future contract shall take effect as soon as the essential elements of the contract have been established by it."

[3] Civillikums [Civil Law] (28.01.1937). Available: https://likumi.lv/ta/en/en/id/225418 [last viewed 11.03.2024].

[4] See: *Torgāns, K.* Komentārs 1541. pantam [Commentary on Section 1541]. In: Latvijas Republikas Civillikuma komentāri: Ceturtā daļa. Saistību tiesības (1401.–2400. p.). Autoru kolektīvs prof. K. Torgāna vispārīgā zinātniskā redakcijā [Commentaries on the Civil Law of the Republic of Latvia: Part Four. Law of Obligations (Sect. 1401–2400). Team of authors, general scientific editing by Prof. K. Torgāns]. Rīga: Mans Īpašums, 1998, p. 97.

[5] The Senate's Judgement of 05.07.2023 in case No. SKC-19/2023 (C29244819), paras 10.3.,10.4., 11.5.

elements of the future contract. A preliminary contract does not create rights, e.g., to claim the property, regarding which and the price of which agreement has been reached in the preliminary contract, but only to claim conclusion of a contract regarding this property and for the said price. Pursuant to this, liability for non-compliance with the preliminary contract may set in not for the failure to transfer the property but for not concluding the contract, and this liability may be manifested as compensation for losses."[6]

Prof. K. Torgāns continued to maintain this finding, supplementing it with the following: "A preliminary contract is a contract regarding conclusion of another contract in the future. Sometimes, proceeding towards the conclusion of a contract is gradual, first of all reaching agreement on some provisions of the contract, leaving the agreement on others for later, hoping that, finally, it will be possible to align all the rules, important for the contracting parties. A memorandum of understanding, negotiations agreement or a preliminary contract can serve this purpose. [...] A preliminary contract is binding in the sense that one of the parties has the right to claim continuation of negotiations and, as recognised in case law, conclusion of the said contract, but if the other party is avoiding it – compensation for the expenditures incurred. There are no grounds to speak, instead of expenditures, about compensation for losses because this concept comprises also lost profits, and this could be claimed also in the case of non-performance of a concluded purchase or other type of contract. A preliminary contract does not give the right to claim mandatory conclusion of the intended contract, that would be contrary to the principle of contracting parties' autonomy."[7]

I.e., although a preliminary contract is a contract, in the opinion of Prof. K. Torgāns, a preliminary contract, nonetheless, is not a genuine contract because its performance cannot be claimed. This understanding conforms with the one that was quite prevalent even in mid-19th century and, pursuant to which, a preliminary contract was deemed to be a stage or a phase in the conclusion of the main contract,[8] from which, logically, followed that none of the contracting parties could have the right to claim performance of the preliminary contract, i.e., entering into the main contract.

On the basis of the said findings by Prof. K. Torgāns, in the period from 2017 to 2019, the following findings were reiterated in the Senate's judgements. Firstly, the wording, included in CL Section 1541, "established essential elements of the contract", is compared to the sufficient grounds for entering into contract, referred to in CL Section 1533,[9] thus, a preliminary contract includes these essential elements, however, the will to bind immediately is absent. Secondly, if a preliminary purchase contract has been concluded, it cannot be the grounds for the right to claim transfer of the purchase object or payment of the purchase price; however, one of the parties has the right to claim continuation of negotiations and entering into the said contract but,

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[6] *Torgāns, K.* Komentārs 1541. pantam, pp. 96–97.

[7] *Torgāns, K.* Saistību tiesības. I daļa. Mācību grāmata [Law of Obligations. Part I. Textbook]. Rīga: Tiesu namu aģentūra, 2006, pp. 55–56; *Torgāns, K.* Saistību tiesības. Mācību grāmata [Law of Obligations. Textbook]. Rīga: Tiesu namu aģentūra, 2014, p. 56; *Torgāns, K.* Saistību tiesības [Law of Obligations]. 2nd revised edition. Rīga: Tiesu namu aģentūra, 2018, p. 54.

