

**CONTRACTUAL PREEMPTIVE RIGHTS:
RUSSIAN DOCTRINE AND EUROPEAN TRADITION IN THE CONTEXT
OF RUSSIAN CIVIL CODE REFORM**

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Problems associated with the possibility of the stipulation of preemptive rights by contract and their effective protection are researched in this article. Based on the examples of German, French and Swiss civil legislation, we establish that contractual preemption is widely used in Europe as a convenient instrument to formalize the interests of the participants in a civil turnover. In this connection, in Russian civil doctrine, the widespread idea that preemptive rights may be stipulated only by law, not by contract, should be revised.

We state that the essence of the institution of preemptive rights predetermines its remedy. Historically Russian civil law provides specific remedy in case of breach of the most spread statutory preemptive rights. It is a claim by the entitled person (holder of preemption) against a third party (counterparty of obliged person whose contract breached the preemption) to transfer from the third party to the entitled person the rights and duties that arose under the contract between the third party and the obliged person. This remedy is more efficient for the entitled person than damages. In accordance with the principle of good faith, it may be used only in cases in which the third party knew or should have known about preemption. However, this requirement is complied in relation to protection of statutory preemptions only. As far as both contractual preemptive rights and contracts stipulated the latter are not recognized and not registered in Russia, such suit will be dismissed by court. The lack of effective protection of contractual preemptions impedes the creation of full-fledge system of preemptive rights in Russian civil law.

In order to create effective mechanism of protection of contractual preemptive rights by giving the participants of a civil turnover the opportunity to ascertain if there is

a contractual preemptions, we suggest that Russian civil legislation should be added by two registration systems. The first is a system for the registration of contracts that stipulate preemptions over immovable property (or registration of the preemptions itself which is better) provided by the Federal Service for State Registration, Cadastre and Cartography of the Russian Federation. The second is a system for the registration of notifications on the conclusion of contracts that stipulate contractual preemptive rights over movable things that could be established by an expansion of the existing system for the e-registration of notifications of pledges of movable things under the jurisdiction of the Federal Chamber of Notaries of the Russian Federation.

Keywords: contractual preemptive rights; right of first refusal; German, French, Swiss civil legislation; reform of the Russian Civil Code.

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Introduction. Russian Preemptive Rights: A “Systemic” Problem

Russian civil legislation provides a wide list of particular preemptive rights, such as:

1. Preemptive rights in Russian company law:

1.1. The preemptive right of a non-public joint-stock company and its shareholders to purchase the shares owned by other shareholders in case of their disposal (Art. 7(3),(4) and Art. 41 of the Federal Law of the Russian Federation on Joint-Stock Companies);

1.2. The preemptive right of a limited liability company and its participants to purchase the shares or part of a share owned by other participants in case of their disposal (Art. 93(2) of the Russian Civil Code (hereinafter RCC), Art. 21(4) of the Federal Law of the Russian Federation on Limited Liability Companies);

1.3. The preemptive right of an economic partnership and its participants to purchase the shares owned by other participants in case of their disposal (Art. 15 of the Federal Law of the Russian Federation on Economic Partnerships);

1.4. The preemptive right of the limited partners of a limited liability partnership to purchase the shares owned by other partners in case of their disposal (Art. 85 RCC);

1.5. The preemptive right of the members of a production cooperative to purchase the shares owned by other members in case of their disposal (Art. 106.5(3) RCC);

2. Preemptive right in Russian property law:

2.1. The preemptive right of the co-owners to purchase shares in ownership owned by other co-owners in case of their disposal (Art. 250 RCC);

3. Preemptive rights in Russian contract law:

3.1. The preemptive right of a lessee of a nonresidential premise to renew a lease contract (Art. 621 RCC);

3.2. The preemptive right of a lessee of a home accommodation to renew a lease contract (Art. 684 RCC);

4. Preemptive rights in Russian intellectual property law:

4.1. The preemptive right of a franchisee to renew a franchise contract (Art. 1035 RCC);

4.2. The preemptive right of a person, when there is an announced public competition for the creation of a work of science, literature or art, to conclude a contract with the author for the purchase of the author's rights in such work (Art. 1060 RCC);

4.3. The preemptive right of a performer to purchase the rights in the unified technologies in case of a tender or an auction (Art. 7 of the Federal Law of the Russian Federation on Transfer of Rights on the Unified Technologies);

5. Preemptive rights in Russian succession law:

5.1. The preemptive right of an heir to inherit an indivisible thing on account of a hereditary share, if it was co-owned by an heir and a testator or if an heir constantly used it before the death of a testator (Art. 1168 RCC);

5.2. The preemptive right of an heir who was living with a testator on the day of the commencement of the inheritance to inherit ordinary home furnishings and household goods on account of a hereditary share (Art. 1169 RCC);

5.3. The preemptive right of an heir who is an entrepreneur or that is a commercial organization to inherit an enterprise on account of a hereditary share (Art. 1178 RCC).

However, the aforementioned preemptive rights do not constitute an integrated system. The legal regulation of preemptive rights is disconnected and divided. There is neither a common procedure for their implementation nor a common remedy when they are breached. The preemptive right of a lessee may be considered as

one of the cases demonstrating the inconsistent legal regulation of this sphere. In considering this example, it is necessary to mention that in the Russian civil legislation there are two independent types of lease contracts. The object of the first type of lease contract (so-called "*arenda*") is nonresidential premises. The object of the second type of lease contract (so-called "*naim*") is home accommodations. In both cases, the lessee has a preemptive right to renew a contract for a new term. It seems that the legal regulation of these two preemptive rights should be very similar. But in fact, it is quite different. In particular, if in the case of an *arenda*, a lessor who refused to conclude a lease contract for a new term with a lessee, but within a year from the day of the expiry of that contract, made a lease contract with another subject, the lessee may, at his discretion, assert a claim in court for both a transfer of the rights and duties under the concluded agreement to himself and the payment of damages, or he may assert a claim only for the payment of damages (Art. 621(1) RCC). In the same situation, in the case of a *naim*, the lessee may assert a claim in court to hold invalid a new lease contract that breached his preemptive right and/or for the payment of damages (Art. 684 RCC). It is impossible to explain logically why the remedies are different in these similar situations. The only explanation is the aforementioned lack of a consistent system of preemptive rights in Russian civil law. There are many other examples demonstrating these inconsistencies.

