

The Legal Regime of the Unilateral Promise to Sell. Delimitation from the Option Agreement

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Abstract

The promise to sale belongs to the broader category of preparatory acts (contracts), those that prepare the conclusion of a contract, if we accept that its conclusion can go through several stages: negotiations, expressing the option, unilateral promise, synalagmatic promise, etc. Creations of jurisprudence and doctrine prior to the current Civil Code, preparatory contracts, also known as provisional contracts, prior contracts, antecontracts or contract promises, represent the approach prior to the sale process. The conclusion of the sales contract is not carried out automatically in all cases, but following pre-contractual agreements that have the role of binding the parties from a legal point of view, they feeling the need for additional guarantees in order to perfect the contract in the future, constituting themselves separate contracts of the sale. A more detailed exposition of the legal regime of each type of preparatory contract leads to a better understanding of the differences between these contracts, the rules regarding their conclusion, the effects they produce and the manner of their execution. The delimitation of the option agreement from the unilateral promise to sell is required in the context where the risk of confusion is quite significant, since both the option agreement and the unilateral promise are contracts that confer a discretionary right to the beneficiary of the option, respectively to decide, or not, the conclusion of the foreseen contract. In the comparative analysis of the two operations, the type of obligation assumed in the case of each of the two is of interest, leading to the qualification of the legal nature of each, as well as the mechanism in which, in case of a positive option, the foreseen contract will be concluded.

Keywords: *promise to sell, option agreement, preparatory contracts, discretionary rights, option to contract, pre-contract.*

JEL Classification: *K11,K12,K15*

1. Preliminaries. Sale promise – expression of contractual freedom

The sales contract is that contract based on which the transfer of ownership from the seller to the buyer operates with the obligation for the latter to pay the former a sum of money as price.

In the matter of property transfer contracts, the Civil Code is dominated by the principle of consensualism, the simple agreement of the parties being sufficient for the property transfer effect to occur².

This principle, however, is not imperative, the parties having the possibility to postpone for a later date the moment of the transmission of the ownership right, the basis of their decision being the most diverse reasons, such as for example the need for the acquirer to procure the entire amount of money agreed as the price, the outline insufficient will of the parties to transfer and, respectively, to acquire ownership of the

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² Eugen Chelaru, *Legal circulation of land*, Ed. All Beck, Bucharest, 1993, p. 215.

asset³, etc. In certain cases, however, this postponement is imposed by the need to fulfill certain formalities required by law for the validity of the property transfer act.

In order to achieve these goals, the parties can resort to a series of legal techniques, such as postponing the moment of the transfer of the ownership right to a later date by stipulating in their agreement the deadline when it will occur, or condition the said transfer on the fulfillment of a future event but uncertain of realization. It is therefore about affecting the transferable legal act of ownership in those ways which are the suspensive term or the suspensive condition. In both cases, simply reaching the deadline or fulfilling the condition will be sufficient to transfer the property, the parties not having to conclude a new agreement for this purpose⁴.

Nothing prevents the parties from resorting to the conclusion of conventions by which they commit themselves not directly to the transfer of ownership of the asset, but to the conclusion of another contract in the future, which will have the effect of transferring ownership. There is also the possibility that only one of the parties is obliged to sell to the other party if the latter wants to buy. These conventions are therefore not sales-purchase contracts, but sales promises (sale-purchase)⁵.

The sale being a synallagmatic contract, the achievement of consent implies the meeting at a given moment of the seller's will to sell and the buyer's will to buy. The problem that arose in judicial practice and in specialized literature was to know what are the legal effects of such a unilateral manifestation of will either on the part of the seller or on the part of the buyer - who has not yet met with the other manifestation of will, hypothetically issued at a later date. Also, in the same context, the question of the legal effects of the manifestations of will was raised, whereby the parties do not agree on a firm sale, either because they cannot, not having met the conditions required by the law, or because they do not want to - but only oblige themselves to conclude later the sales contract⁶.

Depending on the reasons why, before concluding the sales contract, the parties agree to conclude a promise of sale, we can distinguish three situations⁷:

a) Sometimes the seller irrevocably adopts the decision to sell his good, keeping his offer and the good for a certain time, at the disposal of the buyer, who, in that period, could decide to buy or not that good. In this case we are talking about the option agreement.

b) Other times, the essential elements of the sale (the good, the price, etc.) are established, but one of the parties, usually the buyer, reserves the final decision, as he wants to benefit from a time of reflection on the sale, at the end of which he can manifest the option. We consider this to be a unilateral promise.

c) There are situations in which the seller and the buyer are determined to sell, respectively to buy the good at an agreed price. However, the definitive sale cannot be concluded, as it lacks an element that the law or the parties provide for: an

³ Traian Dârjan, "The preliminary contract of sale-purchase" in *Dreptul* no. 3/2000, p. 56.

⁴ Constantin Stătescu, Corneliu Bârsan, *Civil law. The general theory of obligations*, Ed. All Educational, Bucharest, 1998, p. 340-344.

⁵ Eugen Safta-Romano, "The legal regime of pre-contracts regarding real estate alienations following the repeal of Decree no. 144/1958" in *Dreptul* no. 9/1993 p. 31.

⁶ Dan Chirică, *Civil law. Special contracts*, Lumina Lex Publishing House Bucharest 1997 p. 18.