[8] *Savigny, F. C. von.* Das Obligationenrecht als Theil des heutigen Römischen Rechts [The Law of Obligations as Part of today's Roman Law]. Bd. II. Berlin: Veit und Comp., 1853, p. 245.

[9] CL Section 1533 stipulates: "A contract shall be considered to be finally entered into only when the contracting parties have reached complete agreement regarding the essential elements (Section 1470) with the purpose of mutually binding each other."

if the other party avoids it, – claim compensation for the expenditures incurred. It has been noted in some of the Senate's judgements that the preliminary contract, although not giving rise to right, e.g., to claim the property, regarding which and the price of which agreement has been reached, nevertheless, gives the right to claim entering into contract on this property and for the said price. Liability for the non-performance of a preliminary contract may not set in for not transferring the property but may set in for not concluding the contract, and this liability can be manifested as compensation for losses. Thirdly, entering into a preliminary contract does not grant the right to claim mandatory conclusion of the intended contract, as it would be contrary to the principle of the autonomy of contracting parties or the principle of freedom of contracts. It is noted, simultaneously, that, in view of the differences existing between a purchase contract and a preliminary purchase contract, the buyer's right to claim transfer of property follows from the purchase contract, whereas the right to claim conclusion of the main contract – from the preliminary contract.[10]

The Senate has concluded, at least in one judgement, that if the contracting parties had concluded a preliminary purchase contract, the right to claim compensation for the loss of expected profit (in the amount of purchase price set) from a third person, due to the unlawful actions of which the main contract had not been concluded, did not follow from such a contract and CL provisions on compensation for losses because, in difference to a purchase contract, a preliminary purchase contract does not give the right to claim payment of the purchase price.[11]

At the same time, it must be noted that different findings had been expressed in the case law at the turn of the century. Thus, in 2007, the Senate left unchanged the appellate court's judgement, by which the appellate court, partly satisfying the claimant's claim, on the basis of the preliminary purchase contract concluded by the parties, imposed the obligation upon the defendant to conclude a contract regarding the purchase of immovable property by a certain date.[12] In 2004, the Chamber of Civil Cases of the Supreme Court, in turn, concluded that an obligation that followed from a preliminary contract could be reinforced by earnest money.[13] It follows from CL Section 1725,[14] in systemic conjunction with CL Section 1728,[15] that by giving earnest money, it is possible to secure not only the performance of a final contract entered into but also the performance of a preliminary contract, therefore a preliminary contract is to be deemed a final contract entered into, in the meaning of CL Section 1725. The Senate has reaffirmed this finding also in 2013, pointing, in addition, to the right

[10] *Kalniņš, E.* Priekšlīguma saistošais spēks [Binding Force of the Preliminary Contract]. In: Starptautisko un Eiropas Savienības tiesību piemērošana nacionālajās tiesās. Latvijas Universitātes 78. starptautiskās zinātniskās konferences rakstu krājums [Application of the International and European Union law in the national courts. Collection of research papers of the 78th International Scientific Conference of the University of Latvia]. Riga: LU Akadēmiskais apgāds, 2020, p. 220.

[11] The Senate's Judgement of 14.09.2018. in case No. SKC-245/2018 (C20186514), para. 15.2. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/362368.pdf [last viewed 11.03.2024].

[12] The Senate's Judgement of 11.04.2007. in case No. SKC-261/2007 (C04344704), reasoned part. Available: https://www.at.gov.lv/downloadlawfile/726 [last viewed 11.03.2024].

[13] Judgement by the Chamber of Civil Cases of the Supreme Court of 14.03.2002. in case No. PAC-98. In: *Tihonovs, V.* Tiesu prakse civillietās [Case Law in Civil Matters]. Rīga: Tiesu namu aģentūra, 2004, pp. 56–64.

