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Precontractual Liability in Russian and Foreign Law

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5.1.3. Private Law (Civilistic) Sciences

GENERAL CHARACTERIZATION OF THE RESEARCH

Relevance of the research issue. Precontractual liability as an important tool for controlling the good faith behavior of the parties at the stage of contract conclusion has gained recognition in many legal jurisdictions and has shown its effectiveness for a long time. Unlike classical contractual and tort liability, which have their origins in Roman law, the theory of precontractual liability has a more modest history. In the form of an independent concept, such liability was first formalized in the XIX century thanks to the works of the famous German civilist R. Iering. The problem of pre-contractual liability quickly attracted the attention of German and French legal doctrine, due to which the concept was significantly modernized. The idea of precontractual liability was reflected in the civil legislation of many European states and was quickly adopted by judicial practice.

In Russian law general rules on precontractual liability appeared in the Civil Code of the Russian Federation (article 434.1) only in 2015. Until that time, legal regulation of precontractual relations was carried out only at the level of special rules authorizing individual cases of precontractual misconduct. Article 434.1 of the Civil Code of the Russian Federation stipulated general requirements for the behavior of the parties to negotiations, certain grounds for precontractual liability, rules on the conclusion of agreements on the procedure of negotiations and the amount of precontractual liability.

The introduction of general provisions on liability at the precontractual stage in the Civil Code of the Russian Federation led to the intensification of scientific research in this area. Despite this, a number of important issues of precontractual liability have not yet been sufficiently elaborated in the scientific literature. It is expected that the emergence of general rules on liability at the stage of contract conclusion should have led to a wave of court disputes on imposing precontractual liability on dishonest counterparties.

However, any legal institution without a detailed theoretical understanding can hardly pretend to be effectively applied in practice. It required more than a

hundred years for European legal jurisdictions to develop a balanced model of liability at the precontractual stage, which, on the one hand, protects the interests of the contracting party from the unfair behavior of the counterparty and, on the other hand, guarantees the subjects' freedom to discuss the terms of the future contract. The present study is aimed at searching for and developing a construction of precontractual liability that is optimal for the Russian context.

Degree of elaboration of the issue of the thesis research. The impulse to theoretical reflection of the problem of precontractual liability was the famous article of the German civilist R. Iering, written by him in 1861. It was in it that the conceptual issues of precontractual liability were considered for the first time. An important contribution to the development of the doctrine of precontractual liability was also made by Italian civilist G. Fagella (in an article published in 1906) and French jurist R. Saleilles (in an article published in 1907). Unfortunately, these articles are not freely available. Meanwhile, their content is partially covered in the work of the Russian pre-revolutionary jurist A.S. Hirschbandt. Reference to the works of these authors is also in the work of V.I. Sinaisky.

Currently, the problem of liability at the precontractual stage is the subject of due attention in foreign legal literature. The extensive study of this phenomenon was conducted by J. Cartwright and M. Hesselink in 2009. A great contribution to the development of the problem of liability for termination of negotiations was made by a relatively recent study by I. Zuloaga. Specific aspects of liability at the precontractual stage and related issues were given special attention in the works of U. Babusiaux, K. Ballerstedt, L.A. Bebchuk, Y. Ben-Dror, O. Ben-Shahar, H. Bernstein, E. Bucher, C.-W. Canaris, F. Caterini, G. Christandl, M. Coester, T.W. Cousens, R. Craswell, H. Dahm, M. Dressler, M.A. Eisenberg, V. Emmerich, J. Esser, E.A. Farnsworth, C. Feldmann, E. Fine, G. Fischer, H. Fleischer, J.-U. Franck, L.L. Fuller, P. Giliker, D. Gunst, E.W. Hadley, N. Hage-Chahine, J.D. Harke, B. Heiderhoff, J. Hein, H. Herrmann, J.A. Holten, A. Johnston, D. Kaiser, D. Kästle-Lamparter, C. Kersting, F. Kessler, H. Kötz, A.T. Kronman, K. Larenz, P. Legrand, S. Littbarski, S. Lohsse, B. Markesinis, S. Martens,

D. Medicus, A.T. Mehren, S. Meier, N.E. Nedzel, J. Neuner, R. Nirk, W.R. Perdue, V. Rieble, H. Roth, E. Schmidt, A. Schwartz, R.E. Scott, R. Sefton-Green, K. Sharma, M. Timme, L.E. Trakman, D.C. Turack, H. Unberath, W.-E. Voß, M. Weber, S. Wei, S. Whittaker, H.F. Wright, K. Yu, R. Zimmermann. The articles by M. Kjaerdi and B. Fovark-Cosson, which have been translated into Russian, are also dealing with issues of precontractual liability.