Another problem with the Russian institution of preemptive rights which will be addressed in this article is that the RCC does not contain any general rule that allows a contract to be concluded which provides a preemption right for one of the contractors. Such an approach has led some Russian researchers to the conclusion that preemptive rights may be established only by law. Therefore, from this point of view, contractual preemptive rights are not allowed. This conclusion stems from the idea that preemptive rights limit the equality of the participants in a civil transaction; therefore, only the legislature may stipulate them and provide their content, the procedure for their implementation and their remedy (*numerus clausus* principle).¹

Some supporters of this position have attempted to prove it using the following argument. According to Russian civil legislation, a contract that breaches a contractual preemption cannot be nullified by a court. The only possible remedy in this situation is the payment of damages to the entitled person. However, this remedy is not effective because, in the end, the entitled person will receive money, but not the desired good. Thus, if a contractual right cannot be effectively protected, it should not exist.²

Because of the insufficient attention of Russian civil doctrine to the institution of preemptive rights, this point of view has become dominant. It seems that one of

¹ Белов В.А. Гражданское право: Общая часть [Vadim A. Belov, *Civil Law: General Part*] 840 (Moscow: YurInfoR, 2002).

² Никольский С.Е. Преимущественные права в наследственном праве России: Дис. ... канд. юрид. наук [Sergey E. Nikolskii, *Preemptive Rights in the Succession Law in Russia: PhD in Law Dissertation*] 50 (Moscow, 2006).

the reasons for this situation is the uncritical borrowing from the relevant provisions of Soviet civil legislation.

In particular, during the Soviet era, the very existence of preemptive rights was threatened because of the initiative of one group of researchers who asserted that the right of first refusal contradicted the main principles and the spirit of socialist civil law.³ In this connection, contractual preemptive rights were not even a point of discussion. In the end, the legislature supported another point of view: The right of first refusal is a necessary attribute of co-ownership that helps to protect the interests of the co-owners even in a socialist state⁴. However, the legal regulation of the right of first refusal in Article 64 of the Civil Code of the Russian Soviet Federative Socialist Republic (1922) was quite laconic. This Article established neither a procedure for the implementation of the right of first refusal nor consequences for its breach. The situation changed a bit with the adoption of the Civil Code of the Russian Soviet Federative Socialist Republic (1964), whose Article 120 was devoted to the right of first refusal. This Article provided a much more detailed regulation. It has been almost completely replicated in the current Article 250 RCC.

Hence, it has been more than 50 years since the adoption of the Civil Code of the Russian Soviet Federative Socialist Republic (1964), and with the transition of the Russian Federation to a market economy, new types of preemptive rights have correspondingly appeared with the development of civil relationships; however, nothing has changed in the regulation of the preemptive right of co-owners, which has been, basically and historically, the first preemptive right. All in all, the general approach to the legal regulation of preemptive rights has not been improved. Contractual preemptive rights still are not recognized; further, a single system addressing preemptive rights does not yet exist.

On the contrary, in Germany, France and Switzerland, whose civil legislations were and still are the source of inspiration for other civil law countries, systems of preemptive rights have existed for quite a long time. Moreover, contractual preemptive rights are necessary elements of these systems. In this connection, the main purpose of this article is to establish, based on the examples of Germany, France and Switzerland, that contractual preemptive rights may provide an effective protective mechanism for the interests of participants in civil turnovers. For that purpose, the systems of preemptive rights in Germany, France and Switzerland and the place of contractual preemptions in these systems, as well as the features characterizing their implementation and protection, will be consecutively described and discussed.

³ Зимелева М.В. Общая собственность в советском гражданском праве // Ученые записки ВШЮН. 1941. Вып. 2. С. 64 [Maria V. Zimeleva, *Joint Ownership in Soviet Civil Law*, 2 Scientific Notes of the All-Union Institute of Legal Sciences 3, 64 (1941)].

⁴ Еремеев Д.Ф. Право личной собственности в СССР [Dmitry F. Eremeev, *The Right of Private Ownership in the USSR*] 81 (Moscow: Gosyurizdat, 1958).

1. Contractual Preemptive Rights in the German System of Preemptive Rights

The German system of preemptive rights is quite complicated, but very well structured. German civil legislation allows a right of preemption to be established both in favor of public-law entities (e.g. the state) and private subjects (e.g. legal and natural persons). Therefore, depending on the holder of the preemptive right, the latter may be public or private. The grounds for their establishment and the mechanisms for their implementation are different.⁵ Usually, public preemptive rights are established in special legislation,⁶ while the basics of private preemptive rights are regulated by the German Civil Code (*Bürgerliches Gesetzbuch* (hereinafter BGB)).

Public preemptive rights are only statutory. Private preemptive rights may be established by law (statutory preemptions), contract or testament. The German legislature realizes that statutory private preemptive rights excessively limit ownership and suppress civil transactions. In this connection, the BGB provides only three types of such rights: the real right of first refusal (§§ 1094–1104 BGB), the right of preemption of a lessee (§ 577 BGB) and the right of preemption of co-heirs (§§ 2034–2035 BGB).