[14] CL Section 1725 stipulates: "Earnest money shall mean that which is given by one party to the other party at the time of entering into a contract not only as proof that a contract has been entered into, but also to secure its performance."

[15] CL Section 1728 stipulates: "Upon earnest money being given a contract shall be considered to be entered into if otherwise it complies with all requirements of law, and either party may demand its performance."

of a contracting party to claim compensation for such losses that they have incurred because the other contracting party, contrary to the provisions of the preliminary contract (unlawfully), has refused to enter into a purchase contract.[16] Moreover, the Senate has recognised that the obligation, which follows from the preliminary contract, may be reinforced also by contractual penalties, the payment of which can be claimed if the main contract is not concluded.[17] At the same time, it has been recognised that, although the contracting party has the right to claim payment of contractual penalties, they do not have the right to claim imposing the obligation upon the other contracting party to take certain actions, without the performance of which the conclusion of the main contract is impossible.[18]

Although the abovementioned Senate's findings are quite contradictory, they lead to several conclusions. First, although a preliminary contract is a contract that contains the essential elements of the main contract it, nevertheless, is not a "genuine" contract of the obligations law. Secondly, although a preliminary contract contains and it must contain the essential elements of the main contract, a preliminary contract cannot be equated to it. Thirdly, legal remedies that can be used in the case where the preliminary contract is not performed voluntarily are limited, although, on the basis of the Senate's judgements examined above, unequivocal conclusion as to what the legal consequences of a preliminary contract are cannot be reached, i.e., whether the right to claim conclusion of the main contract, compensation of losses or only compensation of expenditures follows from a preliminary contract.

2. The Senate's judgement of 5 July 2023 in case No. SKC-19/2023

2.1. Description of a preliminary contract

The Senate, analysing the content of CL Section 1541, has recognised, first and foremost, that a preliminary contract is mutual expression of the will, based on agreement (concerted) between the contracting parties to enter into another contract in the future or the so-called main contract. A preliminary contract acquires binding effect if the essential elements of the main contract, to be concluded in the future, have been determined in it or can be determined pursuant to it, expect for the case where, in establishing the essential elements of the main contract to be entered into in future, one or both contracting parties have reserved the right to negotiate certain ancillary provisions, in this case, the agreement can be recognised as being only the so-called "preliminary discussion", in the meaning of CL Section 1534.[19] Obligation to enter into a specific main contract, with specific content, is established by a preliminary contract.[20] In other words, a preliminary contract is a genuine contract of obligations law, by which one or both parties assume the obligation, upon

[16] The Senate's Judgement of 28.02.2013. in case No. SKC-294/2013 (C30522209), para. 9 (unpublished).

[17] The Senate's Judgement of 11.05.2011. in case No. SKC-123/2011 (C04284905), paras 21.3–21.5 (unpublished).

[18] The Senate's Judgement of 11.05.2011. in case No. SKC-123/2011 (C04284905), para. 20.3.

[19] CL Section 1534 stipulates: "The agreement which has been made between the contracting parties regarding essential elements of the contract, if they have directly reserved the right to still negotiate certain ancillary provisions, shall be regarded only as a preliminary discussion. But when they have not reserved such a right concerning ancillary provisions, the contract shall be regarded as finally entered into, unless it indicates opposite intention, and in such case the natural elements (Section 1471) of the transaction shall be settled in accordance with the provisions of the law concerning the nature of this transaction, but the incidental elements (Section 1472) – pursuant to the discretion of the court."

