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ON THE QUESTION OF LEGAL NATURE OF PRE-EMPTIVE RIGHT

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Abstract: The subject of this report is the legal nature of the pre-emptive right, which, in the author's opinion, should be seen as an independent subjective right that is, in some cases, an element of a civil legal relationship.

One of the theses is the idea that the pre-emptive right does not have a binding legal nature, since there is no counter obligation that corresponds to this right. There are no signs of obligation, including obligation arising on the basis of the law, since there is no active and passive subject. At the end of the study, the author concludes that the pre-emptive right is a set of legal norms regulating the regime of its exercise. In this regard, we can speak of a legal institution of pre-emptive rights. In a subjective sense, the pre-emptive right is an independent subjective right, established by law, of a participant in a certain legal relation (right in rem, right in personam, corporate law, etc.), which is an element of it, aimed at protecting other subjective rights of participants in such legal relations.

Keywords: civil law, preemption, civil law, legal doctrine, theory of law, realization of law, obligations

Civil law scholars who have not yet agreed on an unambiguous definition of this legal construct, have repeatedly investigated the legal nature of pre-emptive right[1].

[1] In the pre-revolutionary period, an outstanding scholar of that time I. A. Pokrovsky, within the framework of the classification of property rights to other people's things given by him, classified the right of pre-emptive purchase as the third group of rights to other people's things (author's note – limited property rights), the so-called rights to acquire a known thing. See: *Pokrovsky I.A.*. [Osnovnye problem grazhdanskogo prava] Main Problems of Civil Law. M., 1998. P. 207–208. *Professor V.P.*

It thus continues to be one of the debatable issues of civil law before and now.

Pre-emptive rights are known to be peculiar to various sub-branches of civil law. The legislator has introduced the construct in property, debt, inheritance and corporate law.

At present, there is much academic debate about the legal nature of the pre-emptive right. Scholars are trying to unambiguously determine whether the pre-emptive right is a right in rem[1], in personam[2] or is a secondary law[3], which is a

Gribanov, Russian civil expert, wrote that pre-emptive rights in Soviet civil law are understood as cases where, all other things being equal, the law grants an advantage to a certain group of people who have some special characteristics. See: *Gribanov V.P.* [Osushchestvlenie i zashchita grazhdanskikh prav] Exercise and Protection of Civil Rights. M., 2001. P. 295. One cannot disagree with the given conclusion. It is well known that the legislator in different legal relations, for example, rights in rem, rights in personam, corporate law, and so on, realizes the construction of the pre-emptive right. In other words, we can presume that this or that legal relation will determine the group of persons to whom the pre-emptive right is granted in accordance with the law. The legal relationship is the boundary within which the pre-emptive right exists. The construction of pre-emptive rights is essentially designed to protect a legal relationship from the intrusion of third parties who are not the subjects of the relationship. This is rightly pointed out by D.V. Lomakin, noting that the pre-emptive right should not be regarded as a right to protection but as one of the ways to protect subjective civil rights. See: *Lomakin D.V.* [Korporativnye pravootnosheniya: obshchaya teoriya i praktika ee primeneniya v khozyaystvennykh obshchestvakh] Corporate legal relations: general theory and practice of its application in commercial companies. M., 2008. P. 421. Consequently, the pre-emptive right is necessary for protection of subjective civil rights of participants of this or that legal relation which cannot be protected in any other way, except for granting of the pre-emptive subjective right. The legal nature of the pre-emptive right as applied to corporate legal relations has been the subject of independent scientific research. See: *Kachalova A.V.* // Legislation. No. 1. 2017.

[1] For example, L.Yu. Leonova notes that the pre-emptive right to purchase a share has the same characteristics as other rights in rem, in particular: the pre-emptive right follows the property, not the obliged person; the exercise of the right of pre-emption does not entail its termination (if there is common ownership). The right to another's property terminates in the same way as other rights in rem. In particular, when a thing is destroyed, the right in rem to it terminates and the pre-emptive right terminates accordingly. See: *Leonova L.Yu.* [Preimushchestvennye prava v grazhdanskom prave] Pre-emptive rights in civil law: Thesis, Doctor of Law. M., 2005. P. 22.