It is important to point out that in German civil law, there are two types of right of first refusal, which are the most well-known and wide-spread preemptive rights. These types have different legal natures: the real right of first refusal (right *in rem*, *dingliche Vorkaufsrecht*) and the personal right of first refusal (right *in personam*, *obligatorische Vorkaufsrecht*). This division between real and personal rights is traditional in the civil law (Romano-Germanic) system. It is reflected even by the structure of the BGB. In particular, the personal right of first refusal is regulated by §§ 464–473 BGB (Book 2 “Law of Obligations,” Division 8 “Particular Types of Obligations,” Title 1 “Purchase, Exchange,” Subtitle 2 “Special Types of Purchase,” Chapter 3 “Preemption”), while the real right of first refusal is regulated by §§ 1094–1104 BGB (Book 3 “Law of Property,” Division 5 “Right of Preemption”).

At the same time, according to § 1098(1) BGB, the provisions regarding the personal right of first refusal regulate the relationship connected with the real right of first refusal. That is why it is important to distinguish between these two categories:⁷

⁵ Klaus Vieweg & Almuth Werner, *Sachenrecht* 624 (3rd ed., Munich: Franz Vahlen, 2007); Фунатова У.Б. Право преимущественной покупки в европейских правовых системах: история и современность // Правовые вопросы недвижимости. 2012. № 2. С. 30–32 [Ulyana B. Filatova, *Right of Preemption in European Legal Systems: History and Modernity*, 2 Legal Issues of Immovables 30 (2012)].

⁶ Such as § 24–28 of the German Building Code (*Baugesetzbuch*) of 23 September 2004; § 19 of the General Railway Law (*Allgemeines Eisenbahngesetz*) of 27 December 1993; § 44 of the Law on Energy Industry (*Gesetz über die Elektrizitäts- und Gasversorgung, Energiewirtschaftsgesetz*) of 7 July 2005; § 9a of the Law on Federal Trunk Roads (*Bundesfernstraßengesetz*) of 28 July 2007, etc.

⁷ Vieweg & Werner 2007, at 623; Harry Westermann, *Sachenrecht* 877–878 (7th ed., Heidelberg: C.F. Müller, 1998).

1. The real right of first refusal may be statutory or contractual. A statutory real right of first refusal (*gesetzliche Vorkaufsrecht*) does not require registration. It arises by an act of the law. A contractual real right of first refusal (*vertragliche Vorkaufsrecht*) is usually established by a notarized contract as a suspensive condition (e.g. buy-back sale contract, hire-purchase contract). A contractual real right of first refusal must be registered (§ 873(1) BGB). In contrast with a real right of first refusal, a personal right of first refusal may be established only by a contract.

2. A plot of land is the only type of immovable thing in German civil law (§§ 94, 95, 87 BGB) that can be the object of a real right of first refusal; however, any movable or immovable thing which has not ceased to be a thing in commerce may be the object of a personal right of first refusal (§ 1094 BGB).⁸

3. A real right of first refusal is a typical right *in rem*.⁹ In German civil law, there are numerous clauses regarding real rights of first refusal whose particular content is stated by law (the German principles of *Typenzwang* and *Typenfixierung*). A real right of first refusal has an absolute character, and it is associated with a thing (object); therefore, it belongs not only to its first owner, but also to his legal successors.¹⁰ On the contrary, there is no limited list of personal rights of first refusal, which are associated only with a particular person on the basis of a contract, and they cannot be transferred.

4. A real right of first refusal usually may be implemented in the case of the sale of a plot of land by a person who owned it at the time of the establishment of this right or by his legal successor. However, it may also be established for more than one or for all cases of sale by subsequent owners (§ 1097 BGB). On the contrary, a personal right of first refusal may be realized only once in the case of a sale of an object by the person who owned it at the moment of the establishment of the personal right of first refusal.

5. A real right of first refusal may be exercised if the plot of land is sold by the administrator in insolvency proceedings by private agreement (§ 1098(1) BGB); however, a personal right of first refusal is excluded if the sale occurs as a result of the execution of a judgment or insolvency (§ 471 BGB).

6. According to § 464(2) BGB, when the right of preemption is exercised, the purchase takes effect between the entitled person and the obliged person on the terms agreed between the obliged person and a third party. In the case of a personal right of first refusal, this rule is dispositive. This means, in particular, that the price of a purchase in the exercise of a personal right of first refusal is equal to the price agreed between the obliged person and the third party if another price is not agreed upon by the obliged person and the entitled person. In cases involving a real right of first refusal, this rule is imperative: Another price cannot be agreed upon by the owner and the entitled person.

⁸ Otto von Gierke, *Deutsches Privatrecht. Bd. 2: Sachenrecht* 150–151 (Berlin: Duncker & Humblot, 1905).

⁹ Klaus Schurig, *Das Vorkaufsrecht im Privatrecht* 64 (Berlin: Duncker & Humblot, 1975).

¹⁰ Jan Wilhelm, *Sachenrecht* 894 (Berlin: Walter de Gruyter, 2010).

7. In cases involving the breach of a personal right of first refusal, the obliged person must pay damages to the entitled person. Other remedies cannot be exercised. In particular, if the third party could not know about the contract establishing the personal right of first refusal, and therefore, acts in compliance with the principle of good faith, he cannot be dispossessed of the property (§§ 932, 936 BGB). On the contrary, it is presumed that everybody knows about the existence of a real right of first refusal: The statutory real right of first refusal is established by law; a contractual real right of first refusal is registered, and it has the effect of a priority notice that is entered to secure the claim which arises from the exercise of the right to transfer ownership (§ 1098(2) BGB). Therefore, a third party who bought a plot of land in breach of a real right of preemption cannot be considered to have been conscientious. In this connection, the law allows him to be dispossessed. Thus, a real right of preemption is effectively protected.