[20] The Senate's Judgement of 05.07.2023 in case No. SKC-19/2023 (C29244819), paras 10.3.1, 10.3.6, 10.5.

the setting in of certain preconditions, to enter into another contract of obligations law or the main contract, having specific content. Although the preliminary contract does not create an immediate obligation to perform the main contract, to be entered into in future, the preliminary contract, nevertheless, establishes the obligation to enter into this main contract.[21]

It follows from the above that a preliminary contract is a genuine unilateral or bilateral (mutual) contract of obligations law, from which the right to claim conclusion of the main contract arises. At the same time, it has been recognised that a preliminary contract, although being a contract of obligations law, has a different subject-matter than the main contract. This is in full conformity with CL Section 1412,[22] which provides most extensive definition of the subject-matter of a contract. Thus, if a preliminary contract is directed at, e.g., conclusion of an alienation contract then the subject-matter of such a preliminary contract is taking certain actions (entering into the main contract), and the transfer of the title to property to the acquirer is the subject-matter of the alienation contract as the main contract. Hence, the Senate has recognised that the subject-matter of a preliminary contract that is directed at entering into a consensual contract is the commitment of one or both contracting parties to make mutual and concerted expressions of will with predetermined content, thus concluding the main contract.

2.2. Private autonomy

It is essential that the Senate has attributed[23] the preliminary contract regulated by CL Section 1541 to the legal consequences set out in CL Section 1587[24] and Section 1590.[25] By this, the Senate, firstly has logically recognised that the principle *pacta sunt servanda*, enshrined in CL Section 1587, applies not only to the types of contracts regulated by law itself but also to such contracts or acts, the basic content of which is not regulated by law and for the protection of the rights derived from these, historically, the principle *pacta sunt servanda* was created.[26] In providing explanation of private autonomy and the principle of freedom of contracts, the Senate, essentially, has recognised that the obligation assumed by a preliminary contract, instead of imposing inadmissible restriction upon private autonomy of contracting parties, creates such manifestation of private autonomy, in the framework of which the contracting parties have limited their freedom of contracts, by assuming contractually the obligation to enter into the main contract in the future.[27] Secondly,

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[21] The Senate's Judgement of 05.07.2023 in case No. SKC-19/2023 (C29244819), para. 10.3.3.

[22] CL Section 1412 stipulates: "The subject-matter of a lawful transaction may be not only an action, but also an inaction, or also an action the purpose of which is to establish or to transfer a property right, as well as an action with some other purpose."

[23] The Senate's Judgement of 05.07.2023 in case No. SKC-19/2023 (C29244819), para. 10.4.1.

[24] CL Section 1587 stipulates: "A contract legally entered into shall impose on a contracting party a duty to perform that which was promised, and neither the exceptional difficulty of the transaction, nor difficulties in performance arising later, shall give the right to one party to withdraw from the contract, even if the other party is compensated for losses."

[25] CL Section 1590 stipulates: "Each party shall have the right of claim for the performance of the contract by the other party [...]."

[26] *Pavlovskis, G. Pacta sunt servanda* principa attīstība romiešu tiesībās [Development of *Pacta Sunt Servanda* Principle in Roman Law]. In: Tiesību ierobežojumu pieļaujamība un attaisnojamība demokrātiskā tiesiskā valstī. Latvijas Universitātes 81. starptautiskās zinātniskās konferences tiesību zinātnes rakstu krājums [Admissibility and Justifiability of Restrictions of Rights in a Democratic State Governed by the Rule of Law. Article collection in legal science, the 81st international scientific conference of the University of Latvia]. Rīga: LU Akadēmiskais apgāds, 2023, pp. 51–59.

[27] The Senate's Judgement of 05.07.2023 in case No. SKC-19/2023 (C29244819), para. 10.4.5.

the Senate has clearly recognised that, also in the case of a preliminary contract, the primary legal remedy is claiming performance of the preliminary contract, i.e., entering into the main contract, which was recognised in the law of the Baltic Provinces already at the end of the 19th century.[28]

2.3. Claims and joining thereof in one action

As concluded by the Senate, a party to a preliminary contract is entitled to claim the fulfilment of the promise by the other party, i.e., concluding the main contract with the content stipulated in the preliminary contract, hence, the appropriate claim would be to impose upon the defendant the obligation to conclude the main contract, by making appropriate expression of will. However, it might be difficult to enforce a judgement that imposes an obligation upon the defendant to take such an action as the conclusion of a contract. Hence, in an action for performance of a preliminary contract, the claim requesting recognising the main contract as being entered into would be a more effective and appropriate, as the result of which such a judgement replaces the consent, unlawfully withheld by the defendant, to entering into the main contract, and drawing up of another deed.[29]