[2] Some researchers, in particular O.E. Blinkov and S.E. Nikolsky, come to the conclusion that the pre-emptive right has a binding nature, as it is implemented in a legal relationship that meets all the characteristics of an obligation arising on the basis of the law. See: *Blinkov O.E., Nikolskiy S.E.* [Preimushchestvennye prava v nasledstvennom prave Rossii i zarubezhnykh stran] Preferential rights in inheritance law of Russia and foreign countries: Monograph. M., 2006. P. 59.

[3] K. Sklovsky and M. Smirnova, consider the institute of pre-emptive purchase through the prism of secondary law. They point out that "the position of the seller who has made a declaration of intention to sell a share (thing, right) can be described as a binding, but not as an obligation. The position of the seller who made the sale bypassing the subject of the pre-emptive right can also be described: the seller is bound by the fact that the subject of the pre-emptive right can become the buyer in the contract. Moreover, which is characteristic of secondary law, the bound person can in no way affect the exercise of this right by the other party, including by committing (failing to commit) any

kind of prerequisite for the acquisition of other rights and obligations and which scientists have singled out as a special group of rights due to the fact that they are not subject to any obligation[1]. Occasionally, however, other views are expressed, in particular those that view the pre-emptive right as an element of legal capacity.

In view of the above, it should be noted that the consideration of pre- emptive rights as rights in rem does not take into account the fact that rights in rem are absolute, whereas pre-emptive rights are always relative in nature because they arise between parties to a legal relationship.

The pre-emptive right is also not of a binding nature, as there is no countervailing obligation to this right. There are no binding signs including one based on the law, as there is no active or passive subject. According to Article 307 of the Civil Code of the Russian Federation, by virtue of anobligation, one person (debtor) is obliged to perform a certain action in favour of another person (creditor) such as to transfer property, perform work, render a service, contribute to joint activities, pay money, etc., or to refrain from a certain action, and the creditor is entitled to demand that the debtor fulfils his obligation. The act of the obligated person is not present in case of subject matter of an obligation. The obligation incumbent on the person who must exercise the pre-emptive right on the other person(s) is limited to notifying them of his or her intentions. The pre-emptive right itself is limited to a certain period of time, after which the person obliged to comply with it ceases to be bound by the pre-emptive right of the other person(s). The pre-emptive right is not infinite! Only until the expiry of the statutory period may a party to a relationship exercise the pre-emptive right granted to it, under the conditions established by law. However, it arises anew each time a participant in the relationship decides to withdraw from it by selling a thing, a share or a right. In this case, the holder of right has no right to claim his pre-emptive right, which is not characteristic of an obligation, where it is almost always possible to compel the debtor to fulfil the obligation. A person, whose pre-emptive right has been violated, can only demand the transfer of rights and obligations under a contract entered into in violation of the pre-emptive right.

Therefore, this is solely an obligation to respect the pre-emptive right of the person entitled to it, which arises at the onset of statutory cases, such as the sale

actions to exclude its exercise. Further, the authors note that the mere fact that the seller's declaration of sale, stating all its essential terms, should be regarded as an offer, apparently predetermines the qualification of the seller's position as a whole by means of the category of secondary law". See: *Sklovsky K., Smirnova M.* [Institut preimushchestvennoy pokupki v rossiyskom i zarubezhnom prave] Institute of pre-emptive purchase in Russian and foreign law // Economy and Law. 2003. No. 10. P. 104.