In finalizing the issue of the differentiation between the real right of first refusal and the personal right of first refusal, it is necessary to mention that some scholars find the criteria for this classification in § 1103 BGB. The latter states that there are two types of preemptive rights. One of them, which exists in favor of the current owner of a plot of land, may not be separated from the ownership of the plot of land (*subjektiv-dingliches Vorkaufsrecht*). Another one, which exists in favor of a specific person, may not be connected with the ownership of a plot of land (*subjektiv-persönliches Vorkaufsrecht*). Russian scholars K.I. Sklovskii and M.I. Smirnova suppose that if a preemptive right is connected with the ownership of a particular plot of land, it is a real preemption, and therefore, must be registered; if it is connected with a particular person, it is a personal preemption provided by a contract.¹¹ It seems that such a conclusion stems from a mistake in translation. Indeed, German civilians do not use the term "*persönliches Vorkaufsrecht*" for personal preemption. In such a case, they use the term "*schuldrechtliche/obligatorische Vorkaufsrecht*." Real preemption is called *dingliche Vorkaufsrecht* in the German civil doctrine. If the specificity of this terminology and the fact that § 1103 BGB is located in Book 3 "Law of Property" of the BGB are taken into account, it becomes clear that the subjective-proprietary right of preemption (*subjektiv-dingliches Vorkaufsrecht*) and the subjective-personal right of preemption (*subjektiv-persönliches Vorkaufsrecht*) are just two types of the real right of preemption. Neither of them is a personal right of preemption.¹² As demonstrated above, there are several criteria for the differentiation between a real right of first refusal and a personal right of first refusal.

¹¹ Скловский К., Смирнова М. Институт преимущественной покупки в российском и зарубежном праве // Хозяйство и право. 2003. № 10. С. 88–98 [Konstantin Sklovskii & Marina Smirnova, *Institute of Preemption in Russian and Foreign Law*, 10 Economy and Law 88 (2003)].

¹² Arthur Bock, *Das dingliche Vorkaufsrecht nach dem B.G.B. Inaugural-Dissertation* (Düsseldorf: Dietz, 1908); Hans T. Schümer, *Das obligatorische Vorkaufsrecht* (Zürich: H.A. Gutzwiller, 1925); Hans Schott, *Vergleich zwischen der vorgemerkten Kaufsachforderung, dem obligatorischen und dem dinglichen Vorkaufsrecht* (Borna, Leipzig: Noske, 1916).

Thus, a brief analysis of the system of preemptive rights in German civil law shows that the German legislature minimized the quantity of private statutory preemptive rights and provided a wide opportunity to establish the preemptions using different contracts. At the same time, it is clear that contractual real preemptive rights are better protected than contractual personal preemptive rights. The only possible remedy in the case of a breach of the latter is damages paid by the obliged person. In the case of a breach of a contractual real preemptive right, the entitled person can sue the third party in order to dispossess him and to receive the necessary goods.

2. Contractual Preemptive Rights in the French System of Preemptive Rights

The Napoleonic Code was adopted in 1804 in accordance with the ideas of the French revolution. In particular, it was based on the principle of the absolutization of the right to property ownership. In this connection, the French Civil Code (hereinafter FCC) does not provide a consistent system of limited real rights. Therefore, the theory of contractual preemptive rights that limits property ownership also was not supported by French civil doctrine. For example, noted French civilian Léon J. de la Morandière supposed that preemptive rights cannot be established by a contract because privileges can be provided only by law.¹³ Thus, initially, only statutory preemptive rights existed in French civil law.

There are two types of statutory preemptive rights in French civil law: public and private. Public statutory preemptive rights are established by special legislation. For example, Article L211-1 of the French Town Planning Code (*Code de l'urbanisme*) provides municipalities the preemptive right to purchase real estate being sold which is located in particular areas of a settlement (*Le droit de préemption urbain*). Articles L.123-1–L.123-3 of the French Heritage Code (*Code du patrimoine*) provides the state the preemptive right to purchase artwork which is being sold by tender or contract (*Droit de préemption des œuvres d'art*).

Private statutory preemptive rights, namely statutory rights of first refusal (such as *retrait successoral*, *retrait litigeux* and co-owners' right of first refusal), are regulated by the FCC.¹⁴ Articles 831–834 FCC establish *retrait successoral*, i.e. the preemptive right of heirs (the spouse of a testator or the heir co-owner) to inherit particular assets (e.g. residential real estate, its furnishings, a business or share of a business, etc.) that the heirs were using at the moment of the testator's death. As noted above, similar constructions exist in German¹⁵ and Russian civil law.¹⁶ *Retrait litigeux* is a preemptive

¹³ Морандьер Л.Ж. Гражданское право Франции. Т. 3 [Léon J. de la Morandière, *French Civil Law*. Vol. 3] 411 (E.A. Fleyshits (trans.), Moscow: Inostr. lit., 1960).

¹⁴ René Wiederkehr, *Kausalabgaben* 29 (Bern: Stämpfli, 2015).

¹⁵ Doris Binz-Gehring, *Das gesetzliche Vorkaufsrecht im schweizerischen Recht* 74 (Bern: Peter Lang, 1975).

¹⁶ Articles 1169, 1169, 1178 RCC.

right regulated by Article 1699 FCC. According to the latter, a debtor, whose debt was purchased by a cessionary, has a preemptive right to buy back the debt with the same sum of money that was paid by the cessionary. Co-owners' right of first refusal is provided in Article 815-14 FCC.