⁷ Ioan Popa, *Civil contracts. From theory to practice*, Universul Juridic Publishing House, Bucharest, 2020, p. 125 – 126.

authorization, a certificate, the exercise of a preemption, obtaining a loan, etc. We have, in this case, a synalagmatic promise to sell.

Therefore, as through such conventions both parties or only one of them undertakes the obligation to conclude the sale-purchase contract in the future, the sale promise is bilateral or unilateral.

2. The legal regime of the unilateral promise to sell

The previous civil code did not regulate the unilateral promise, but it was quite recognized and used in practice under the name of promise or option to sell. The unilateral promise to sell was characterized by the promisor's firm commitment to the beneficiary to sell a certain good at a determined price, if the latter decided to buy the good that was the subject of the promise within a certain period.

Jurisprudence has defined the unilateral promise of sale as follows: *"the promise of sale, a contract not regulated by our Civil Code, and which does not transfer property, but gives rise only to a personal obligation, is characterized by the fact that one of the parties, either the buyer or the seller, promises the other party to sell or buy, without the latter promising in turn to contract, but on the contrary, preserving its freedom to decide as it will"*⁸.

In the doctrine⁹, the unilateral promise of sale is defined as an agreement of will between the buyer and a certain person, by which the seller promises to sell him a good, usually within a certain period, the buyer reserving his right as in the established period, to buy the good or not.

The unilateral promise to sell has as its main object the option given to the beneficiary for a certain time. The existence of the option is what characterizes the unilateral promise and distinguishes it from the synalagmatic promise.

In the conception of the provisions of the current Civil Code, the unilateral promise does not benefit from a legal definition, but some texts make express reference to it. Thus, art. 1,669 para. (3) Civil Code stipulates that *"the provisions of par. (1) and (2) shall be applied accordingly in the case of the unilateral promise to sell or buy, as the case may be"*, and para. (4) of the same article states that *"in the case of a unilateral promise to purchase a specific individual good, if, before the promise has been executed, his creditor alienates the good or establishes a real right over it, the promisee's obligation is considered extinguished"*.

Unilateral promises of sale have regained their practical utility especially in the matter of real estate sales, when due to the high value and importance of the transaction, the need arose to offer the beneficiary the necessary thinking time to make the purchase decision, but also as a form of guarantee of repayment of a loan.¹⁰ Also, the conclusion of unilateral promises is preferred, to the detriment of option pacts, because the beneficiary of the unilateral promise can reserve the right that, in the event that the promisor does not fulfill his obligation to consent to the sale without justification, to opt for a judgment that to hold the place of sale and the engagement of his liability by obliging him to pay damages, something he cannot do in the case of the

⁸ Supreme Court, December section no. 56/1949, *Justiția Nouă*, p. 608.

⁹ Francisc Deak, *Treaty of civil law. Special contracts*, Actami Publishing House, Bucharest 1999 p. 23.

¹⁰ Ioana Ionescu, *Antecontract of sale and purchase*, Ed. Hamangiu, Bucharest, 2012, p. 101.

option pact.¹¹

As to the conditions of form, even if the sale were a solemn contract, the promise need not take the authentic form prescribed by law for the contract of sale. The legislator considered that it would be too burdensome for the contracting parties to conclude both the promise and the contract of sale in authentic form.

In the current Civil Code there is no express legal provision of a general nature that imposes the authentic form *ad validitatem* for the contract promise. The only requirement provided by art. 1.279 para. (1) of the Civil Code refers to the content of the contract promise, which must contain all those clauses of the promised contract, without which the parties could not execute the promise. When he considered that the authentic form is necessary *ad validitatem* for a certain type of contract promise, the legislator expressly provided for it, as in the case of the donation promise, subject to the authentic form under the penalty of absolute nullity.

In one opinion¹² it was argued that as long as the consent to the promise (which refers to the essential elements of the sale) is the one which, by reiteration, is also the basis of the sale projected and assumed by the promise, it is imperatively necessary that, when the promise has as object the sale of an immovable property, and for that sale the law (art. 1.244 of the Civil Code) requires the authentic form *ad validitatem*, the promise itself to be subject to the same form of validity to produce full effects, that is, in case of refusal, at the request of the beneficiary, the court can pronounce a judgment that the sale takes place.

However, the High Court of Cassation and Justice ruled definitively¹³ on the fact that in the interpretation and application of the provisions of art. 1.279 para. (3) first sentence and art. 1,669 para. (1) of the Civil Code, the authentic form is not mandatory when concluding the promise to sell an immovable property, in order to pronounce a decision that will take the place of an authentic act.

Regarding the legal nature of the unilateral promise to sell, over time, divergent opinions have been expressed in the doctrine.

In a singular opinion¹⁴, the unilateral promise to sell is considered a complex legal institution, *sui generis*, which cannot be included either in the category of unilateral acts, or in the large class of contracts.

The argument for which the unilateral promise of sale cannot be included among unilateral legal acts is, in this opinion, that the promise is not formed only by a unilateral legal act (offer), which is the main element of the institution, but, in the composition also, as a secondary element, an accessory, but absolutely necessary,

¹¹ Dan Chirică, *Treaty on civil law. Special contracts*. Vol. I. Sale and Exchange, 2nd ed., Ed. Hamangiu, Bucharest, 2017, p. 204.