[1] See: *Alekseev S.S.* [Odnostoronnie sdelki v mekhanizme grazhdansko-pravovogo regulirovaniya] Unilateral transactions in the mechanism of civil law regulation // [Antologiya ural'skoy tsivilistiki] Anthology of Ural civilistics, 1925–1989: Collection of articles. M., 2001. P. 64–66; *Bratus S.N.* [Sub'ekty grazhdanskogo prava] Subjects of civil law. M., 1950. P. 9.

of a share in the share capital of a limited liability company to a third party, etc. This obligation does not correspond to the pre-emptive right, but is a completely independent, unilateral obligation, which terminates upon expiry of a legal term that occurs upon sending the relevant notification to the entitled person. Obligations legal relationship may arise through the exercise of the right of first refusal of the consent of the holder of right, subject to his positive expression of will to enter into this obligations legal relationship, or, in the event of a transaction with violation of the pre-emptive right of the holder of right, if the latter wishes to claim the transfer of rights and obligations under a contract concluded in breach of the pre-emptive right. In the event that the holder of right does not wish to exercise his pre-emptive right within the statutory period, no legal relationship will arise at all.

In our view, with regard to the consideration of pre-emptive right as secondary law, i.e. not imposing any obligation on anyone, but only binding a person in a certain way, the following should be noted. The category of secondary rights itself is very imperfect. It is not universally accepted by all scholars. Its justification is in itself highly controversial. It should only be emphasised that, as a rule, the adherents of the category of secondary law, as a rule, cite the offer as the main and perhaps the only example of a secondary law, which, in the opinion of the researchers of this category, although it binds the offerer, does not oblige him to take certain actions. However, for example, O.A. Krasavchikov considered the offer as an incomplete part of the legal composition, not generating any legal consequences, even though incomplete consequences. The scientist rightly, in our view, noted that the legal significance of the offer itself lies in the plane of relations to conclude a contract, but not in the plane of the legal relations, to the emergence of which it is aimed. It is a legal fact that is part of the legal composition of a contractual legal relation[1]. This is the legal significance of the offer, and recognizing it as a secondary law does not bring us any closer to establishing the essence of the phenomenon.

The concept of pre-emptive right is also present in corporate legal relations relating to participation in business companies and production co-operatives, which we can in no way refer to either right in rem, right in personam or secondary law, as rightly pointed out by D.V. Lomakin[2].

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[1] See: *Krasavchikov O.A.* [Kategoriya nauki grazhdanskogo prava] Categories of Science of Civil Law. Selected Works: In 2 vols. Vol. 2. M., 2005. P. 111.

[2] Thus, the Russian scholar D.V. Lomakin repeatedly notes in his works that legal relations of participation (membership) that develop in organizations called corporations do not have attributes of obligations, in connection with this, cannot be called binding legal relations. Regarding the proprietary nature of corporate legal relations, account notes that in the vast majority of cases participation (membership) rights are not characterized as classical proprietary rights, because it is obvious to specialists that there is no sufficient basis for this. See: *Lomakin D.V.* Op. cit. P. 114–123.

In our opinion, pre-emptive rights by their nature cannot be attributed to right in rem, right in personam, corporate law or other legal relations. These relations are an external "shell" within which pre-emptive rights can be exercised in the cases prescribed by law. It exists within these legal relationships. Their existence is a necessary precondition for the emergence, existence and termination of pre- emptive rights.

Concerning the essence of the legal construct of pre-emptive rights, it must be borne in mind that undoubtedly there is a certain relationship between the subjects, but this relationship is determined solely by the legal relationship within which the exercise of the pre-emptive right by the authorised person is possible, not by the pre-emptive right itself, which cannot exist outside of the legal relationship[1].

The pre-emptive right should therefore be seen as a separate subjective right that is an element of a civil legal relationship in a number of statutory cases.

In this connection, the following common characteristics can be identified, which are characteristic of the pre-emptive right constituting the content of the various legal relations (right in rem, right in personam, corporate law and others) set out in the current civil legislation.

Firstly, a constitutional feature of a pre-emptive right is that it is usually derived from a rule of law established by law, which determines its content, as a result of which it cannot be abrogated by the executive body[2]. As far back as Dmitry Ivanovich Meyer, speaking of privileges in Russian civil law, pointed out that privileges are established by an act of the legislature, for this authority alone is called upon to establish rights[3].