Undoubtedly, the problem of precontractual liability has not been ignored in Russian literature. All major studies dealing with the institute of liability at the stage of contract conclusion can be divided into three groups. The first group includes studies directly dealing with liability at the stage of contract conclusion. These include dissertations by K.V. Gnitsievich, V.S. Komaritsky, V.G. Polyakevich. The second group consists of works that are primarily focused not on precontractual liability, but on the study of the category of precontractual legal relations. These are dissertation studies by V.V. Bogdanov, O.V. Shpoltakov, as well as the monographs by A.V. Demkina and A.N. Kucher. Here we can also include the dissertations of D.A. Boyarsky and V.V. Sarkisyan dealing with negotiations on the conclusion of the contract. Finally, the third group includes the studies conducted by O.V. Muratova and A.M. Stepanischeva. In the dissertations of the mentioned authors precontractual liability and precontractual legal relations are considered through the prism of private international law. The dissertation of R.R. Lugmanov should be separately mentioned. It is focused on informational duties, the study of which, however, is very important for the theoretical understanding of liability at the stage of contract conclusion.

Despite a significant number of major studies on the problem of precontractual liability, many issues of the institute of liability at the stage of contract conclusion have not yet been fully studied. This is due to the fact that most of the studies were conducted before the amendments to the Civil Code of the Russian Federation in 2015. Therefore, they do not take into account modern regulation and judicial practice. Those studies, which were conducted after the amendments were made, still do not contain answers to all possible questions of application of this

institute. In particular, such issues as the applicability to liability at the precontractual stage of the rules on tort liability, the range of subjects of precontractual liability, conditions of bad faith termination of negotiations, precontractual information obligations and liability for their violation, determination of the amount of precontractual liability are still weakly elaborated.

Certain aspects of liability at the stage of contract conclusion were considered, inter alia, by M.M. Agarkov, A.G. Arkhipova, I.Z. Ayusheeva, Y.V. Baigusheva, D.E. Bogdanov, D.V. Boreisho, S.L. Budylin, A.A. Gromov, S.L. Degtyarev, M.A. Egorova, M.B. Zhuzhzhzhalov, S.Y. Kazachenok, A.G. Karapetov, I. Kiselev, E.A. Krasheninnikov, A.D. Kuzmina, O.V. Mazur, M.N. Maleina, I.M. Mutai, K.V. Nam, K.D. Ovchinnikova, I.I. Papilin, T.P. Podshivalov, Y.S. Porfirieva, A.S. Rainikov, A.D. Rudokvas, A.P. Sergeev, T.A. Tereshchenko, N.V. Tololaeva, A.A. Yagelnitsky.

The variety of publications on the topic of precontractual liability, unfortunately, does not indicate that it is sufficiently researched. Firstly, some of the publications were prepared before the fixation in the Civil Code of the Russian Federation of general norms on liability for bad faith behavior at the stage of contract conclusion. Secondly, the publications do not analyze all the issues of precontractual liability, which is necessary for the elaboration of the optimal construction of such liability in Russian law.

Aims and tasks of the study. The aim of this study is to elaborate a balanced and optimal construction of precontractual liability for Russian law.

In order to achieve the set aim, a number of ***research tasks*** have been defined, among which the most essential ones should be outlined:

- to determine the legal nature of precontractual liability in Russian and foreign law;
- to systematize the grounds of precontractual liability;
- to study the problem of reasonableness of imposing independent precontractual liability on third parties who are not parties to the contract;

- to identify and formulate the conditions of imposing liability for the termination of negotiations;
- to formulate the grounds and conditions for imposing precontractual liability for information violations;
- to determine the grounds for the occurrence and the main types of precontractual obligations;
- to identify the features of unlawfulness as a general condition of civil liability in relation to precontractual liability;
- to propose approaches to determining the amount of precontractual liability;
- to identify the specificity of causal connection in relation to precontractual liability;
- to determine the content of fault at the stage of contract conclusion necessary for liability.

Object of the research. The object of the study is social relations arising between the parties in the process of precontractual interaction.

Subject of the study. The subject of the study is doctrinal ideas about precontractual liability, its normative fixation in the Russian and foreign legal orders, as well as judicial practice of imposing it.

