THE LEGAL REGIME OF THE UNILATERAL PROMISE REGARDING THE SALE CONTRACT

Livia MOCANU*

Abstract

The conclusion of a sale contract is often preceded by several agreements or temporary contracts taking several forms in the Romanian contemporary law, such as: the preference pact, the option pact, the unilateral and bilateral promise of sale. The current study regards the unilateral promise of sale/purchase which will be analyzed in the context of its legal acknowledgement by means of the Civil Code. The originality of this institution resides in its constitution elements, evolution and purpose, all of them composing an autonomous mechanism, completely different from the sale contract and the other contract meant to shape the latter.

Keywords: *unilateral promise of sale, bilateral promise of sale, option pact, promissor, beneficiary.*

1. Introduction

The field subject to analysis in the present work regards the unilateral promise of sale/purchase, an institution clearly regulated by the provisions of the new Romanian Civil Code. The importance of this institution has been pointed out by both the legal literature and practice and has gone through a progressive transformation, from a contract with no name, subject to a regime fiercely debated in the legal literature, to an autonomous contract, already having a legal regime and effects clearly regulated by the lawmaker. The unilateral promise regarding a sale contract is among the contracts preparing the final ultimate sale, which most of the times is not concluded instantaneously or almost instantaneously, being often preceded by several provisory agreements or contracts. The economic and legal realities have led to the multiplication and diversification of these acts preceding the sale contract, a fact which caused the lawmaker to step in, as a process which is absolutely necessary for establishing the legal regime of the pre-contracts in the sales field.

In terms of the legal institution subject to analysis, the present study shall determine the original elements of the unilateral promise to sell/purchase, comprising its definition, delimitation and purpose. In order to underline precisely the autonomy of this institution, we shall proceed to delimiting it from both some pre-contractual mechanisms with enforcement in the sales field, like the offer to enter a contract, the preference pact, the option pact and the bilateral promise of sale, and from the sale contract or a variety of the latter, namely the sale based on tasting.

The objectives mentioned above shall be accomplished by analyzing the legal provisions in the field, in order to render the changes and the novelty elements brought to the institution subject to analysis by the entry in force of the new Civil Code. The presentation of this contractual mechanism shall be based also on the specialized literature and legal practice – admittedly more reduced in the absence of a legislative acknowledgement (until the entry in force of the Civil Code). Nonetheless, the unilateral promise regarding the sale contract has already drawn the attention of the specialists, due to the issues which it raises when interpreting the legal norms applying to it.

2. Presentation

2.1. Definition

Traditionally, the birth of a contract was the result of the spontaneous instantaneous encounter between an offer and its acceptance. According to article 1182 paragraph (1) of the Civil Code, "A contract is concluded together with its negotiation by the parties or the acceptance without reservation of the offer to enter that contract". The text of the current Civil Code expresses in its turn the idea according to which the conclusion of a contract can take place spontaneously, without determining any potential pre-contractual phase, or in a complex manner, marked by negotiations, due to the object of the contract or the interests of the parties. As specialized literature also points out, in these situations "…the more complex is the object of the future contract, the bigger is the intensity of the negotiations preceding it"[1].

Precisely in the context of the constant evolution and change of the legal-economic reality, several pre-contractual agreements aiming to prepare the final contract emerged. When it comes

* Reader Ph.D, "Valahia" University from Târgovişte, Faculty of Law and Administrative Sciences (e-mail: **mocanulivia@yahoo. com**).

[1] V. Pop, *Contractul,* p. 203 and the following, apud Liviu Pop, Ionuț – Florian Popa, Stelian Ioan Vidu, *Curs de drept civil.Obligațiile,* Universul Juridic Publ. House, Bucharest, 2015, p. 53.

particularly to the conclusion of some contracts between professionals, the parties resort to broad negotiations regarding the elements of the definitive contract, which take the form of some complex procedures involving previous agreements between the parties[2].