¹² Dan Chirică, holder of the discipline "Civil Law" (Special contracts and successions) at the Faculty of Law of the "Babeş-Bolyai" University in Cluj-Napoca - Opinion on the referral for the issuance of a preliminary decision for the resolution of some legal issues that formed the object file no. 3996/1/2016 of the High Court of Cassation and Justice of Romania, inserted in Decision no. 23/03/04/2017.

¹³ Decision no. 23/2017 of April 3, 2017 of the High Court of Cassation and Justice (HCCJ) regarding the resolution of the following legal issue: "the method of interpretation of the provisions of art. 1.279 para. (3) the third sentence of the Civil Code, respectively, whether the authentic form is mandatory at the conclusion of the promise of sale-purchase of an immovable property, in order to issue a decision that will take the place of an authentic act", published in the Official Monitor of Romania, Part I, no. 365 of May 17, 2017

¹⁴ Ion Lula, "The legal nature of the unilateral promise to sell" in *Dreptul* no. 6/1998, p. 43-50.

agreement is entered, by which the parties expressly agree that the beneficiary is the creditor of an option right on the conclusion or non-conclusion of the promised sale-purchase contract. On the other hand, the unilateral promise of sale could not be considered and included in the category of bilateral legal acts either, as long as it mainly consists of a firm and complete offer addressed to a specific person, a unilateral legal act on which it is grafted an accessory convention relative to the beneficiary's option right.

The author of this opinion thus concludes that "*considering that the unilateral promise of sale represents a complex legal act, made up of the union of the two elements shown above (a unilateral legal act and a bilateral legal act), closely related to each other, its legal nature can only be artificially reduced to the legal nature of any of its component parts. That is why [...] the unilateral promise to sell has a legal nature and a distinct regime of its own*"¹⁵.

In another opinion it is stated that the unilateral promise to sell "*is not a contract but only an ante-contract*"¹⁶ that gives rise to a right of claim, one of the parties being obliged (obligation to do) towards the other to sell a certain good, the beneficiary of the promise being able to choose to buy it or not. Obviously, this opinion sins because it ignores the fact that the antecontract is a contract.¹⁷

The quasi-unanimous and best-argued opinion, however, is that this promise is a contract by which one party, called the promisor, undertakes (promises) to sell a good, at a determined price, to the other party, called the beneficiary, who accepts the promise without assuming the obligation to buy it.¹⁸

According to art. 1.279 para. (1) Civil Code "*the promise to contract must contain all those clauses of the promised contract, without which the parties could not execute the promise*". Thus, the unilateral promise must include all the essential elements of this contract, namely the good sold and the price.

The unilateral promise to sell should not be confused with the simple offer or polycitation, since, while the first is a true contract, which by its essence implies the agreement of two wills, the second is a manifestation of will, in order to form a contract¹⁹. The practical consequence of this distinction lies in the fact that the unilateral promise to sell cannot be unilaterally withdrawn until the beneficiary manifests his option within the period fixed for this purpose, while the offer can be withdrawn at any time before its acceptance by to the person to whom it was addressed.

On the other hand, the unilateral promise to sell must not be confused with the sale affected by a term or a condition, because although both agreements constitute contracts, they differ, on the one hand, by the unilateral character of the first and the synalagmatic character of the second, and on the other hand by their object, in the first case being a legal relationship having as object an obligation to do, while in the second a legal relationship having as object an obligation to give. The promise to sell is a

¹⁵ Ibid, p. 49.

¹⁶ Eugen Safta Romano, *Civil contracts*, Ed. Polirom, Iasi, 1999 p. 27.

¹⁷ Flavius Antonius Baias, „The legal effects of the sale-purchase contract of a construction under the conditions of the repeal of decree no. 144/1958” II in *Dreptul* no. 7/1994 p. 32.

¹⁸ Ioan Zinveliu, *Civil contracts - instruments to satisfy citizens' interests*, Ed. Dacia Cluj-Napoca, 1978 p. 47. See in this sense Dan Chirică, *op. cit.* (1997), p. 18; Francisc Deak, *op. cit.*, p. 23.

¹⁹ Dan Chirica, *op. cit.* (1997), p. 18.

unilateral contract that creates obligations only for the promisor, but it cannot be argued that it is void for the reason that it would be affected by a pure potestative condition (the option to contract the sale being at the discretion of the beneficiary) because only the contracted obligation is void under such a condition on the part of the debtor, not on the part of the creditor, as happens in this situation.

The unilateral promise to sell also differs from the preference pact, which is a contract by which one of the parties (the owner of a thing) commits to another person (beneficiary), who accepts this promise to prefer it under equal price conditions, if he decides to sell.²⁰

As stated, the promise of sale is a unilateral contract as it creates obligations only for one of the parties (promisor). The unilateral promise to sell gives rise to a unilateral binding relationship in the content of which is the obligation of the promisor-seller to conclude the promised contract and the right of the beneficiary to choose between requesting or not concluding that contract, usually within a term agreed by the parties.²¹

However, it is possible that, in exchange for the option right granted to him, the beneficiary of the promise obliges himself to pay a sum of money (the price of the option right), in which case the unilateral promise to sell will be a bilateral (sinalagmatic) contract, but without having turned into a bilateral promise of sale-purchase, because the beneficiary does not assume the obligation to buy, but only to pay the price of the option given to him. In this view, the beneficiary does not assume the obligation to buy, but only pays an immobilization allowance, as in the case of the option agreement. Likewise, if the beneficiary obliges himself to pay a sum of money in case he chooses in the negative sense.²²

If, after the acceptance of the option by the beneficiary, the promisor refuses to conclude the contract, the latter will bear the resolution of the promise and the payment of damages.