Structure of the study. The structure of the study is determined by the above aim and tasks, object and subject of the study. The first chapter deals with the general characteristics of precontractual liability, its legal nature and its subjects. The second chapter examines the main types of precontractual misconduct: bad faith termination of negotiations, information misconduct, non-fulfillment of precontractual obligations. The third chapter analyzes the conditions for the occurrence of precontractual liability: unlawfulness of the party's conduct, losses caused by the precontractual misconduct, causal relationship and the fault of the negotiating party. The conclusion formulates the obtained results of the conducted research.

Research methodology and methods. In the process of the research general scientific (analysis, synthesis, system approach, functional approach), special-legal (formal-legal, comparative-legal) and historical methods of cognition are used.

Scientific innovation of the study. The results possessing scientific innovation have been achieved by conducting the research. Firstly, the paper determines the applicability to precontractual liability of the rules of Russian tort law and makes proposals to improve its tort regulation. Secondly, the range of potential subjects of precontractual liability is defined and the possibility of bringing third parties involved in the process of concluding a contract to independent liability is justified. Thirdly, the conditions of precontractual liability for bad faith termination of negotiations and providing incomplete or misleading information are formulated. Fourth, the rules for determining the amount of damages to be compensated as part of precontractual liability are formulated. Taking into account these and other results, the thesis formulates the optimal construction of precontractual liability for Russian law.

Provisions put to the defense:

1. The provision is justified according to which, in countries with the principle of general tort, precontractual liability has a tort nature and should be regarded as a special type of tort, characterized by (1) the existence of a precontractual legal relationship between the parties to a future contract, which is prior to the creation of the tort obligation, but which, however, does not qualified as a precontractual obligation; (2) a special mechanism for the formation of damages, which are voluntary expenditures by the party, that are related to the conclusion of the contract, and lost opportunities.

2. The dissertation systematizes precontractual misconduct. The following main groups of precontractual offenses are identified: 1) destruction of the counterparty's reasonable reliance on the perspectives of concluding a contract; 2) deceit, violation of precontractual obligations to inform and maintain or not to use confidential information; 3) creation of obstacles to the conclusion of a contract; 4) unlawful inducement of the other contracting party to conclude a contract.

3. The expediency of imposing precontractual liability on third parties participating in the conclusion of a contract on an equal basis with the contracting party is argued on the grounds that the liability of a third party is possible for intentional causing of harm to the counterparty or for negligent causing of harm if at least one of the following conditions is present: 1) the counterparty has a special trust in the third party; 2) the third party has a substantial economic interest in the conclusion of the contract. Otherwise, third parties are not held personally liable, but a party to a future contract may still be liable for their behavior, which is possible if two conditions are present in the aggregate: 1) the precontractual misconduct was committed by the third party within the scope of the tasks assigned to it by the contracting party; 2) the third party acted as a precontractual assistant of the contracting party under its control and did not act independently of it.

4. Two conditions for liability for unreasonable termination of negotiations are defined, which must be established in the cumulation, namely (1) the reliance of the aggrieved party on the conclusion of the contract and (2) the absence of a sufficient reason for withdrawal from the negotiations. In establishing the first condition, the following must be taken into account: a) the reliance may be not only on the inevitability but also on the high probability of concluding the contract; b) the reliance may be induced or increased not only by the conduct of the counterparty but also by other reasons, if the counterparty who broke off negotiations was aware of the party's expectation of concluding the contract and his conduct influenced the reliance, for example, supported it; c) the reliance must necessarily be reasonable. In determining the second condition, it is important to take into account the following circumstances: a) as a general rule, substantial economic factors are adequate reasons, and in contracts in which the characteristic of the counterparty is important, reasons related to it are also adequate; b) circumstances within the counterparty's area of responsibility are generally not a reasonable cause for breaking off negotiations unless the party has informed the counterparty in advance of the relevant circumstances in which it may withdraw from the negotiations.

5. The conditions of liability for providing incomplete or misleading information are formulated: 1) the culpable party knew or should have known about the incompleteness or inaccuracy of the information; 2) the injured party reasonably relied on the provided information and trusted it; 3) the culpable party realized or should have realized that the relevant information is of great importance for the counterparty, is unknown to him and he will rely on it. However, in case of fraud by omission of important information or negligent providing of incorrect information or its omission, for liability it is also necessary to establish the existence of an information obligation of the dishonest counterparty at the precontractual stage. In the case of deceit by providing false information or concealment of information, a duty of information is not required for liability.

6. It has been proved that in the Russian legal system the precontractual agreement is the only source of precontractual obligation, which has two main types: 1) the obligation to conclude a contract; 2) the obligation to negotiate in a certain way. In the case when the obligation to negotiate in a certain way introduces additional duties in relation to those established by law (for example, a prohibition on parallel negotiations), the imposition of liability for its violation should be based on the rules of contract law, but the amount of liability will still be determined according to the rules of tort liability (only negative interest is compensated, not positive interest).