The existence of several phases in the process for concluding a contract has led to the theory of the progressive constitution of contracts[3]. Either that they regard the constitution of the consent, or the object of the future contract, pre-contractual operations are based on contractual freedom and good faith[4], the parties approving the clauses of the operations in agreement with their interests and the concrete circumstances in which they are[5].

As for the unilateral promise to enter a contract, although it can be encountered in several categories of contracts, it is more of the times present in the sales field, having a well-defined role, in terms of both the gradual constitution of the consent and the progressive elaboration of the object of the final contract. Irrespective of the form which it takes, the unilateral promise to enter a contract has been defined by the legal literature as the convention by means of which one of the parties – called *promissory party* – takes in respect of the other party – called *beneficiary* – the duty to conclude in the future, upon his request, a certain contract, whose essential content is for the moment determined by the promise to enter a contract[6]. From the perspective of the validity conditions, it is necessary for the unilateral promise to enter the contract to contain all the essential elements of the promised contract.

When it comes to the unilateral promise of sale/purchase, we are speaking of a contract by means of which a person called *promissory party* takes in regard to another person called *beneficiary* the duty to sell/purchase a certain asset, at a determined/determinable price, within a certain term, while the beneficiary of the promise has the freedom to choose whether he wants to sell/purchase the asset[7]. The exclusive promise of sale (or only of purchase) is a unilateral contract, as it creates duties belonging only to one of the parties - the promissory party. As a result of the conclusion of a unilateral promise, together with the duty taken by the promissory party, the right to express an option emerges in the patrimony of the beneficiary, as a result of which he can choose to accept or deny buying the asset promised by his debtor[8].

As it results from the definition above, the unilateral promise of sale/purchase is based on an agreement of wills which determines the offer of the promissory party and his firm commitment to conclude a contract, while the consent of the beneficiary only refers to expressing his choice of selling/purchasing. The most encountered in practice is the unilateral promise of sale, which is typical to real estate sales, which have considerably developed since the beginning of the 20th century.

Before the entry in force of the new Civil Code[9], the institution of the unilateral promise of sale has been acknowledged and recognized by both the legal literature and practice, but there has not been any clear regulation of it. Although a legal regulation was missing, the conclusion of the pre-contract was deducted from the principle of contractual freedom[10],whereas the decision ruled to have the role of a sale purchase act was legally based on the provisions of articles of 1073 and 1077 of the 1864 Civil Code[11].Moreover, through article 5 paragraph (2) of Title X of Law No. 247/2005 on the reform in the field of property and justice, but also some secondary measures[12], the lawmaker clearly acknowledged the possibility of courts to give a sentence having the role of sale-purchase act, if one of the parties did not use the pre-contract. We would also like to mention the regulations with a special character referring to the leasing contract and operations included in the G.O. No. 51/1997 on the leasing operations and firms[13]. Article 16 of the Ordinance above basically presents the sanction applied when the promissory party does not respect the right of the dweller/user of buying or not the asset, clearly underlining that courts have the possibility to give a sentence which can replace the sale-purchase contract.

The unilateral promise of sale is currently subject to a regulated legal regime, which the current

---

[2] For more details, seeGheorghe Piperea, *Introducere in dreptul contractelor profesionale,*C.H.Beck Publ. House, Bucharest, 2011, pp.83 – 94.

[3] Juanita Goicovici, *Formarea progresivă a contractelor – noțiune și sfera de aplicare,* in Dreptul Magazine No. 7/2008, p. 27.

[4] The good-faith duty is a legal duty clearly provided for by article 1183 paragraph (2) of the Civil Code, according to which “The party entering a negotiation is bound to respect the good faith requirements. The parties cannot agree to limit or to exclude this duty”.

[5] Ioana Ionescu,*Antecontractul de vânzare-cumpărar,*Hamangiu Publ. House, Bucharest, 2012, p. 98.

[6] Monna – Lisa Belu Magdo, *Contractul de vânzare în noul Cod civil,* Hamangiu Publ. House, Bucharest, 2014, p. 102.

[7] P. 100.

[8] Ioana Ionescu, *quoted works,* p.156.

[9] Law. No. 287/2009 on the Civil Code, republished in the Official Gazette No. 505 from 15th July 2011.