To ensure the opposability of the inalienability clause, the unilateral promise must be noted in the land register if it is a real estate or in the National Register of Real Estate Advertising, if the asset that is the object of the promise is movable. In the absence of the fulfillment of these formalities, the unilateral promise is not enforceable against third parties, the inalienability having no effect towards them. In this context, a possible deed of alienation concluded with the third party in good faith cannot be annulled, but nevertheless the beneficiary of the promise has the right to damages from the promisor who violated his obligations assumed by the promise to sell.

For the validity of the promise, it is necessary that it meet all the validity conditions of an ordinary sale.

Thus, the promisor must have the ability to oblige at the moment of concluding the promise, because at this moment he obliges and not at the time of the completion of the sale-purchase; instead, the capacity of the beneficiary is assessed at the moment he demands the performance of the promisor's obligation, since at that moment he gives

²⁰ Octavian Căpățână, *Treaty of international trade law*, vol II, special part: Ed. Academia R.S.R., Bucharest, 1987, p. 43.

²¹ Liviu Pop, „About pre-contractual negotiations and preparatory contracts”, *Revista Romana de Drept Privat* no. 4/2008, p. 113.

²² Francisc Deak, *op. cit.* (1999), p. 25.

his consent to the completion of the sale purchase contract. If we consider, however, the beneficiary's special ability to acquire certain goods by sale (in the sense of art. 1.653 and 1.654 Civil Code, regarding the inability to buy), this must exist at the time of exercising the option, a moment that coincides with assuming the obligation to buy.

The validity of the consent of the parties is assessed at the time of concluding the promise of sale. Under the unilateral promise to sell, the promisor-seller consents to the conclusion of the promise, not the definitive contract. For this reason, his consent has no translational value and, consequently, must not be given in a solemn form. The consent of the beneficiary is also given for the conclusion of the promise, and not of the definitive deed of sale.

The object of the unilateral promise to sell is the very future contract that the parties can foreshadow at the time of the conclusion of the promise, without it being mandatory to include all the elements of the contract that the parties aim to conclude. Both the cause and the object of this promise must have a lawful and moral character at the time of the completion of the sale-purchase.²³

Apart from the validity conditions that must be fulfilled, the unilateral promise to sell includes characteristic constituent elements such as: the promisor's obligation, the option right, the option term and the immobilization allowance.

In consideration of the unilateral promise to sell, the promisor's obligation is the primary obligation, an obligation to do by which he holds available to the beneficiary his consent to the sale. Thus, the promisor will have to refrain from any conduct that would endanger the acceptance of the option by the beneficiary.

The unilateral promise to sell gives rise in favor of the beneficiary to an option right similar to that which arises in favor of the beneficiary of an option agreement, which allows him, during its validity, to choose between accepting the promisor's offer to consent to the sale in the future or not to accept this offer, being therefore the holder of a potestative right.

Although it is not mandatory, the term of option is a constitutive element of the unilateral promise, existing only in the time interval from the date of conclusion of the promise to the date of completion of the term or until the exercise of the option by the beneficiary. The term of option was considered in the doctrine to be an extinguishing term, because its fulfillment extinguishes the right of option of the beneficiary and the obligation assumed by the promisor.²⁴

Currently, the parties stipulate a term in which the beneficiary can opt out, but nothing prevents this convention from being subject to a condition. Within the stipulated term, the promise cannot be withdrawn unilaterally by the promisor.²⁵ It is also possible that the parties do not stipulate a term for keeping the promise and, implicitly, for its acceptance. In such a case, in order to be able to validly release himself from his obligation, the promisor has two solutions: the first, especially embraced by the French doctrine and jurisprudence, consists in delaying the beneficiary, in order to conclude the contract of sale- purchase, followed in case of his refusal to pronounce, by the legal action within which the court will fix a term

²³ Ioan Zinveliu, *op. cit.* (1978), p. 48.

²⁴ Cristina Nicoleta Muscă, *Preparatory contracts in the Civil Code*, <https://www.juridice.ro/706311/contractele-preparatorii-in-codul-civil.html>, published on 15.02.2021.

²⁵ Botosani Court, civil sentence from 18 Oct 1925 in *Pandectele Romane* 1926, II, p. 254-255.

depending on the circumstances of the case²⁶; the second supported by our jurisprudence and doctrine consists in the possibility of the promisor withdrawing the promise after the expiration of a time interval considered sufficient for receiving the answer from the beneficiary²⁷; in case of misunderstanding between the parties on the sufficient or insufficient character of the time interval, the court is also the one called to pronounce.

Unlike the option pact, the unavailability of the promised good in the matter of the unilateral promise is not expressly provided for, but the provisions of art. 627 para. (4) Civil Code state: "*the inalienability clause is implied in the agreements that give rise to the obligation to transfer the property in the future to a determined or determinable person*". It follows that such a clause is also implicit in the unilateral promise to sell, having the same effects as in the case of the option agreement. The unavailability can be engaged by the promisor without an equivalent counter or with an equivalent counter by paying an immobilization allowance. The amounts paid as immobilization allowance represent an advance on the agreed price. If, however, the level of the immobilization allowance is extremely high, it was appreciated that²⁸, in this case, the beneficiary's freedom to contract is purely formal, so that the beneficiary will be obliged to buy due to the high level of the allowance, which turns the unilateral promise into a synalagmatic one.