7. The specificity of unlawfulness as a condition of precontractual liability has been shown, which is expressed in the fact that unlawfulness has a different content depending on the specific type of precontractual liability: 1) in case of violation of a special rule directly establishing a duty at the precontractual stage, the unlawfulness is the same as in other torts; 2) in case of violation of a precontractual obligation, the unlawfulness is the same as in case of violation of a contractual obligation; 3) in most cases the condition of unlawfulness is actually reduced to the criterion of bad faith, in connection with which liability is imposed for bad faith behavior.

8. The expediency of compensating in Russian law under precontractual liability only the negative interest of the injured party (i.e., the costs that the person would not have made if he had not expected to conclude a legally perfect contract, as well as the opportunities lost in this connection) was justified, since (1) the award of negative interest, as a rule, fully compensates the losses of the injured party and (2) the award of positive interest (i.e., compensation for what the party should have received under the contract) violates the freedom of contract, because it creates an indirect inducement for a party to enter into a contract.

9. The specificity of the causal link has been identified, which is that, with regard to liability for bad faith termination of negotiations and providing incomplete or misleading information, this condition breaks down into two aspects: 1) the expenses and lost opportunities must arise from reliance on the conclusion of the contract or from trust in the information provided by the other party on which the injured party relied; 2) after the commitment of the precontractual misconduct, the expenses and lost opportunities transferred to the damages.

10. The provision is justified according to which the fault in the termination of negotiations refers exclusively to the fact of the breakdown of negotiations, but not to the formation of legitimate expectations of the injured party regarding the conclusion of the contract.

11. On the basis of the study of foreign experience of legal regulation of precontractual liability it is concluded that there are several approaches to liability at the stage of contract conclusion: 1) denial of good faith at the precontractual stage and a broader (England) or less broad (USA) denial of precontractual liability; 2) a balanced approach to precontractual liability, in which (a) liability is incurred for bad faith behavior at the stage of contract conclusion, (b) as a rule, only the negative interest of the injured party is subject to compensation (Germany, France); 3) an excessively wide application of precontractual liability with the possibility of recovery of positive interest and even inducement to prolong the negotiations (Dutch). In order to preserve the motivation to enter into precontractual contacts, the optimality for Russian law of a balanced construction of precontractual liability with

a tort nature (as in France) and the possibility of compensation of only negative interest was argued.

Theoretical significance of the study. Theoretical significance of the research is that its results can serve as a basis for further study of the problems of precontractual liability in Russian law. The results achieved within the framework of the conducted research have scientific value, enable to determine the place of precontractual liability in the system of Russian civil law, which is necessary for its further research.

Practical significance of the study. The practical significance of the research consists in the fact that the conclusions made in the dissertation can be used in the process of further improvement of legal regulation of liability at the precontractual stage, as well as in court practice in resolving disputes on imposing precontractual liability.

SUMMARY OF THE RESEARCH

The **introduction** reflects the relevance of the research topic, a review of the literature on this issue, defines the object, subject, aims and tasks of the research, research methods, specifies the structure of the paper, describes the theoretical and practical significance of the thesis, provides the provisions for defense.

The **first chapter** is characterized precontractual liability in Russian and foreign law. It considers the fundamental issues of liability at the stage of contract conclusion. The first chapter consists of three paragraphs.

The **first paragraph** is dealing with the concept and characteristics of liability at the precontractual stage. It examines the genesis of the theory of precontractual liability. Attention is focused on the scope of application of liability at the stage of conclusion of the contract. From the point of view of the classical approach it is applicable at the conclusion of a civil law contract. In foreign legal jurisdictions there are also examples of the use of this institute in family and labor law. All grounds of precontractual liability are referred to in this paper as precontractual misconduct. The precontractual misconduct may consist in (1) violation of the requirements of good faith at the precontractual stage; (2) violation of special provisions of the law or (3) non-fulfillment of the precontractual obligation.

In general, there are two possible approaches to the understanding of liability at the precontractual stage. According to the first approach, any liability, the basis of which, i.e. a precontractual misconduct, took place before the conclusion of the contract, may be considered precontractual. According to the second approach, not only the moment of the precontractual misconduct is taken into account, but also the nature of the liability (mainly negative interest is recovered, but not positive interest, as in the case of breach of contract). The first paragraph defends the scientific value of the second approach, since the first approach completely confuses contractual liability and precontractual liability in the case of a valid contract, which only leads to the dissolution of the theoretical construct of liability at the precontractual stage.