In this regard, it should be added that, although the Civil Procedure Law[30] regulation permits imposing an obligation, by a court's judgement, upon the defendant to enter into the main contract, this action – expression of one's will – can be taken only by the defendant personally, and they are under the threat of public law liability in the case of non-compliance (see Section 197 (1) and Section 620 (4) of the Civil Procedure Law). Therefore, bringing the claim of recognition and a court's judgement, by which the main contract is recognised as being entered into, from the practical perspective, represents more appropriate and, also, more effective legal solutions.[31]

As regards the right to claim compensation for losses, the Senate has noted that a party to the preliminary contract may have the right to claim also a compensation for losses that they have incurred because the main contract had not been concluded or its conclusion had been delayed. Moreover, claiming compensation for losses does not exclude the possibility to claim also a conclusion of the main contract (recognising it as being entered into), if only it is possible to conclude the main contract. Thus, the claim regarding conclusion of the main contract (recognising it as being entered into) and the claim regarding collection of compensation for losses may be both alternative and compatible legal remedies.[32]

Finally, the Senate has turned to a matter, very significant from the practical perspective, of whether the claimant may join the claim regarding performance of the preliminary contract (i.e., recognising the main contract as being entered into) into one with the claim regarding performance of the main contract (e.g., regarding collection of the contractual purchase price). Taking into account considerations of procedural economy, as well as the fact that the parties to the preliminary contract, in entering into the contract, wish not only to conclude the preliminary contract (*per se*) but also to achieve, finally, the performance of the main contract, the Senate

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[28] *Erdmann, C.* System des Privatrechts der Ostseeprovinzen Liv-, Est- und Curland [System of Private Law of the Baltic Provinces of Livonia, Estonia and Curland]. Bd. IV. Obligationenrecht [Law of Obligations]. Riga: N. Kymmel's Verlag, 1894, p. 125.

[29] The Senate's Judgement of 05.07.2023 in case No. SKC-19/2023 (C29244819), para. 10.4.2.

[30] Civilprocesa likums [Civil Procedure Law] (14.10.1998). Available: https://likumi.lv/ta/en/en/id/50500 [last viewed 11.03.2024].

[31] *Kalniņš, E.* Priekšlīguma saistošais spēks, p. 227.

[32] The Senate's Judgement of 05.07.2023 in case No. SKC-19/2023 (C29244819), para. 10.5.

has given an affirmative answer to the question referred to above. Namely, by accepting the legal findings of the Swiss[33] and German[34] law, the Senate has joined the so-called "one step theory" and recognised that both the respective claims may be joined in one if the actual and legal circumstances of the case allow it, and, in this respect, at least the following pre-conditions should be met: 1) both claims should be litigated between the same parties (the main contract should be concluded between the same parties that have to perform the contract), and 2) it should be feasible to fulfil the obligation that follows from the main contract as soon as the main contract is concluded. Moreover, no other obstacles to joining the claims may be present in the circumstances of the particular case.[35]

3. Future challenges

3.1. Variations of preliminary contracts and related particularities

As the judgement, examined above, reveals, the Senate has provided a sufficiently detailed interpretation, complying with the contemporary requirements of civil law circulation for the preliminary contract, regulated in CL Section 1541, and its legal consequences.

However, CL Section 1541 is not the sole provision that regulates the preliminary contract. Thus, CL Part on Obligations Law includes provisions that regulate a preliminary contract for a loan contract (CL Section 1935) and a preliminary contract for bailment (the second sentence in CL Section 1970), and these legal provisions should be considered, *vis-à-vis* CL Section 1541, *lex specialis*. A preliminary contract as an institution of law is not totally unknown also in other Parts of the Civil Law. Thus, e.g., a betrothal, regulated in CL Sections 26–31, can be considered as being a preliminary contract *sui generis* (because it is aimed at concluding marriage in the future),[36] as well as the contract, regulated in the second sentence of CL Section 640, which includes "a promise to appoint someone as his or her heir in the future" (a preliminary contract to an inheritance contract).