[10] Doina Anghel, *Comentariile Codului civil. Contractul de vânzare și contractul de schimb,* Hamangiu Publ. House, Bucharest, 2012, p.49.

[11] Pavel Perju, *Practic judiciară civilă. Comentată și adnotată,* Continent XXI Publ. House, Bucharest, 1999, pp. 138 – 151, Alina Gabriela Țambulea, *Vânzarea. Hotărâri care țin loc de contract. Comentarii și jurisprudență,* Hamangiu Publ. House, Bucharest, 2013, pp. 50 – 55.

[12] Published in the Official Gazette No. 653 from 22nd July 2005. The text is currently abrogated by Law on the enforcement of the Civil Code No. 71/2011.

[13] Published in the Official Gazette No. 224 from 30th August 1997 and republished with the subsequent changes and completions in the Official Gazette No. 9 from 12th January 2000.

Civil Code in force acknowledges at Book V – On duties, Title IX – Various special contracts, Chapter I – The sale contract, Section I – General provisions, point 4 – The option pact regarding a sale contract and the sale promise.

2.2. Differences from other similar institutions

Taking into account the consent of the parties and the similarity degree between pre-contractual conventions with the contract itself which will be concluded, the unilateral promise of sale presents similarities and differences withother similar legal institutions, as it will be shown below.

2.2.1. The difference from the offer to enter a contract

The offer, regulated by articles 1187-1195 of the Civil Code, is defined as a unilateral statement of will, addressed by one person to another, by means of which the first expresses his intention to consider himself bound, if the other party accepts[14].According to article 1188 of the Civil Code, in order to produce the desired effects, the offer to enter a contract must meet three conditions:

- it must contain a proposal to conclude a contract
- it must represent the manifestation of the will to conclude the contract
- it must contain the conditions desired for concluding the contract.

The legal requirements mentioned above characterize the offer to enter a contract as a firm proposal to conclude a determined contract, in certain conditions, which are also determined. It represents a unilateral legal act, by means of which the issuer announces his will to enter a contract to third parties, but also the essential conditions of the contract. In fact, the Civil Code in force pays a particular attention to the unilateral legal act, which is a source of civil obligations, and dedicates a quite thorough regulation to the phase when the contract is constituted.

According to law, the proposal to enter a contract does not give rise to a contract as long as it is not accepted, since it can be revoked up to that point. It is the unilateral statement of its author's will which represents the base of the compulsory character of the offer to enter a contract.

While the offer to enter a contract constitutes a unilateral manifestation of will, the unilateral promise of sale is an agreement of wills, a genuine contract aiming to the firm commitment of the promissory party to sale/purchase an asset, in the conditions clearly established herein. It is why the offer must not be mistaken with the promise to enter a contract, which is a contract itself, as it results from the agreement of wills, from the encounter of the promise and the acceptance of the beneficiary. Being a contract, the unilateral promise of sale/purchase is not subject to unilateral revocation, while the non-observance of the promise shall trigger a contractual liability[15].

2.2.2. The difference from the preference pact

The preference pact is also a variety of preparatory contract, defined as the promise which the owner of an asset makes that, if he decides to sell that asset, he shall give priority to a certain person (beneficiary) when making the offer to enter the contract, at the same price[16].This contractual mechanism is regulated in the sales field: the convention which gives raise to the pre-emption right referred to by article 1730 and the following of the Civil Code is particularly a preference pact, having a sale contract as object. In the context of the preference pact, the promissory party – seller (or buyer) does not make the promise to enter a contract but only that, if he shall decide to enter the contract, he shall prefer the beneficiary. Consequently, when a preference pact is concluded, the promissory party does not issue a consent regarding the conclusion of the future contract, while the beneficiary is only the owner of *a priority right* in front of third interested parties, and not of an option right, as it happens with the option pact.