As mentioned above, contractual preemptive rights initially did not exist in French civil legislation, even though this kind of preemption could be established by an agreement on the basis of the principle of freedom of contract. However, necessity in the legal regulation of such relationships led to the formation of the model of contractual preemptive rights by means of judicial lawmaking (*creation do droit*). The French Court of Cassation (*Cour de cassation*) developed several legal positions about the objects, terms, and forms of a contract establishing a preemptive right and the consequences of the breach of the latter. During the recent reform of the FCC, these positions were actively discussed. The results of their critical revision were realized in three main projects of the development of the FCC: Article 1106-1 of the Catala project (*projet Catala*),¹⁷ Article 35 of the Project developed by the Ministry of Justice of France (*Projet de la Chancellerie*)¹⁸ and Article 25 of the Terre project (*projet Terré*).¹⁹ The Ordinance No. 2016-131 of 10 February 2016 "On Reform of Contract Law, General Provisions and Certain Obligations" (hereinafter the Ordinance) synthesized all the doctrinal proposals on the development of French civil legislation. Most of its provisions came into force on 1 October 2016.²⁰ Along with the many global changes in the FCC, Article 1123 of the Ordinance expressly provides the right to establish a preemptive right by contract.

This Article is located in Book III "Different Models of Acquiring Ownership," Title III "Sources of Obligations," Chapter II "Formation of a Contract," and Section I "The Conclusion of a Contract" of the FCC. It shows that in French civil law, a contract providing preemptive right is characterized as a preliminary contract (*avant-contrat*). In practice, such a contract is usually included in the text of the main contract (e.g. sale contract, lease contract, copyright contract, etc.).²¹ Both movable and immovable

¹⁷ Catala P. (dir.) *Avant-projet de reforme du droit des obligations* (Articles 1101 a 1386 du Code civil) et du droit de la prescription (Articles 2234 a 2281 Code civil). Rapport a Monsieur Pascal Clement Garde des Sceaux, Ministre de la Justice, 22 Septembre 2005 (Jan. 10, 2019), available at http://www.justice.gouv.fr/art_pix/RAPPORTCATALASEPTEMBRE2005.pdf.

¹⁸ *Le projet de la Chancellerie de réforme du droit des contrats* (Juillet 2008) (Jan. 10, 2019), available at http://www.chairejlb.ca/files/sites/38/2010/07/reforme_all.pdf.

¹⁹ F. Terré (dir.). *L'avant-projet de réforme du droit des obligations*. Document de travail 23 octobre 2013 (Jan. 10, 2019), available at <https://mfmblog.files.wordpress.com/2014/09/avant-projet-de-rc3a9forme-octobre-2013.pdf>.

²⁰ Ordonnance No. 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la prevue des obligations. Journal officiel No. 0035 du 11 février 2016 texte No. 26 (Jan. 10, 2019), available at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032004939&categorieLien=id>.

²¹ Dimitri Houtcieff, *Droit des contrats* 212 (Brussels: Larcier, 2016).

things may be its object. A contract providing preemptive right may be concluded for a definite or an indefinite term. Under the general provisions of French contract law, a contract concluded for an indefinite period may be terminated unilaterally. A contractual preemptive right is inheritable; it also may be the object of an assignment agreement unless otherwise specified in the contract. At the same time, because a preemptive right is inextricably linked with the identity of the entitled person, the assignment of a contractual preemption must be agreed upon by the obliged person through a judicial notification to the latter (Art. 1690 FCC); otherwise, it is terminated.

In the case of a breach of a contractual preemptive right, the entitled person may claim the payment of damages, the nullification of a contract between the obliged person and a third party, or the replacement of the latter by the entitled person (i.e. the transfer to the entitled person of the rights and duties of the third party under the latter's contract with the obliged person). However, the last two remedies may be applied under two conditions. The first condition is a breach of the contractual preemptive right. This happens if the entitled person was not informed about the conclusion of a contract (e.g. sale contract) between the obliged person and a third party. The second condition is the awareness of the third party of the existence of the contract providing the contractual preemptive right. In case of the absence of one of these conditions, the entitled person may claim only the payment of damages. In fact, if the third party did not know about the preemption, the third party is considered to have acted in compliance with the principle of good faith and cannot be dispossessed. Before the adoption of the new version of Article 1223 FCC, this approach was formulated by the French Court of Cassation in 1924²² and was once again confirmed by it in 2006.²³

Considering that in France, neither a contract providing the contractual preemption nor the contractual preemption itself are registered publicly, it is almost impossible to prove that a third party was aware of its existence. In this connection, the French mechanism for the protection of contractual preemptive rights may hardly be assessed as effective.

Taking this situation into account, in the revised FCC, the French legislature introduced the institution of interrogations (*actions interrogatoires*). In particular, the FCC states three situations in which one participant in a civil turnover may ascertain the legal status of another participant, even against the will of the latter. One of these situations is regulated by Article 1123(2),(3) FCC: A third party who wants to purchase any property and conjectures that a contractual preemption right may

²² Joanna Schmidt, *Preliminary Agreements in International Contract Negotiation*, 6 Houston Journal of International Law 37, 44–47 (1983).

²³ Cour de Cassation, Chambre mixte, du 26 mai 2006, 03-19.376, Publié au bulletin No. de pourvoi: 03-19376 (Jan. 10, 2019), available at <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007055468&dateTexte>.

exist may exercise a right to ask a person who, in the third party's opinion, might possess a preemption. Such person must respond within a reasonable time regarding whether this person has a contractual preemption and whether this person wishes to take advantage of it. If such person does not answer this request, the latter will not be allowed to later claim the nullification of a contract between the obliged person and the third party or a replacement of the latter by the entitled person.