In German legal doctrine, where the construct of precontractual liability (*culpa in contrahendo*) has been widely developed doctrinally, two points of view on the duration of the precontractual obligatory legal relationship have been proposed: 1) the theory of change (*Umschlagstheorie*), according to which at the moment of contract conclusion the precontractual protective legal relationship is transformed into a contractual obligation to perform the contract; 2) the theory of a unified legal protective relationship (*einheitlichen gesetzlichen Schutzverhältnis*), which assumes that after the conclusion of the contract the precontractual legal relationship remains, within the framework of which the realization of precontractual liability is possible. Despite the fact that in German legal doctrine and judicial practice the first theory has achieved greater authority, the realization of precontractual liability is also possible after the conclusion of a valid contract as an alternative to liability for breach of contract.

The first paragraph systematizes precontractual misconduct. The following main groups of precontractual offenses are identified: 1) destruction of the counterparty's reasonable reliance on the prospects of concluding a contract; 2) deceit, violation of precontractual obligations to inform and keep confidential or not to use confidential information; 3) creation of obstacles to the conclusion of a contract; 4) unlawful inducement of the other contracting party to conclude a contract.

The paper demonstrates the organic connection of precontractual liability with precontractual legal relations, the entry into which signals the beginning of increased social contact between their parties, which indicates the need to protect their interests.

As a result of the analysis carried out in the first paragraph, the following main features of liability at the precontractual stage are formulated: 1) close connection with the conclusion of the contract (which is expressed in the presence of a precontractual legal relationship between the subjects of liability); 2) the basis of liability must necessarily arise before the conclusion of the contract; 3) the main

subjects of liability are the parties to the future contract; 4) the amount of liability is, as a general rule, the negative interest of the injured party.

The **second paragraph** of the first chapter deals with the problem of the legal nature of precontractual liability. The following approaches are analyzed: 1) quasi-contractual (used in German law); 2) tort (used in French law); 3) sui generis; 4) nihilistic (denial of its own legal nature of precontractual liability). The legal nature of precontractual liability is closely related to the existence of a general tort rule in the legal system. The quasi-contractual approach, widespread in German law, is due to the absence of a general tort rule in the German Civil Code. The tort approach implemented in French law, on the contrary, is derived from the general tort rule. The paragraph argues the author's point of view that in Russian civil law, considering the presence in it of the rule of general tort (article 1064 of the Civil Code of the Russian Federation), precontractual liability is a tort liability.

The author concludes that the tort approach has one serious imperfection – the impossibility to provide a uniform regulation of all cases of precontractual liability. This is due to the fact that the parties can conclude an agreement on negotiation, which in the presence of additional rights and duties changes the tort nature of liability to contractual. At the same time, the regulation of contractual and tort liability on a number of important issues differs, so the paper proposes the development of an autonomous (unified) regulation of precontractual liability, the foundations of which are laid in article 434.1 of the Civil Code of the Russian Federation.

The second paragraph also analyzes the norms of chapter 59 of the Civil Code of the Russian Federation, subsidiarily applicable to precontractual liability. A number of norms do not satisfy the specifics of the precontractual stage, so the author makes proposals to improve the tort regulation of precontractual liability: 1) to establish the possibility of reducing the amount of precontractual liability in the presence of any form of fault in the actions of the injured party, excluding the factor of the material status of the causer of harm; 2) to allow joint and several liability of several dishonest negotiators acting on the same side, independent of the joint nature

of their actions, in the presence of the fault of each of them; 3) to save the individual liability of the dishonest party to each injured counterparty with the possibility of filing joint and several injured parties' claims in case of common losses.

The **third paragraph**, which closes the first chapter, is focused on the issue of the subjects of precontractual liability. In this issue, the main focus is on German law, where the construction of the liability of a third party who is not a party to the concluded contract was substantially developed during the twentieth century in the practice of the German Federal Supreme Court. Resisting bad faith behavior on the part of third parties involved in the contracting process, German courts limited their liability to strict bounds. Firstly, third party tort liability is possible in case of intentional cause of harm to the other contracting party. Second, liability for negligent behavior is also possible, but with the compulsory existence of one of two conditions: 1) special trust of the counterparty in the third party; 2) substantial economic interest of the third party in the transaction. The third paragraph also demonstrates that the liability of a third party involved in the conclusion of a contract is also possible in Russian law on the basis of the rules of chapter 59 of the Civil Code of the Russian Federation. However, in the absence of clear criteria of liability of such persons in Russian legal doctrine and judicial practice, there is a risk of excessive and unreasonable imposition of precontractual liability on third parties. Therefore, it is proposed to limit their potential liability in case of negligent behavior to the conditions formulated in German law. In the case of an intentional tort, third parties should be held liable without these conditions.