The preference pact represents a valid promise, as it is affected only by a simple potestative condition which does not only depend on the will of the promissory party, but also on external circumstances, which would determine him to conclude the sale[17]. Precisely on the base of the arguments above, most of the legal literature has considered the preference pact as a variety of the unilateral promise which, due to its features, has a narrow application, only in the field of the sales and renting contracts[18].Another singular opinion states that the preference pact is different from the unilateral promise to sale, by being a particular convention, which affects the eventuality of an asset to be sold, subordinated to the beneficiary's option[19]. Taking into account all the differences which exist between the two pre-contractual institutions, we

---

[14] E. Gaudemet, *Theorié générales des obligations,* Sirey Publ. House, Paris, 1973, p. 34, V. Flour/Aubert/Lavaux, *L'acte juridique,*p.111, No. 132, apud, Liviu Pop, Ionuț – Florian Popa, Stelian Ioan Vidu, *quoted works,* p. 68.

[15] Ion Turcu, *Noul Cod civil republicat, Cartea a V-a. Despre obligații art. 1164 – 1649,* 2nd edition, C.H.Beck Publ. House, Bucharest, 2011, pp. 157-158.

[16] Francisc Deak, *Tratat de drept civil. Contracte speciale,* ACTAMI Publ. House, Bucharest, 1999, p. 22.

[17] Liviu Stănciulescu, Vasile Nemeș,*Dreptul contractelor civile și comerciale în reglementarea noului Cod civil,* Hamangiu Publ. House, Bucharest, 2013, p. 82.

[18] Monna – Lisa Belu Magdo, *quoted works,* p. 113.

[19] D.Chirică, *Drept civil.Contracte special,* Lumina Lex Publ. House, Bucharest, 1997, p.22.

agree to the majority, according to which the role of the unilateral promise of sale in preparing a final contract is superior, while the preference pact is used rather in particular circumstances[20].

2.2.3. The distinction from the option pact

Specialized literature defines the option pact as a contract by means of which a person, called promissory party, promises to another, called beneficiary, to sell (or to purchase) an asset for a certain price (determined or determinable), if the beneficiary decides to buy (or to sell) within a certain term[21].

The option pact is a new institution, clearly defined in the general party of duties, particularly at article 1278 paragraph (1) of the Civil Code, which must be corroborated with the provisions of article 1668 in the sales field. Just like the unilateral promise, the option pact must contain all the essential elements of the contract which the parties aim to conclude. This makes so that the conclusion of the final contract is done by the simple acceptance of the beneficiary of the option.

In the sales field, the option pact is the legal act by means of which a party promises to the acquirer to maintain an irrevocable sale offer put at his disposal. The option pact is a contract, since the parties agree that it is compulsory for each to express his will and the conditions in which the acceptance must be done. From the perspective of the effects which it produces, the option pact is in principle a unilateral contract, which gives rise to obligations only for the promissory party, while the beneficiary has no obligation. Concretely speaking, the promissory party must not conclude with third parties a contract with an identical object than the one in the pact. In the sales field, the option pact generates a genuine impossibility of legal alienation, deducted as taking place within the option term [article 627 paragraph (4) of the Civil Code]. By exception, the option pact is a bilateral contract if the beneficiary offers a certain performance – the payment of an amount of money – in the exchange of the offer maintenance (*immobilization indemnity*)[22].

As seen before, the option pact has the features of a variety of a unilateral promise of sale; yet, the two pre-contractual institutions evince differences in terms of their legal regime, as long as the option pact is qualified as giving rise to a potestative right, whereas the unilateral promise of sale gives rise to a debt right[23].Thus, the unilateral promise of sale, since it does not have the effect of transferring a property right towards the beneficiary, nor the creation of an obligation to give, generates a personal right in the patrimony of the beneficiary, which is a debt one, and not a real right. It is a particular debt right, different from other debt rights, because it is exerted upon a determined asset from the patrimony of the debtor, namely the promised asset, upon which the beneficiary has a certain exclusivity. From this perspective, it has been stated the opinion that “the right coming from a unilateral promise of sale is in reality a real estate debt right”[24].