However, the efficiency of the institution of interrogations in the described situation should not be overestimated. Indeed, as mentioned above, in France, it is almost impossible to prove that a third party was aware of a contractual preemption. Therefore, remedies such as the nullification of a contract between the obliged person and the third party or the replacement of the latter by the entitled person may be applied only in exceptional cases. This means that in most cases involving a breach of contractual preemptive rights, the third party is safe. In these circumstances, the third party will rarely take a risk and make a request, because there is a chance that the requested person will disclose his contractual preemption and his will to exercise it. In the latter situation, the third party will lose any chance to purchase the desired property. Also, it is important to remember that the contract providing the preemption may include a confidentiality clause. In this case, the requested person has the right not to answer the request, and the existence of a contractual preemption and the willingness of the entitled person to exercise it will be presumed. In this context, the institution of interrogations does not make sense. Finally, it should not be forgotten that often, for a third party, it is difficult to make conjectures about who is an entitled person, and correspondingly, to whom a request should be sent.

3. Contractual Preemptive Rights in the Swiss System of Preemptive Rights

Swiss civil law is a perfect example of the existence of contractual preemptive rights. In addition to a right of first refusal that is based on a contract (*Vorkaufsvertrag*), other instruments providing contractual preemptions in the case of sales of goods, are used in Swiss practice: the call option (*Kaufrecht*), the put option (*Verkaufsrecht*), the right to repurchase (*Rückkaufsrecht*), and the preferences (*Vorhand/Fore-hand*). The right of first refusal may be contractual or statutory, other aforementioned special instruments have a purely contractual nature.

A call option (*Kaufrecht*) is a special contractual right (*Gestaltungsrechte*), but not a duty, of the entitled person to purchase particular goods from the obliged person during a particular period of time stated in a contract at a predetermined price.²⁴ The difference between the right of first refusal and a call option in Swiss civil law is the following. First, a contract between the obliged person and a third party is a necessary

²⁴ Hans P. Schmid, *Das Vorkaufsrecht* 9 (Basel: Helbing Lichtenhahn, 1934).

condition for the implementation of a right of first refusal by the entitled person. There is no such precondition for the implementation of a call option. Secondly, the right of first refusal is realized by the conclusion of a contract between the entitled and the obliged persons. A call option is realized by a unilateral notification by the entitled person. Thirdly, the period of time for the realization of the right of first refusal is stated by law or contract (depending on whether there is a statutory or contractual right of first refusal), while a call option may be realized during a period of time stated by a contract. Finally, in the case of a call option, the price to purchase the goods is already stated in the contract. In the case of the right of first refusal, two mechanisms of price determination are possible. The price may be stated by a contract providing this right, and it does not depend on the price stated in the contract between the obliged party and a third party. In Swiss civil law, such a right of first refusal is called a limited right of first refusal (*limitiertes Vorkaufsrecht*).²⁵ A contract providing a limited right of first refusal must be notarized and registered. In cases involving an unlimited right of first refusal (*unlimitiertes Vorkaufsrecht*), the price of the implementation of the right of first refusal must be equal to the price stated in a contract between the obliged person and a third party. A contract providing an unlimited right of first refusal does not require notarization and registration.

A put option (*Verkaufsrecht*) is very similar to a call option. It is a special contractual right (*Gestaltungsrechte*) of the entitled person to sell particular goods to the obliged person during a particular period of time stated in a contract at a predetermined price.

A right to repurchase (*Rückkaufsrecht*) is a contractual right of a seller to buy back sold property if the buyer decides to sell it. In this case the price of repurchase is usually equal to the primary price of purchase if another price is not specified in the contract.

The institution of preferences (*Vorhand/Fore-hand*) is very similar to the right of first refusal. The entitled person gets the preemptive right to buy particular property if it is offered for sale. The differences between these categories are the following. First, *Vorhand* is not established by Swiss civil legislation. This preemption may be provided only by contract; however, the right of first refusal may be statutory or contractual. Secondly, *Vorhand* may be implemented even if there is no contract between the obliged person and a third party. Thirdly, *Vorhand* is a purely personal right and does not need to be registered. Therefore, the payment of damages is the only possible remedy in case of a breach. Finally, *Vorhand* is the only contractual preemption that is not characterized in Swiss civil doctrine as *Gestaltungsrechte*. This means that *Vorhand* cannot be implemented by the unilateral notification of the entitled person. This preemption is based on a preliminary contract; therefore,

²⁵ Pascal Simonius & Thomas Sutter, *Schweizerisches Immobiliarsachenrecht. Bd. 1: Grundlagen, Grundbuch und Grundeigentum* 41 (Basel: Helbing Lichtenhahn, 1995).

for its implementation, another contract between the entitled and obliged persons is needed.

As a result of a partial revision of the Swiss civil legislation which was finalized on 1 January 1994, different models of contractual preemptive rights are stated in the Swiss Code of Obligations (hereinafter SCO). Statutory preemptions are regulated by the Swiss Civil Code (hereinafter SCC). Initially, the SCO was adopted earlier than the SCC, but it currently constitutes the SCC's fifth part.

Articles 680–682a SCC, located in Part 4 of the SCC “Property Law” (Chapter 2 “Substance and Limitation of Land Ownership”; Title 19 “Land Ownership”; Division 1 “Ownership”) regulate the following types of statutory preemptive rights:

1. A right of first refusal that belongs to any co-owner (the preemptive right to buy a share in ownership that is offered for sale);
2. A right of first refusal that belongs to the owner of a plot of land that is burdened with a building leasehold (a preemptive right to buy a building leasehold that is offered for sale);
3. A right of first refusal that belongs to person who erected a building on the basis of a building leasehold (a preemptive right to buy the plot of land that is offered for sale on which this building is located);
4. A preemptive right to buy a plot of land for agricultural purposes.