Therefore, at the conclusion of the promise, the parties express a simple consent, while the consent necessary for the execution of the promise is given by the promisor-buyer under a purely potestative condition (*si voluero*), without this nullifying the agreement. The promisor-buyer is the holder of a discretionary right to accept or not the conclusion of the future contract. What is essential for potestative rights is the power that their holder, an active subject, has to intervene through his unilateral will in pre-existing legal situations, the passive subject bearing the consequences of the exercise of potestative rights²⁹.

The acceptance of the unilateral promise to sell by the beneficiary generates the formation of a synalagmatic promise to sell, and not the formation of the contract of sale. Thus, for the actual conclusion of the sales contract, the parties will reiterate their consents.

If, after the acceptance of the promise by the beneficiary and thus the birth of the synalagmatic promise of sale, one of the parties no longer willingly consents to the conclusion of the sales contract, the party that has fulfilled its obligations, upon request, will be able to obtain a judgment to hold a place of sale pursuant to the provisions of art. 1.279 para. (3) thesis I and art. 1.669 para. (1), (2) and (3) Civil Code or may request execution by equivalent by obliging the defendant to damages under the provisions of art. 1.279 para. (2).

The unilateral promise to sell gives rise to a right of claim in favor of the beneficiary of the promise, and in the burden of the promisor to an obligation to perform.

²⁶ Ioan Zinveliu, *op. cit.* (1978), p. 47.

²⁷ Bucharest Court of Appeal, I, dec. civ of June 9, 1920 in *Pandectele Romane* 1924, II p. 158.

²⁸ Philippe Malaurie, Laurent Aynès, Pierre Yves Gautier, *Civil law. Les contrats spéciaux*, 3^e éd., Ed. Defrenois, Paris, 2007, p. 78.

²⁹ Ioan Popa, *op. cit.* (2020), p. 129.

Obtaining a decision that takes the place of a sales contract ensures the forced execution of the obligation to do, legally assumed by the promise of sale, and does not lend the legal nature of the sales-purchase contract. Through the decision pronounced by the court, it is valued the right of the creditor (promisor-buyer) to obtain the execution of the obligation to conclude the contract capable of transferring the right of ownership, assumed by the debtor (promisor-seller), but the court decision cannot be confused with the contract of sale, in the sense of negotium.

Also, the High Court of Cassation and Justice ruled definitively³⁰ on the fact that in the interpretation and application of the provisions of art. 1073 and art. 1077 of the Civil Code from 1864, art. 5 para. (2) from title X of Law no. 247/2005 regarding the reform in the fields of property and justice, as well as some adjacent measures, with subsequent amendments and additions, art. 1.279 para. (3) thesis I and art. 1.669 para. (1) of the Civil Code, in the situation where the promisor-seller has promised to sell the entire building, although he does not have the quality of its exclusive owner, the promise to sell cannot be executed in the form of a court decision that takes place by sales contract for the entire asset, in the absence of the consent of the other co-owners.

What is essential in the case of a unilateral promise to sell, is the fact that it does not transfer ownership of the asset from the promisor to the beneficiary³¹. At the same time, it is not necessary to fulfill any publicity requirement as in the case of the perfect sale (when applicable). As the owner of the good, the seller will continue to bear the risk of accidental destruction of the good. All real estate charges agreed by the promising owner up to the date of completion of the sale remain valid, the buyer possibly only having a right to interest damages. In the case of the transformation of the promise into a sale, the latter will have a transferable nature of ownership only from the moment of its conclusion and only for the future. The sale concluded in this way does not produce retroactive effects, i.e. its translational effects do not rise until the conclusion of the unilateral promise to sell, because the promise to sell is not a sale under a suspensive condition which, in the event of its realization, would also produce effects for the past³². The proof of the promise of sale will be made according to the general rules in the matter of proof of contracts.

The beneficiary, as the holder of a claim right, can transfer it to a third party, provided that the option was not granted *intuitu personae*. The transmission between the living of the unilateral promise can be achieved by means of the assignment of the contract. As a result of the assignment, the promisor will be obliged to transfer the good, on the date of acceptance that will complete the future sale, to a person he did not have in mind when he consented to the option³³.

In matters of succession, in the event of the beneficiary's death before the completion of the option period, the beneficiary's right to accept the promise without

³⁰ Decision no. 12/2015, published in the Official Gazette of Romania, Part I, no. 678 of September 7, 2015, regarding the examination of the appeal in the interest of the law formulated by the Board of Directors of the Suceava Court of Appeal regarding the admissibility of the action regarding the validation of the promise of sale-purchase of a certain immovable property, in the situation where the promisor-seller has only a share -ideal part of the right of ownership over it.

³¹ Eugen Safta Romano, *op. cit.*, p. 28; Supreme Court, sect. Civ. Dec. no. 412 of February 12, 1980 in "Repertory of judicial practice in civil matters for the years 1975-1980" p. 88.

³² Ioan Zinveliu, *op. cit.* (1978), p. 48-49.