On the other hand, with the conclusion of an option pact, the beneficiary is interested in the promissory party, although remaining the owner of the asset, not using the promised asset within a certain period of time. This situation generates a potestative right[25] – neither real, nor a debt one – aiming to allow the conclusion of the future sale contract by means of a unilateral manifestation of will. The option pact generates an option right which is a specific one, preventing the promissory party to give up on his promise, and leaving all the freedom to the beneficiary in terms of his choice.

2.2.4. The distinction from the bilateral promise of sale-purchase

According to legal literature, the bilateral promise of sale, also called pre-contract or sale pre-contract, is the convention by means of which both parties firmly commit to conclude a sale contract in the future, whose essential elements they have already agreed[26].Unlike the unilateral promise of sale-purchase, in respect of which only the promissory party promises to sell or to purchase, when it comes to the bilateral promise, both partiespromise to conclude a certain sale contract in the future. This time, the obligation to do, consisting in the conclusion of a contract in the future, is taken by both parties. It is a firm mutual obligation, while the pre-contract contains all the essential elements of the future contract, including the conclusion date. When one of the parties of the pre-contract of sale-purchase refuses without a good reason to conclude the promised contract, the other party can demand

[20] For more details, see Ioana Ionescu, *quoted works,* pp. 129-133.
[21] G.Boroi, L. Stănciulescu, *quoted works,* p.338.
[22] For more details regarding the immobilization indemnity, see Ioana Ionescu, *quoted works,* pp. 164 – 169.
[23] Regarding the distinctions between the two institutions, see Paul Vasilescu, *Drept civil. Obligații, în reglementarea noului Cod civil,* Hamangiu Publ. House, Bucharest, 2012, pp. 283 – 284, Bogdan Dumitrache, *Pactul de opțiune, între deziderat și soluție disponibilă pentru practicieni,* in the proceedings*Liber Amicorum Liviu Pop. Reforma dreptului privat român în contextul federalismului juridic European,* Editors Dan Andrei Popescu, Ionuț-Florin Popa, Universul Juridic Publ. House, Bucharest, 2015, p.221 – 222.
[24] Ioana Ionescu, *quoted works,* p. 157.
[25] Regarding its definition, see Valeriu Stoica, *Drept civil. Drepturile reale principale,* 2 edition, C.H.Beck Publ. House, Bucharest, 2013, pp. 48 – 50.
[26] Ioana Ionescu, *quoted works,* p. 133.

for a decision to be ruled and replace the contract, if all the other validity conditions are met[27].

The duties of the parties resulting from the bilateral promise of sale-purchase are mutual and interdependent, as even if the promise does not have the value of a sale act, it generates for the parties the obligation to comply with all the duties necessary for concluding the promised contract. The content of the unilateral promise of sale is missing the two essential and necessary clauses for any bilateral promise, namely the one referring to the mutual character of the promise to conclude the contract in the future and the one according to which each of the parties must commit to the duty to do something. When it comes to the unilateral promise, the beneficiary does not commit himself to buying something in the future, nor does he take any legal duty, having he freedom to decide by the date agreed with the promissory party whether he will buy the promised asset. Hence, if the beneficiary of the unilateral promise does not promise to buy, but reserves his right to decide whether we will do this, the promissory acquirer of the bilateral promise takes upon himself the firm duty to buy the asset in the future, exactly in the conditions established by the pre-contract.

The similarity between the two institutions in question is that both the bilateral promise of sale-purchase and the unilateral one represent contracts, basically pre-contracts, which give rise to some debt rights. The frequency of the bilateral promise of sale-purchase in practice has led to it being named a *pre-contract of sale-purchase*. Before the entry in force of the Civil Code, both institutions were contracts without a name, lacking a legal name and a particular regulation. Taking the definitions from the legal literature and the acknowledgement within the legal practice, the current Civil Code regulates the promise to enter a contract, the promise to sell and the promise to buy, as well as the possibility for a court to give a sentence replacing the contract – articles 1279 and 1669 of the Civil Code.

Just like the unilateral promise of sale-purchase, the bilateral one has, as a rule, a consensual character, even when the promised contract is subject to some formal requirements for it to be valid. From this aspect, the Civil Code makes no mention neither in its general part – article 1279 – not in its special one – article 1669, as it can be encountered at article 1278 regarding the option pact.