The location of these rules in SCC shows that the Swiss legislature treats preemptions as an instrument for the limitation of ownership, particularly a limitation on the disposal of ownership (*Veräußerungsbeschränkung*). In German civil law, as demonstrated above, a right of first offer *in rem* is one of the rights *in rem* that exists on par with the right to property ownership.

It is interesting to note that, unlike the civil legislation of many countries (such as Germany and Russia, for example), Swiss civil legislation does not establish the preemptive right of a lessee of a nonresidential premises (in case of *das Vorpachtrecht*) or a home accommodation (in the case of *das Vormietrecht*) to renew a respective lease contract. At the same time, this preemption may be established by contract.

The usual object of statutory preemptive rights is a plot of land, which is not the only type of immovable thing in Swiss civil law (Art. 655(1) SCC). Others are buildings, mines, and co-ownership shares in immovable property. The statutory preemptive rights are stipulated by law and, therefore, do not need to be registered. However, private statutory preemptions may be stipulated, changed or terminated by a contract that must be registered (Art. 680 SCC). Statutory preemptions are permanent. They cannot be inherited or transferred to another person by contract. They may be realized even if the plot of land is sold by an administrator in insolvency proceedings.

On the contrary, any movable or immovable thing may be an object of a contractual preemptive right. The latter may be stipulated by contract, testament, succession agreement (*Erbvertrag*) or decisions of the unit owner assembly (*Die Stockwerkeigentümersversammlung*). Contractual preemptive rights may be registered

at the request of the contractors for a certain period of time (Art. 216 SCO, Art. 959 SCC). If a contractual preemption is not registered, this means that no one, except the contractors, has knowledge of it. Therefore, in the case of a breach of such an unregistered contractual preemptive right, the entitled person may only claim the payment of damages from the obliged person. If a contractual preemptive right was registered for a certain period of time, this means that everyone should know about its existence. Therefore, in the case of a breach of a registered contractual preemption, the entitled person may claim both the payment of damages (against the obliged person) and the transfer of the rights and duties of the third party under the latter's contract with the obliged person. In Swiss civil doctrine, there is an opinion that after the registration of a contractual preemptive right, this personal right acquires the features of a real right. Thus, Swiss researchers even assert a kind of "real obligation" (*Realobligationen*) in this case.²⁶

Conclusion. Does the Reform of the Russian Civil Code Provide a Good Opportunity for Contractual Preemptive Rights?

This analysis of the German, French and Swiss models of preemptive rights shows that contractual preemption is widely used in Europe as a convenient instrument to formalize the interests of the participants in a civil turnover. However, its effectiveness depends on the remedy provided by law in case of its breach. Effective remedy helps the entitled person to receive expected goods. In Russian civil law such a remedy is a claim of the entitled person against a third party to transfer to the entitled person the rights and duties of the third party that have arisen on the basis of a contract which was concluded with the obliged person in violation of the preemptive right. The result of the implementation of this remedy is to deprive the third party of ownership of particular goods. In accordance with the principle of good faith, it may be used only in cases in which the third party knew or should have known about the contractual preemption. In situations involving the registration of a contract providing the contractual preemption or the registration of the contractual preemption itself, this requirement is met as far as registration provides a public notification of the existence of the latter.

Thus, it appears that, first, the Russian legislature should literally provide the possibility to conclude a contract stipulating a preemptive right in the RCC. There is no doubt that even in the absence of any special rule similar clarification given by

²⁶ Hans Giger, *Berner Kommentar. Kommentar zum schweizerischen Privatrecht. Bd. 6: Obligationenrecht. 2. Abteilung: Die einzelnen Vertragsverhältnisse. 1. Teilband: Kauf und Tausch. 3. Abschnitt: Der Grundstückskauf* Art. 216–221 OR 91 (Bern: Stämpfli, 1997); Arthur Meier-Hayoz, *Vom Vorkaufsrecht*, 92 *Zeitschrift des Bernischen Juristenvereins* 302 (1956); Arthur Jost, *Die Realobligation als Rechtsinstitut: mit besonderer Berücksichtigung des schweizerischen Sachenrechts* 3 (Bern: Stämpfli, 1956); Binz-Gehring 1975, at 42–48.

the Plenary Session of the Supreme Court of the Russian Federation will be sufficient, because the conclusion of such a contract is possible on the basis of the principle of freedom of contract. However, considering the historically established negative attitude of Russian civil doctrine toward contractual preemptive rights, direct statutory regulation is preferable.

Secondly, in the RCC, it should be stated that in case of a breach of a contractual preemptive right, the entitled person may assert a claim against a third party who concluded a contract with the obliged person in violation of a contractual preemptive right to transfer the rights and duties of third party to the entitled person if the third party knew or should have known about the contractual preemption.

Thirdly, in order to provide the participants in a civil turnover the possibility to ascertain whether there is a contractual preemptive right over immovable property, Russian civil legislation should provide a system for the registration of contracts establishing such preemptions (or registration of preemptions itself). The latter requirement will not be too radical due to already existing system for the registration of long-term lease contracts. Such information may be found in the Unified State Register of Real Estate, which is the responsibility of the Federal Service for State Registration, Cadastre and Cartography.²⁷ One of the purposes of the establishment of the system for the registration of long-term lease contracts is to provide public notification of the existence of encumbrances on the real estate created by the rights of the lessee. The registration of contractual preemptive rights or contracts establishing such preemptions will play similar role.