The third paragraph also addresses another problem related to the participation of negotiating assistants in the contracting process: should the contracting party be held liable for their behavior? Based on an analysis of German case law, the third paragraph sets out two conditions for the contracting party's liability for the conduct of third parties, which must be considered together: 1) the third party committed the precontractual misconduct within the scope of the tasks assigned to it by the contracting party; 2) the third party acted as a precontractual assistant of the contracting party under its control, rather than acting independently of it. However,

even if a party has not authorized the third party to perform any acts at the precontractual stage or if the third party has gone significantly beyond the tasks assigned to it, the contracting party may be held precontractually liable for its conduct if, in view of the actual circumstances, the counterparty has the impression that the third party is acting in the interests of the contracting party.

The **second chapter** examines the grounds of precontractual liability. The range of grounds considered is narrowed down to bad faith termination of contract negotiations, provision of incomplete or misleading information, unauthorized use or disclosure of confidential information and breach of precontractual obligation. This is due to the fact that other precontractual offenses have already received relative development in the domestic legal doctrine, while the above grounds appeared in the Civil Code of the Russian Federation only in 2015 together with article 434.1. The second chapter also consists of three paragraphs.

The **first paragraph** analyzes the bad faith termination of negotiations. The paper identifies three types of bad faith conduct and termination of negotiations: 1) sham negotiations; 2) failure to inform about the termination of negotiations; and 3) arbitrary termination of negotiations. Depending on the type of this misconduct, the conditions of liability differ: 1) in the case of sham negotiations – only the lack of will of the negotiating party to conclude the contract; 2) in the case of failure to inform about the termination of negotiations as the only condition, in the author's opinion, we should consider the reasonable reliance of the affected party on the conclusion of the contract; 3) the conditions of liability for arbitrary termination of negotiations are simultaneously (a) the reliance of the counterparty on the conclusion of the contract and (b) the absence of a justified reason for termination of negotiations.

The existence of the above liability conditions should be established on the basis of judicial discretion and the courts' assessment of the negotiation context as a whole, taking into account the balance between the economic reasonableness of the negotiating party's behavior and the standard of good faith at the precontractual stage. At the same time, the thesis proposes a spectrum of abstract rules to guide the

determination of the existence of liability conditions. Applied to the condition of reliance on the conclusion of the contract, these rules are as follows: 1) reliance can be not only in the inevitability, but also in the high probability of the conclusion of the contract; 2) reliance can be not only caused or strengthened by the behavior of the counterparty, but also caused by other reasons, if the counterparty, who terminated the negotiations, was aware of the existence of the party's expectations regarding the conclusion of the contract and his behavior influenced the reliance on the conclusion of the contract, for example, supported it; 3) reliance must necessarily be reasonable, i.e. based on the actual circumstances of the negotiations. The author identified the following list of the main factors of reasonable reliance: 1) advanced nature of the negotiations, when the parties to the negotiations have agreed on part of the essential terms of the future contract; 2) assurance of the conclusion of the contract made by a party at the advanced stage of negotiations; 3) approval by the other party of additional costs and actions of the counterparty at the precontractual stage; 4) non-professional status of the person with whom the negotiations were terminated; 5) trusting nature of the relationship between the parties to the negotiations.

In assessing the reasonableness of the reason for termination of negotiations, in the author's opinion, the following rules should be followed: 1) as a general rule, adequate reasons are economic factors, and in contracts in which the characteristic of the counterparty is important, adequate are also the reasons related to it; 2) circumstances within the area of responsibility of the counterparty, as a rule, are not a reasonable reason for breaking off negotiations; 3) a favorable offer from a third party in rare cases with particularly strong confidence of the counterparty in the conclusion of the contract can be recognized as an unjustified reason.

Although, as a general rule, contracting parties are free to engage in parallel negotiations, the author has demonstrated the appropriateness of deviating from this rule in two cases: 1) a party has agreed to the contractual policy of the counterparty not to engage in multiple simultaneous negotiations; 2) a party, by providing false information about the absence of parallel negotiations, has formed the counterparty's

reliance on the conclusion of the contract. Obviously, parties to negotiations may also enter into an exclusivity agreement between themselves prohibiting or restricting concurrent negotiations.