³³ Octavian Capățână, *op. cit.* (1987), p. 42.

intuitu personae character, being a right with patrimonial content, is transmitted to the heirs, who can exercise it under the same conditions as the decedent himself. In case of the promisor's death before the option term is fulfilled, his obligations towards the beneficiary will be passed on to the heirs, who will be held by them like their predecessor.

The jurisprudence ruled on two special situations in the matter of the unilateral promise to sell. In a first situation, the court established that *"There is no legal provision that provides that the promise to sell a good (real estate), made by a non-owner, would be invalidated. This solution has its reason in the fact that the non-owner has the possibility to buy from the owner, the good offered for sale, and then be able to complete the sale"*³⁴. In the second situation, the problem arises of what happens with the unilateral promise if, before the term is fulfilled, the promisor disposes of the promised asset to a person other than the beneficiary. In this hypothesis, the unilateral promise to sell, not transmitting the right of ownership, but only giving rise to an obligation to perform in the charge of the promisor, cannot bring any harm to the rights of the third party acquirer in good faith. Consequently, in the relations between the promisor and the beneficiary, the only way left to follow is that of obliging the former to pay damages based on art. 1530 of the Civil Code³⁵. However, in the situation where there is proof of a fraudulent collusion between the promisor and the third party acquirer to the detriment of the beneficiary, to the extent that the existence and effectiveness of the *fraus omnia corrumpit* principle is recognized, the alienation is void due to illegal cause (art. 1238 Civil Code), and as a result of the finding of nullity, the asset returns to the promisor's patrimony so that the beneficiary can accept the promise with all the consequences arising from this fact³⁶.

The cases of lapsing applicable in the matter of the option agreement are also applicable in the case of the unilateral promise to sell, including: failure to exercise the right of option within the stipulated term, the unilateral renunciation of the beneficiary during the effectiveness of the promise or the accidental loss of the promised good in its entirety. Regarding the unilateral promise to buy, a special case of lapsing is highlighted, in the sense that the promise becomes lapsed if the beneficiary disposes of the asset or establishes a real right over it³⁷.

In conclusion, the unilateral promise to sell has seen a slow but steady evolution. Considered over time either as an imperfect synalagmatic promise, or as a conditional sale or as a simple polycitation, it has now found its legislative consecration, appearing as an imperfect synalagmatic and perfectly autonomous contract³⁸.

Symmetrically, opposite to the unilateral promise to sell, one can also imagine the situation, which practically intervenes less often, in which a person (promisor) firmly commits to buy a good if its owner decides to sell. In this situation, *mutatis mutandis*, the validity conditions and effects of such a contract are similar to those of

³⁴ Supreme Court civil section Dec. no. 412 of February 12, in "Repertory of judicial practice in civil matters for the years 1075-1980", p. 88.

³⁵ The Supreme Court, civil section, Dec. no. 1732 from 1957 in Ion Mișuță, Al. Lesviu "Repertoire of practice in civil matters for the years 1975-1980", p. 88.

³⁶ Dan Chirică, *op. cit.* (1997), p. 21.

³⁷ Dan Chirică, *op. cit.* (2017), p. 217.

³⁸ Cristina Nicoleta Muscă, *op. cit.*

the unilateral promise to sell³⁹. In the case of a unilateral promise to purchase a specific individual asset, if, before the promise has been executed, the beneficiary of the promise disposes of the asset or establishes a real right over it, the promisor's obligation is considered extinguished.

3. Delimitation from the option agreement

The Civil Code, in force since October 1, 2011, introduced as a novelty the institution of the option pact, reorganizing the matter of agreements preparatory to the sale.

The institution of the option agreement, regulated by the Romanian Civil Code in art. 1.278⁴⁰, is inspired by the Italian Civil Code, which, by art. 1331 para. (1), refers to the "option" in the sense that the hypothesis in which the parties agree that one remains bound by its own declaration, and the other has the faculty to accept or not the declaration of the first party, is considered an irrevocable proposal, the effects of which are provided by art. 1329 para. (1) C. civil it.

Based on this text, the theory of the "option contract" was developed in Italian law, or the option pact, in Romanian civil law, art. 1.278 para. (1) of the Civil Code being quasi-identical with art. 1.331 paragraph (1) of the Civil Code.

The mechanism of the option pact requires the existence of two documents: a contract whose object consists in maintaining the offer to contract, which becomes irrevocable for the period stipulated in the contract; and a declaration - a unilateral act of the beneficiary of the pact - through which he exercises his option (or "removes" the option, according to the expression established in the French doctrine and taken over by the Romanian doctrine before the appearance of the new Civil Code).⁴¹

The option pact is, therefore, a unilateral contract intended to prepare a future contract concluded between the promisor and the beneficiary, specifying that the expression of the consent of the promisor represents the very consent to the future contract, its reiteration is no longer necessary. Instead, the beneficiary must express his will twice to create the contract of sale: first an agreement at the conclusion of the option pact, and then an agreement at the conclusion of the contract of sale.⁴² Thus, an option pact means that convention by means of which one of the parties consents to the conclusion of a certain contract, and the other party reserves the option to express or not - within a certain period - their own consent, with a view to the conclusion of the contract respectively. The parties set a deadline for acceptance, otherwise the deadline

³⁹ Dan Chirică, *op. cit.* (1997), p. 22.