The said legal provisions have not been mentioned and analysed in the Senate's judgment that was examined above. However, already in its judgement of 15 November 2023 in case No. SKC-19/2023, the Senate linked *obiter dictum* the constituent elements of the provision of CL Section 1935[37] to the conclusion that a preliminary contract is a genuine civil law contract, the failure to perform it voluntarily gives the right to claim recognising the main contract as being entered into.[38] Although there are no doubts that a preliminary contract for a loan contract is

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[33] *Zellweger-Gutknecht, C.* In: *Widmer Lüchinger, C., Oser, D.* (Hrsg.) Obligationenrecht I. Basler Kommentar [Law of Obligations I. Basel Commentary]. 7. Aufl. Basel: Helbing Lichtenhahn Verlag, 2020, Art. 22 OR, N 19.

[34] *Busche, J.* In: Münchener Kommentar zum Bürgerlichen Gesetzbuch. Bd. 1 [Munich Commentary on the Civil Code. Vol. 1] *Schubert, C.* (ed.). 9. Aufl. München: C. H. Beck, 2021, Vorbemerkung (Vor § 145), Rn. 70.

[35] The Senate's Judgement of 05.07.2023 in case No. SKC-19/2023 (C29244819), paras 11–11.6.

[36] *Kalniņš, E.* Privāttiesību teorija un prakse. Raksti privāttiesībās [Theory and Practice of Private Law. Articles on Private Law]. Rīga: Tiesu namu aģentūra, 2005, pp. 9–11.

[37] CL Section 1935 stipulates: "A contract whereby one party promises to grant a loan and the other party undertakes to accept it, shall take effect only from the time that the contracting parties mutually agree on the amount of the loan. If the promisor thereafter refuses to perform it, then he or she shall compensate the other party for all losses."

[38] The Senate's Judgement of 15.11.2023. in case No. SKC-25/2023 (C24086817), para. 9.4. Available: https://www.at.gov.lv/downloadlawfile/9586 [last viewed 11.03.2024].

a genuine contract of obligations law; however, pursuant to CL Section 1935, the right to claim conclusion of a loan contract as a real contract or giving the loan does not follow from it, and the contracting party has the right to claim only compensation for losses. At the same time, it should be noted that, already at the end of the 19th century in the Baltic literature on private law, such understanding of the preliminary contract to the loan contract was deemed to be outdated and incompatible with the requirements of contemporary civil law circulation.[39] The said can be attributed also to the solution, envisaged in the second sentence of CL Section 1970, pursuant to which, if one party to the preliminary bailment contract refuses to conclude a contract of bailment or accept an object for bailment, the other contracting party has only the right to claim compensation for losses. Whereas CL Section 1541 is applicable to preliminary contracts for other real contracts, on which special regulation is not provided for in law (e.g., a preliminary contract for a lending contract[40]), pursuant to which the right to claim conclusion of the respective main contract is derived from it. Moreover, it should be taken into account that, in difference to a preliminary contract to a consensual contract, the subject-matter of which is entering into the main contract by consensus as such, the subject-matter of a preliminary contract to a real contract is entering into the real contract, which requires both the consensus between the contracting parties and transfer of the respective property (*res*).