Despite the absence of general liability for breakdown of negotiations in Anglo-American law, the paragraph shows that in these jurisdictions, liability for breakdown of negotiations is possible in some cases on the basis of special constructions. Thus, through their use in common law countries, the same result as in European continental legal jurisdictions, namely, liability for withdrawal from negotiations, can sometimes be achieved.

Russian law also provides for liability for withdrawal from negotiations. Meanwhile, the paragraph justifies the imperfection of the presumption of bad faith of termination of negotiations in Russian law. Suddenness is not an independent condition of precontractual liability. The paper shows that the presumption of bad faith termination of negotiations in Russian law is formulated as a complete composition of misconduct of bad faith behavior, which results in the presumption's loss of sense.

The **second paragraph** of chapter two examines information misconduct. These include: 1) providing incomplete or misleading information; 2) unauthorized use or disclosure of confidential information.

Liability for providing incomplete or misleading information is familiar to many legal jurisdictions, including the Russian one. The dissertation demonstrates a different approach to precontractual information obligations in common law and European continental law countries: in Anglo-American jurisdictions, the absence of a duty to provide information at the precontractual stage is taken as a general rule, while in European continental law jurisdictions such a duty is sometimes derived from the principle of good faith.

The paragraph proposes a process for establishing the necessary elements of liability for providing incorrect information or omitting important information. The first step is to determine the type of bad faith behavior. If there was active fraud (the contracting party has intentionally provided false information to the counterparty or

has concealed certain facts), it is not necessary to establish a precontractual information duty. If there has been passive fraud (simple omission of any facts without concealing them) or fault in the form of negligence, it is necessary to proceed to the second step. At this stage, it is necessary to determine whether an information duty exists. The precontractual information duty may be expressly provided for by law or may follow from the nature of the relationship between the parties to the negotiations. In the second case, the author has identified the following factors influencing the emergence of the information duty: 1) the nature of the contract; 2) the unequal position of the parties; 3) the fiduciary nature of the parties' relations. The third step is to establish the conditions of the duty to inform: 1) one party's possession of information of material importance to the counterparty (sometimes a party may have a duty to find out information if it is unknown to it); 2) the other party's unawareness of this information and lack of ability to obtain it itself. Finally, the fourth step is to establish the conditions of liability for providing incomplete or misleading information. The author identifies only three conditions that must be established in the aggregate: 1) the culpable party knew or should have known about the incompleteness or inaccuracy of the information; 2) the injured party reasonably relied on the information provided and trusted it; 3) the culpable party realized or should have realized that the relevant information is important for the counterparty, unknown to him and he will rely on it.

The thesis demonstrates that it is possible to give the injured party the right to claim precontractual liability even if a valid contract has been concluded between the parties. The amount of damages is recoverable to the extent of the negative interest, but it is defined as the difference between the price of the contract that would have been concluded by the injured party with a third party under conditions of full and accurate information and the price under the current contract concluded with the unfair party on unfavorable terms. This allows the injured party to bring a claim for precontractual or contractual liability, whichever is more favorable to it.

Confidentiality of information may be expressly stated by the party providing it or inferred from the nature of the information. Although the duty of confidentiality

first appears at the precontractual stage, it does not disappear after the conclusion of the contract and may continue even after its termination. Liability is possible both for the disclosure of confidential data and for its use without the consent of the right owner.

The **third paragraph** of the second chapter examines the breach of a precontractual obligation. Two main types of precontractual obligation are distinguished: 1) the obligation to conclude a contract; 2) the obligation to perform or not to perform certain actions in the process of concluding a contract. The study analyzes various classifications of preliminary agreements. Not all preliminary agreements are recognized in Anglo-American legal jurisdictions. For example, agreements to negotiate in good faith are not recognized in England. This practice is sometimes criticized by legal doctrine. In Russian law, there is an absolute prohibition on excluding precontractual liability or limiting its amount in a negotiation agreement. In the author's opinion, a more flexible approach seems optimal: extending the prohibition to exclude or limit precontractual liability only to cases of intentional causing of harm.

After the grounds of precontractual liability, the study in the **third chapter** considers the conditions of liability at the stage of contract conclusion, which have certain specificity.

The **first paragraph** considers such a standard condition of civil liability as unlawfulness, which has a different content in relation to different cases of precontractual liability: 1) in the case of liability for bad faith negotiations, the condition of unlawfulness is actually reduced to the condition of bad faith (which seems reasonable, since the flexible condition of good faith allows the court to better take into account all the circumstances of precontractual legal relations); 2) in the case of liability for breach of special rules establishing precise duties at the precontractual stage, there is a classical tort unlawfulness; 3) if there was a precontractual obligation between the parties to the negotiations, the unlawfulness will be as in contractual liability – in addition to the rules of law, the contractual terms are also taken into account. However, the Anglo-American legal jurisdictions

are characterized by the absence of a general requirement of good faith at the precontractual stage, and therefore in these jurisdictions in the first case the good faith criterion is not taken into account.