⁴⁰ Art. 1.278 Civil Code provides that: "(1) When the parties agree that one of them remains bound by their own declaration of will, and the other can accept or refuse it, that declaration is considered an irrevocable offer and produces the effects provided for in art.1.191. (2) If the parties have not agreed on a term for acceptance, it can be established by the court by presidential order, with the summons of the parties. (3) The option agreement must contain all the elements of the contract that the parties aim to conclude, so that it can be concluded by the simple acceptance of the beneficiary of the option. (4) The contract is concluded by exercising the option in the sense of acceptance by the beneficiary of the declaration of intent of the other party, under the conditions agreed by the pact."

⁴¹ Ioan Popa, *op. cit.* (2020), p. 135.

⁴² Francisc Deak, Lucian Mihai, Romeo Popescu, *Treaty of civil law. Special contracts*. Vol. I. Sale and Exchange, 5th ed. updated by Romeo Popescu, Ed. Universul Juridic, Bucharest, 2017, p. 64.

may be set by the court, citing the parties.

From the point of view of the capacity to contract requirements, given the fact that, from the point of view of the promisor, the consent to the conclusion of the pact has as its object the consent to the sale, he must fulfill the conditions of capacity for sale at the date of the conclusion of the pact, while the beneficiary must meet the special conditions of capacity to buy only upon acceptance of the option, at the date of the conclusion of the pact, having to meet only the general requirements to contract.⁴³

Regarding the form, in accordance with the provisions of art. 1.278 para. (5) Civil Code: *"both the option agreement and the declaration of acceptance must be concluded in the form prescribed by law for the contract that the parties seek to conclude."* Thus, if the authentic form of the contract of sale is required by law *ad validitatem*, the consent to the sale of both parties must be given in authentic form, even if the beneficiary of the pact expresses his consent in two stages. If the law provides for the authentic form for the valid conclusion of the sales contract, and the option agreement regarding such a contract, does not take the authentic form, according to the provisions of art. 1.242 para. (1) Civil Code, the option agreement will be struck by absolute nullity.

As a rule, the option pact is a unilateral, gratuitous contract that gives rise to obligations only for the promisor. The exception consists in the fact that in exchange for the commitment of the promisor and the unavailability of the asset during the option pact, the beneficiary can assume the payment of a sum of money called immobilization allowance, as in the case of the unilateral promise to sell. Thus, the character of the pact becomes onerous and synalagmatic, but with the mention that the promise does not automatically convert into a synalagmatic promise to sell, the promisor's commitment to sell not being correlated to the specific commitment to the synalagmatic promise to buy of the beneficiary, who still has the free will to buy or not.⁴⁴

The non-payment of the indemnity entitles the promisor to demand the resolution of the promise, referring to the fact that the promise becomes synalagmatic by the very insertion of the indemnity. In the situation where the beneficiary accepts the option, the value of the allowance will be included in the sale price.

Regarding the sales contract, art. 1.668 of the Civil Code provides that *"in the case of an option agreement regarding a contract for the sale of a determined individual asset, between the date of conclusion of the agreement and the date of exercise of the option or, as the case may be, that of the expiration of the option term, the asset that constitutes the object cannot be disposed of the pact."* In this way, a legal inalienability is born regarding the good that forms the object of the pact, in the sense of not concluding acts of disposition that could prejudice the beneficiary in his future capacity as a buyer. The inalienability clause is enforceable only after the fulfillment of the forms of publicity by noting in the land register, in the case of immovable goods, or by registration in the National Register of Movable Publicity, in the case of movable goods. The unavailability of the promised good operates *ope legis*, regardless of whether the parties have foreseen it or not in the content of the pact, they cannot derogate from it, because such an agreement could be equivalent to denying the

⁴³ Dan Chirică, *op. cit.* (2017), p. 193.

⁴⁴ Cristina Nicoleta Muscă, *op. cit.*

essence of the pact. Violation of the inalienability clause established by art. 1668 para. (1) Civil Code, the promisor is sanctioned, at the request of the beneficiary, with the relative nullity of the act by which this clause was violated, according to art. 629 para. (2) Civil Code.

In the context in which the object of the agreement is a real estate, subject to the forms of publicity in the land register, in order to be able to invoke the effects of accepting the agreement by concluding the sales contract, the beneficiary must enter in the land register the declaration of acceptance made in authentic form, accompanied by proof of its communication to the other party. The registration must be completed before the expiration of the option period, otherwise, the right will be automatically deleted from the land register. If the object of the agreement is a movable asset, the acceptance of the option by the beneficiary will lead to the formation of the sale under common law conditions. The beneficiary's freedom of choice can be materialized in the sense of buying the good or refusing either expressly or tacitly, in the latter case it is sufficient not to accept the option within the term. The lifting of the option by acceptance has an indivisible character, it is pure and simple, not being affected by the modalities and can only be done with the exact observance of the conditions established in the pact. Also, the acceptance of the option does not produce retroactive effects, the sale occurring only when the beneficiary's acceptance reaches the promisor.

Although, the provisions of art. 1668 para. 1 of the Civil Code make express reference only to the "*option agreement regarding a contract for the sale of a determined individual asset*" (in which the promisor is the owner of the asset and the beneficiary is the eventual buyer), we appreciate that the option agreement can look, to the same extent, and a sum of money as the price of a possible sale (in which the promisor makes an offer to buy, and the beneficiary-owner of something has an option right).

So, to the same extent that there is a sale option pact (in a restrictive sense), there can also be a purchase option pact. In this sense, we also take into consideration that the "promise to buy" is enshrined, expressly and distinctly (from the promise to sell), in the marginal name of art. 1669 of the Civil Code.