3.2. Form of a preliminary contract

In the judgement examined above, the Senate was not required to examine the question regarding the form of a preliminary contract and, thus, it remains unanswered. An opinion has been expressed in legal literature that, by analogy with the Swiss[41] and Estonian[42] law, the requirements set for the form of the main contract should be applicable.[43] This opinion cannot be upheld (moreover, it ignores the fact that the nature of regulation of the second part of Article 22 in the Swiss Law of Obligations Act on the form of a preliminary contract is not absolute[44]), as it ignores the rather liberal regulation, set out in CL Section 1485 and Section 1487, on the legal consequences for disregarding the written form, envisaged in the law, and the right of each party to demand the other party to prepare "the relevant deed", if the parties agree regarding all the essential elements of the transaction. Moreover,

[39] *Erdmann, C.* System des Privatrechts, p. 257.

[40] Ibid., p. 268.

[41] Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht) [Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations)], Art. 22. Available: https://www.fedlex.admin.ch/eli/cc/27/317_321_377/en [last viewed 11.03.2024].

[42] Võlaõigusseadus [Law of Obligations Act of Estonia], para. 33. Available: https://www.riigiteataja.ee/en/eli/507022018004/consolide [last viewed 11.03.2024].

[43] *Ķesteris, L.* Nodomu protokols un priekšlīgums – dokumenti pirms galvenā līguma noslēgšanas [Memorandum of agreement and preliminary contract – documents before conclusion of the main contract]. Jurista Vārds, No. 41 (1047), 09.10.2018.

[44] *Henrich, D.* Vorvertrag, Optionsvertrag, Vorrechtsvertrag. Eine dogmatisch-systematische Untersuchung der vertraglichen Bindungen vor und zu einem Vertragsschluß [Preliminary Contract, Option Contract, Prerogative Contract. A Dogmatic-systematic Examination of Contractual Obligations before and at the Conclusion of a Contract]. Berlin, Tübingen: Walter de Gruyter & Co, J. C. M. Mohr (Paul Siebeck), 1965, p. 151; *Zellweger-Gutknecht, C.* In: *Widmer Lüchinger, C., Oser, D.* (Hrsg.) Obligationenrecht I, Art. 22 OR, N 69 f.

as recognised in legal literature[45] and case law, [46] if the written form is needed to corroborate in the Land Register, on the basis of the transaction, the title to property or other right to immovable property (see CL Section 1487), instead of demanding that the relevant deed be drawn up, a party has the right to bring a claim against the other party regarding recognition of the particular right because a court's judgement on satisfying this claim replaces the respective written deed as the ground for entering the respective corroboration in the Land Register.

At the same time, it should be taken into account that, in those cases where demand for a written form is based on considerations related to protection of the interests of one or both contracting parties, CL Section 1485 is not applicable to an agreement incompatible with the written form envisaged in law, and only the rules of CL Section 1488 are applicable, which make the validity of the transaction dependent on its performance.[47] The said applies also to a preliminary contract, unless the main contract has to be concluded in the form of a notarial deed, because the aim of concluding a preliminary contract cannot be directed at circumventing the requirements set for the form of a notarial deed, and, pursuant to CL Section 1475(1), such a preliminary contract must be recognised as being invalid.[48]

3.3. Limitation period of claims arising from a preliminary contract

Similarly to the German law[49] and at variance with the Austrian law, in which, pursuant to the second sentence in para. 936 of the General Civil Code,[50] the right to claim conclusion of the main contract, derived from the preliminary contract, ends with the expiry of the preclusive term of one year,[51] the Latvian law does not have a special legal regulation on the limitation period for a claim that follows from a preliminary contract.

If the contracting parties have agreed, by a preliminary contract, on the term of its performance (e.g., by defining a certain period or a final term by which the main contract should be entered into), then this should be considered as the term for fulfilling obligations but not as the term when the claim and the corresponding obligations end. Hence, the claims that are derived from the preliminary contract are subject to the general regulation on limitation period.[52] I.e., claims that follow from a preliminary contract, pursuant to CL Section 1895, are terminated within ten years, however, if, pursuant to Sections 388–390 of the Commercial Law,[53] a preliminary contract is a commercial transaction, then the limitation period for claims derived

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[45] *Vīnzarājs, N.* Prasība par formāla līguma noslēgšanu [Claim to Conclude a Formal Contract]. Tieslietu Ministrijas Vēstnesis, 1935, No. 2, pp. 323–324, 326.