The **second paragraph** deals with damages caused by a precontractual misconduct. As a general rule, the injured party may be awarded only its negative interest (i.e. costs that the person would not have incurred if he or she had not relied on the conclusion of a legally perfect contract, as well as related lost opportunities) and not its positive interest (compensation for what the party should have received under the contract). As part of the negative interest, compensation is subject to: 1) real damage in the form of (a) the costs of negotiating and concluding the contract, (b) the costs of preparing for or performing the contract before its conclusion, (c) other losses related to real damage; 2) lost profits due to (a) loss of income, (b) failure to conclude an alternative contract with a third party. In legal orders that generally recognize the possibility of compensation for loss of chance, compensation for loss of chance to conclude a contract is also possible as part of damages at the precontractual stage. Losses to be compensated as part of precontractual liability must meet the following requirements: 1) connection of losses with negotiations and the process of contract conclusion; 2) reasonableness of actions of the injured party; 3) the expenses undertaken by the party have no independent value for it and their results cannot be used outside the framework of negotiations with an unfair counterparty; 4) connection of losses with reliance on the conclusion of the contract and trust in the information provided by the counterparty.

In the paragraph the problem of limitation of negative interest by the size of positive interest is considered, because in a number of cases negative interest may be more than what the injured party could receive under the contract. The author draws attention to the fact that the amount of precontractual liability should be related to the maximum amount that could have been received in a similar situation under the concluded contract. In the author's opinion, it would be wrong to impose precontractual liability for termination of negotiations in the amount of negative

interest, if the parties in the course of negotiations agreed on the right to unilateral waiver of the contract without compensation for losses.

The paper considers the experience of foreign legal jurisdictions on the recovery of positive interest by way of exception. For example, in German law positive interest may be awarded when the culpable party would have concluded the contract even if it had not committed a precontractual misconduct (for example, the culpable party would have agreed to conclude the contract on different terms on which the counterparty would have concluded the contract if it had possessed full and correct information). In the paragraph the author defends the point of view that in most cases the compensation of negative interest is an effective way to protect the injured party, therefore the author opposes the recovery of positive interest in Russian law in the scope of precontractual liability.

The **third paragraph** analyzes causal connection as a necessary condition for any civil liability. With regard to liability for bad faith termination of negotiations and providing incomplete or misleading information, this condition is broken down into two aspects: 1) expenses and lost opportunities must arise due to reliance on the conclusion of the contract or trust in the information provided by the other party on which the injured party relied; 2) once the precontractual misconduct is committed, the expenses and lost opportunities are transformed into losses. The first aspect comes down to the category of reliance, which plays such an important role in foreign legal jurisdictions that some scholars consider it, rather than good faith, to be the global basis of precontractual liability.

The **fourth paragraph** examines the condition of fault in relation to precontractual liability. In cases of precontractual liability in foreign jurisdictions, the objective standard of good faith is mainly used. According to it, liability is possible both for intentional and negligent behavior. The paper justifies that in relation to liability for the termination of negotiations, the fault of the contracting party should relate exclusively to the fact of the breakdown of negotiations, but not to the formation of expectations of the injured party regarding the conclusion of the contract.

The **conclusion** summarizes the results of the dissertation research.

LIST OF THE AUTHOR'S PUBLICATIONS ON THE SUBJECT OF THE DISSERTATION RESEARCH

Publication in journals included into the HSE list (list B and D):

1. Chistyakov P.D. Precontractual liability of third parties involved in the process of concluding a contract in the law of Russia and Germany: a comparative legal study // Herald of Economic Justice. 2023. No. 10. P. 74–93.

2. Chistyakov P.D. Tort qualification of precontractual liability in Russian law: pro and contra // Statute. 2022. No. 5. P. 146–156.

3. Chistyakov P.D. Legal nature of precontractual liability: unity or differentiation? // Legislation. 2022. No. 3. P. 21–30.

Publication from the Additional List of Publications, publications in which are taken into account by the HSE Dissertation Council in Law for the defense of dissertations:

4. Chistyakov P.D. Withdrawal from negotiations as a basis for precontractual liability in Russian and foreign law // Actual Problems of Russian Law. 2021. Vol. 16. No. 11. P. 83–98.