2.2.5. The distinction from the sale-purchase contract

The unilateral promise and the sale contract are different both in terms of their validity conditions and the legal effects which they produce.

As mentioned before, the unilateral promise comprises all the essential elements for the conclusion of a final contract: the capacity to enter a contract, the consent, the object and the cause. From these, some elements are completely different from those a sale contract, which will eventually follow afterwards, while others will be common for both contracts.

Regarding the differences between the two institutions, we are speaking of the capacity to enter a contract. When it comes of the unilateral promise of sale, the beneficiary must have the capacity to make provisions when the option is expressed and not when it is contracted, while the capacity of the buyer is analyzed at the conclusion of the sale contract. Moreover, the cause of the obligations of the contracting parties is different, as the ground of the advantage agreed upon by the promissory party consists in receiving a immobilization indemnity or another performance assessed as equivalent and satisfactory for him.

The capacity to enter a contract also represents a common element of the two contracts, as the promissory party must have the full capacity to make provisions for the promised asset, from the moment the unilateral promise of sale is concluded. Moreover, from the moment a unilateral promise of sale is concluded, the object, work and price must be determined or determinable.

All the clauses of the final contract must be found within the content of the unilateral promise, since they were taken into account by the promissory party when giving his consent, so that any modification of the conditions initially established necessarily triggers a new manifestation of will from his part, while the sale contract cannot be concluded only as a result of the acceptance of the beneficiary.

Moreover, the two legal acts are also different when it comes to their objects. While the unilateral promise of sale is aimed at establishing the offer, the sale contract is aimed at the property transfer[28].Thus, the promissory party promises to maintain his offer and to conclude the sale contract with the beneficiary in the future, while the seller, with the conclusion of the sale contract, has the obligation to send the property upon the asset. The obligation of the promissory party emerging from the unilateral promise is different from that of the seller, so that the right emerging from this contract is a distinct one – the option right – totally different from the one created by the sale contract.

In its turn, the beneficiary of the unilateral promise of sale does not take the obligation to buy and not even the obligation to conclude a sale contract in the future, but only reserves his right to

[27] Alina Gabriela Ţambulea, *quoted works*, p. 41 and the following.

[28] The transfer of the property right regards only the nature of the sale contract, as the sale can also transfer another right, like: another real right, a debt right, an intellectual property right or succession rights.

take a decision within a certain term whether he will buy the asset promised by the promissory party.

Since the unilateral promise of sale is not a convention of property transfer, it can be deducted that, only when it comes to the sale contract, the effects typical to the property transfer shall take place.

The essential distinction between the two legal acts consists in the fact that the unilateral promise of sale is missing an important element, which is the consent of the beneficiary to buy, who has precisely the possibility to decide in the future whether he will conclude the contract.

2.2.6. The distinction from the sale based on tasting

The text of article 1682 of the Civil Code regulates the sale based on tasting, maintaining the rule according to which, in this case, the sale contract is considered concluded only in the existence of the clear consent of the buyer, meaning that the asset is according to his taste. Specialized literature considers that this variety of sale contract is rather similar to a unilateral promise of sale, given that the future of the sale based on tasting exclusively depends on the fact that the potential buyer found the asset according to his taste after tasting it. In this case, he can also refuse the asset on the simple reason that he does not like it. The sale contract exists only when the buyer declares that the asset is according to his tastes; we cannot speak here of a sale under the suspensive condition, as it happens with the sale based on sampling[29].

2.3. The effects of the unilateral promise of sale

2.3.1. The effects until the option is exerted

2.3.1.1. The rights and duties of the promissory party until the option ends

The unilateral promise of sale provides to the promissory party the duty to do, namely that of maintaining his sale offer throughout the entire term of the option right. In all this time, the beneficiary becomes the creditor of the option right related to the conclusion of the promised contract. The duty to maintain his consent at the sale also triggers for the promissory party a duty of not to do, consisting in his duty of not taking back his promise within the option term and of not selling the promised asset to a third party.