[46] The Senate's Judgement of 15.10.2008. in case No. SKC-338/2008 (C04293105), reasoned part. Available: https://www.at.gov.lv/downloadlawfile/3356 [last viewed 11.03.2024].

[47] *Fillers, A.* Darījumu rakstiskas formas regulējums Civillikumā [Regulation on the Written Form of Transactions in the Civil Law]. Jurista Vārds, 29.10.2013., No. 44 (795).

[48] Ibid.

[49] *Busche, J.* 2021, Vorbemerkung (Vor § 145), Rn. 67.

[50] Allgemeines bürgerliches Gesetzbuch [The General Civil Code of Austria]. Available: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622 [last viewed 11.03.2024].

[51] *Koziol, H., Bydlinski, P., Bollenberger, R.* (eds). Kurzkommentar zum ABGB [Brief Commentary on General Civil Code]. 5. Aufl. Wien: Verlag Österreich, 2017, § 936, Rz 5.

[52] *Henrich, D.* Vorvertrag, p. 218.

[53] Komerclikums [Commercial Law] (13.04.2000). Available: https://likumi.lv/ta/en/en/id/5490-commercial-law [last viewed 11.03.2024].

from such a preliminary contract is three years, pursuant to Section 406 of the Commercial Law.

Summary

The Senate's judgement of 5 July 2023 in case No. SKC-19/2023 marks a significant turning-point in the Latvian law regarding the understanding of a preliminary contract as a legal institution.

Firstly, the Senate has clearly recognised that a preliminary contract is a genuine contract of obligations law, the subject-matter of which is entering into another contract of obligations law. Although the conclusion of a preliminary contract restricts the private autonomy (freedom of contracts) of the contracting parties, this restriction is not contrary to the principle of private autonomy because it is based on a concerted decision by the contracting parties themselves, by which they limit their own private autonomy and which is binding upon them.

Secondly, the Senate has recognised that the right of claim might follow from the preliminary contract both with respect to conclusion of the main contract and compensation for losses if such had been incurred. Moreover, the right to claim regarding conclusion of the main contract should be regarded as the primary legal remedy.

Thirdly, by accepting the findings of the Swiss and German law, the Senate has joined the "one step theory" and recognised the claimant's right to join the claim regarding performance of the preliminary contract (i.e., regarding conclusion of the main contract or recognising it as being entered into) into one with the claim regarding performance of the main contract if both claims are to be litigated between the same parties and if it is feasible to fulfil the obligation, derived from the main contract, as soon as the main contract is concluded, insofar as there are no other obstacles to joining the claims.

The Senate's judgement of 5 July 2023 in case No. SKC-19/2023 did not and could not cover the entire range of legal issues related to the institution of preliminary contract; moreover, only a preliminary purchase contract is examined in the judgement. At the same time, CL regulates also other types of preliminary contracts, e.g., to loan and bailment contracts, in the case of non-performance of which it is not possible to claim conclusion of the main contract or recognising it as being entered into. In the case of a preliminary contract to other real contracts, special regulation on which is not envisaged in law (e.g., a preliminary contract for a lending contract), the general rules of CL Section 1541 are applicable, with the difference that the claim regarding performance of the preliminary contract should be directed not only at recognising the main contract as being entered into but, simultaneously, at the transfer of the respective property (*res*).

The requirements set for the form of the main contract are not applicable to the conclusion of a preliminary contract, unless the main contract should be concluded in the form of a notarial deed or the demand for a written form is based on considerations related to protecting the rights of one or both contracting parties.

The general regulation on limitation period is applicable to claims derived from a preliminary contract, therefore, if a preliminary contract should be qualified as a commercial transaction, the limitation period for the claims derived from it is three years, whereas if a preliminary contract is not a commercial transaction, then the limitation period for the derived claims is ten years.

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