Secondly, a pre-emptive right only exists and is only exercised in a certain legal relationship.

Thirdly, the pre-emptive right for each holder of right is always the original right, not based on the former proprietor of a right.

Fourthly, the pre-emptive right is inextricably linked to an empowered person holding an interest in a particular property, so that it cannot be transferred (ceded) to a third party.

Fifthly, as stated above, the pre-emptive right can be exercised for a legally specified period, after which it expires, indicating its fixed-term nature.

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[1] In this regard, it should be noted that D.V. Lomakin rightly considers pre-emptive rights as elements of the content of corporate legal relations. See: *Lomakin D.V.* Op. cit. P. 396–421.

[2] As was the case with the adoption by the Ministry of Economic Development of Order No. 411 dated 01.08.2018 On Approval of Model Charters under which Limited Liability Companies may Act, which essentially abolished the pre-emptive right established by the imperative provisions of Article 93 of the Civil Code and Article 21 of the Federal Law On Limited Liability Companies dated 08.02.1998 No. 14-FZ.

[3] See: [Russkoe grazhdanskoe pravo] Russian Civil Law (in 2 parts) Revised and Amended 8th edition, 1902. Ed. 3, revised. M., 2003. P. 263.

Sixthly, the pre-emptive right can be exercised by all parties to a legal relationship in the event of circumstances defined by law, such as the intention of one of the parties to sell a share in the right or shares to a third party.

Seventhly, the pre-emptive right can only be violated by the subject of a legal relationship.

In essence, the legislator is creating similar rules for a comparatively wide range of relations. In this connection, it is conceivable that pre-emptive rights could well be regulated by rules of a general nature, which could be applied to various legal relations and, in relation to each specific relation, could, as now, be provided for by special rules regulating special, specific cases peculiar to that relation.

The obligation to respect pre-emptive right is common to all parties to a legal relationship. If the legal relationship is static, the pre-emptive right is reciprocal; all participants are entitled to it. As soon as one of the participants plans the dynamics of the legal relations, the other participants are obliged to respect the priority of the other participants. The person who violates the pre-emptive right of the holder(s) of right bears the disadvantage that a third party who is the buyer, may cease to be a party to the contract they have entered into.

In a narrow sense, it is the right of one participant in a legal relationship to information about the intentions of the other participant in the legal relationship, within which the exercise of pre-emptive rights is possible. In a broader sense, it is the opportunity to increase ones, for example, corporate law by applying, among other things, liability measures in the form of a claim for the transfer of rights and obligations under the contract to oneself.

It is axiomatic that[1] a subjective right is a measure of the permissible behaviour of the subject of a civil legal relationship, as enshrined in the academic literature. Recognizing the pre-emptive right as an independent subjective right and not secondary to any other right, each time the legislator clearly defines its content and the powers that comprise it, which always depend on the type of legal relation within which the exercise of the pre-emptive right is envisaged by the legislator. It is known that each type of legal relationship may have a different content of the pre-emptive right itself. Thus, the content of the pre-emptive right (the powers within it) will depend on the type of relationship within which it is exercised.

To summarize the above, it should be noted that pre-emption right is, in an objective sense, a set of legal rules governing the regime for its exercise. In this regard, we can speak of a legal institution of pre-emptive rights. In a subjective sense, the pre-emptive right is an independent subjective right, established by law, of a participant in a certain legal relation (right in rem, right in personam, corporate

[1] See: [Grazhdanskoe pravo] Civil Law: In 4 vols. Vol. I. General Part: Textbook / Under the editorship of Professor E.A. Sukhanov. 3th edition, revised and supplemented. M., 2004. P. 121.

law, etc.), which is an element of it, aimed at protecting other subjective rights of participants in such legal relations.

Thus, there is no need to distinguish between a pre-emptive right in rem, a pre-emptive right in personam or a pre-emptive corporate law. The pre-emptive is one, but with different contents, depending on the specifics of the relationship.

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