The delimitation of the option agreement from the unilateral promise to sell is required in the context where the risk of confusion is quite significant, since both the option agreement and the unilateral promise are contracts that confer a discretionary right on the beneficiary of the option, respectively to decide, or not, the conclusion of the foreseen contract. In the comparative analysis of the two operations, the type of obligation assumed in the case of each of the two is of interest, leading to the qualification of the legal nature of each, as well as the mechanism in which, in case of a positive option, the foreseen contract will be concluded.

The unilateral promise to contract gives rise to the obligation of the promisor to conclude the contract in the future, so that, in the event that the beneficiary of the promise decides to conclude the contract, the promisor will be required to express his consent at the conclusion of the subsequent contract, and in in case of refusal, his obligation being susceptible to forced (indirect) execution, the court, supplementing his consent, will issue a decision that will take the place of the contract. We note, therefore, that the obligation falling on the promisor, in the case of the conclusion of such a contract, is that of "doing" (implies a subsequent positive conduct, other than

that of "giving"), correlative to the right of claim of the beneficiary, of option, in the sense of deciding and demanding the conclusion of the contract. From this fact, we can qualify the act as having the legal nature of an ante-contract, that is, an agreement by which one of the parties commits to conclude a contract in the future, the essential content of which is determined, being a prior agreement, different from the foreseen one.⁴⁵

Apart from these, in the case of the conclusion of an option pact, the promisor no longer undertakes to conclude the contract (to do) in the future, but already, in a current and anticipated manner, he expresses his consent to the conclusion of the subsequent contract, so that, on the date at which the beneficiary will also opt for its conclusion, with the manifestation of his own will, realizing the agreement of will *ipso jure*, the contract being considered concluded. Moreover, it was defined by the legislator that the manifestation of will, thus expressed, according to art. 1.278 of the Civil Code represents an irrevocable offer, which produces the effects provided for in art. 1.191 Civil Code. As for the legal nature designated by the legislator, as that of an "offer", some reservations have been expressed in the doctrine⁴⁶, since the offer (in the classical conception) represents a proposal to contract, through which the offeror fixes the elements that can be taken in consideration for the conclusion of the contract, or, in the case of the option pact, these elements are established by the parties concluding the pact and not only by the offeror (promisor). The fact that the manifestation of will on the part of the promisor is already expressed, as in the case of the offer to contract, is not of a nature to qualify such a legal act as an offer, which is bilateral or multilateral anyway, but, rather, it represents a manifestation anticipated to conclude the contract, the essential elements of which are already established by the agreement of the parties.

The correct qualification of such a preliminary agreement, as a promise to contract or an option pact, shows a special practical interest, on the one hand, to observe the manner in which the subsequent (projected) contract will be concluded, respectively, in the case of the promise to contract in "two times", being necessary for both parties to express their consent for the conclusion of the subsequent act, while in the case of the option pact, the contract is concluded by the simple expression of will of the beneficiary, in which case the agreement is made of will. And, on the other hand, the form that such an act must take is of interest, because, if in the case of the preferential pact, the legislator has regulated the form of the act as required by law for the contract that the parties seek to conclude (art. 1.278 par. 5), such a regulation is missing in the case of the promise to contract, from which it follows that the general rule, that of consensualism, is applied (art. 1.178 NCC "Freedom of Form"), regardless of whether the designed act is one for which the law requires to conclude in solemn form.

In conclusion, the option agreement for the purpose of sale, type of option agreements regulated in art. 1.278 of the Civil Code, it is thus defined as a hybrid legal act, having the value of sale for the promisor and preliminary agreement for the beneficiary. With the exception of the irrevocable consent and form conditions, the

⁴⁵ Mircea N. Costin, Mircea C. Costin, *Contract promise*, in Mircea N. Costin, Mircea C. Costin, *Civil Law Dictionary*, Lumina Lex Publishing House, 2004, p. 267.

⁴⁶ Florin Ciutacu, Artin Sarchizian, *The option pact and the promise to contract in the new civil code*, https://www.ugb.ro/Juridica/Issue2RO/3_Pactul_de_optiune.Florin_Ciutacu.RO.pdf.

option agreement is easily a preparatory contract more energetic and with closer effects to the definitive contract that it prepares.

The transfer of the rights and obligations contained in the option agreement between living can be achieved through the assignment of the contract, the promisee's consent being expressed either at the conclusion of the agreement or during its execution.

In the event of the death of the beneficiary of the agreement prior to the fulfillment of the option term, it is transmitted to his heirs, being a right with patrimonial content, if the option right does not have an *intuitu personae* character. If the promisor dies before the expiration of the option period, his obligations related to the good promised to the beneficiary will be passed on to his heirs, who will be held to them as the promisor himself. The heirs of the promisor bear the consequences of the consent to the sale previously given by their predecessor, the acceptance of the option by the grantee automatically producing the formation of the sale.⁴⁷

Expiry occurs in case of accidental destruction or expropriation of the asset that is the object of the option agreement, of failure to exercise the right of option within the term stipulated in the agreement, by the death of the beneficiary if the option was given *intuitu personae*, by the unilateral waiver of the beneficiary during the option term.

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⁴⁷ Dan Chirică, *op. cit.* (2017), p. 200.

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