Finally, the Russian legislature should create a system for the registration of notifications on the conclusion of contracts providing contractual preemptive rights over movable things.²⁸ For that purpose, it seems appropriate to expand the already existing system for the e-registration of notifications of pledges of movable things, which is under the jurisdiction of the Federal Chamber of Notaries of the Russian Federation.²⁹ It is assumed that the registration of notifications on the conclusion of contracts providing a preemptive right over movable things will be realized by a notary at the request of the person concerned. In most situations, the latter may be the entitled person (or/and the owner). If the entitled persons do not apply for registration, this means that they are not interested in their contractual preemption. In this case, they will lose the possibility to defend it later using any remedy other than the payment of damages by the obliged person. At the same time, any person who wants to purchase any movable thing will be able to check

²⁷ Official site of the Federal Service for State Registration, Cadastre and Cartography (Jan. 10, 2019), available at <https://rosreestr.ru/site/en/about/>.

²⁸ It is important mostly for valuable movable things, such as vehicles, works of art, jewels, animals, etc.

²⁹ E-Register of the Russian Federation of Notifications on Pledge of Movable Things (Jan. 10, 2019), available at <https://www.reestr-zalogov.ru/search/>.

this open-access system for the e-registration of the notifications of pledges and preemptive rights or even to apply to any notary of the Russian Federation for an official certificate confirming whether there is a preemptive right over a certain movable thing. A certificate confirming that there is no contractual preemptive right over a movable thing at the date of the conclusion of a contract between the owner of the thing and a third party, provided by the latter, will be evidence of the third party's conscientiousness. In this case, the claim of the entitled person against a third party who concluded a contract with the obliged person in violation of the preemptive right and did not know and should not have known about the contractual preemption to transfer the rights and duties of the third party to the entitled person will not be sustained.

It seems that these proposals may have a good outlook, considering the general direction of the reforms of the RCC and the latest developments in its provisions.

The modern reform of the Russian civil legislation began on 18 July 2008 when the Presidential Decree No. 1108 on Improving of the Civil Code of the Russian Federation was passed.³⁰ The most significant and long-debated revision of the RCC since its adoption in the 90s involved several stages.

In the first stage, the plan was to accumulate the existing ideas in Russian doctrine regarding civil law and legal practice for the development of the RCC. The Concept for the Development of the Russian Civil Legislation was a result of this work; it was entrusted to the Council for Codification and Enhancement of Civil Legislation³¹ (hereinafter the Council), together with the Research Centre of Private Law,³² under the Russian President. To accomplish this task, the Council created several Working Groups that were responsible for the development of different spheres of Russian private law. These groups prepared seven projects regarding the Concepts for the Development of the corresponding spheres of Russian civil legislation;³³ on this basis, and taking into account the results of public discussions, the Concept for the Development of the Russian Civil Legislation (hereinafter the Concept) was written.³⁴ It was approved on 7 October 2009. The Concept does not provide any proposals regarding the implementation of contractual preemptive rights in Russian civil legislation. Nevertheless, its paragraph 9.1 pointed out that the essence of the

³⁰ Указ Президента Российской Федерации от 18 июля 2008 г. № 1108 «О совершенствовании Гражданского кодекса Российской Федерации» [Decree of the President of the Russian Federation No. 1108 of 18 July 2008. On Improving of the Civil Code of the Russian Federation] (Jan. 10, 2019), available at <http://www.rg.ru/2008/07/23/kodeks-dok.html>.

³¹ For the staff of the Council, see <http://privlaw.ru/sovet-po-kodifikacii/sostav/>.

³² For official information about Research Centre, see http://www.privlaw.ru/index.php?section_id=1.

³³ For all projects, see <http://privlaw.ru/sovet-po-kodifikacii/conceptions/>.

³⁴ Концепция развития гражданского законодательства Российской Федерации [The Concept for the Development of the Russian Civil Legislation] (Jan. 10, 2019), available at <http://privlaw.ru/sovet-po-kodifikacii/conceptions/>.

institution of preemptive rights predetermines its remedy as a claim to the transfer from a third party to the entitled person of the rights and duties that arose from the contract that breached the preemptive right.

The Concept became the basis for Draft Law No. 47538-6 amending Parts I, II, III and IV of the Russian Civil Code³⁵ (the Draft Law), which was adopted in the first reading by the State Duma, the lower house of the Federal Assembly of the Russian Federation, on 17 April 2012. Chapter 20.5 of the Draft Law revived the limited real right, which had been forgotten by Russian civil doctrine and the legislature, i.e. the right to purchase another's immovable thing. One type of the latter was a preemptive right, such as the right of first refusal. According to Articles 304.1 and 304.2 of the Draft Law, any right to purchase another's immovable thing may be established by a contract and must be registered as an encumbrance on a thing (the object of a contract).

Thus, even in the first stages of the reform of the RCC, there were attempts to improve the institution of contractual preemption rights. However, an ambitious plan to adopt all the amendments to the RCC simultaneously as one Draft Law failed. It was decided that all the amendments should be divided into several groups. Currently, eight groups of amendments to the RCC have already been accepted. The new version of Article 67.2 RCC allows the establishment of a preemptive right by a corporate contract. However, the researchers who argue for a more detailed regulation of contractual preemptive rights are placing all their hope in a group of amendments to Division 2 of Part I of RCC, which is devoted to ownership and other real rights, which has not yet been accepted: Article 250 RCC, which is dedicated to the basic, and historically, the first preemptive right – the right of first refusal – is located in this Division.

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³⁵ The Draft Law No. 47538-6 amending Parts I, II, III and IV of the Russian Civil Code, published on 8 April 2012 (Jan. 10, 2019), available at <http://privlaw.ru/sovet-po-kodifikacii/projects/>.

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