Consequently, the main duty of the promissory party consists in maintain his consent at the sale moment, at the disposal of the beneficiary, refraining from any behavior which could compromise the moment when the option ends.

From the perspective above, it should be noticed a progress made by the current Civil Code which, in order to provide a special protection to the contract in question and to save the beneficiary from a potential conflict with a third acquirer, provides for the duty to make public the unilateral promise of sale, unlike the former regulations which only provided for the possibility to mark it in the real estate book.

If during the option term the promissory party communicates to the beneficiary that he withdraws his sale offer and, with this, his consent as well at the final sale, this manifestation would not be deprived of legal effects. For this matter, we refer to the provisions of article 1669 of the Civil Code, according to which, when the promissory party who concluded a unilateral promise of sale refuses without any reason to conclude the promised contract, the other party – the beneficiary – can ask for a decision to be ruled, which can replace the contract, if all the other validity conditions are met. These provisions are completed by those of article 1278 of the Civil Code and by those of article 1191 paragraph (2) of the Civil Code, all of them expressing the autonomous character of the unilateral promise to sale which, by being first of all a contract, contains an offer which cannot be retracted in a unilateral manner. As a consequence, any revocation of the offer by the promissory party does not have efficiency, while the expression at term of the option by the beneficiary constitutes the sale contract, despite all the opposition of the promissory party.

There is also the possibility for the promissory party to alienate the promised asset, before the option term expires. In this case, by not having any real right on the promised asset, opposable *erga omnes*, the beneficiary cannot claim the asset from the third party acquiring itand cannot demand either, except for certain conditions, the annulment of the contract concluded between the promissory party and the third party. In principle, the third acquirer becomes the owner of the asset and is protected by any action taken by the beneficiary, except for the case when he concluded the contract with the promissory party in bad faith, by knowing of the existence of the unilateral promise to sell the asset and hence transgressing the alienation interdiction, but also the case when he got the asset for free. In this situation, since he can no longer comply with his duty in kind, the promissory party can be forced to pay compensation damage, according to the provisions of article 1530 of the Civil Code, since he caused a prejudice to the beneficiary.

When the promissory party alienates the promised asset, the beneficiary can demand the annulment of the sale concluded between the promissory party with the third party or he can file

[29] Ioana Ionescu, *quoted works,* pp. 139 – 140.

an application for declaring the lack of validity this sale[30].

Before the option term expires, the promissory party can also conclude other legal acts, having the promised asset as object and potentially causing a prejudice to the beneficiary. As it happens with the sale of the promised asset to a third party, the promissory party might just as well exchange or donate the asset, conclude any other convention having the effect of a property right transfer or constitute a mortgage; in the last case, the expression of the option made by the beneficiary remains possible, while the property right sent when the option is expressed is reduced only from an economical point of view.

The term for exerting the option is established by the parties; in the contrary case, the promissory party can address the court for establishing an acceptance term, which will rule in the form of a presidential ordinance, summoning the parties. This course of action is in agreement with the provisions of article 1278 paragraph (2) of the Civil Code.

Until the sale is concluded, the promissory party remains the owner of the promised asset; he maintains its use and has the right of free administration upon it. As a result, the asset can be rented, except for the case in which such action is clearly forbidden for the promissory party.

Moreover, the asset remains in the risk and peril of the promissory party, so that its loss or destruction triggers the nullity of the promise.

3.1.2. The rights and duties of the beneficiary before his option right ends

As it results from the legal regulations, the beneficiary of the unilateral promise does not have a corresponding duty as the one of the promissory party - to maintain his sale offer. Therefore, the beneficiary does not promise to buy the asset in the future; he maintains unaltered his contractual freedom to make a choice, in a positive or negative manner, when his option term ends. Even in the exceptional case in which the beneficiary takes upon himself the duty to pay a certain amount of money as a price for the option, the unilateral promise acquires a synallagmatic character, without becoming nonetheless a bilateral promise of sale. The promissory party can demand the payment of a certain amount of money as long as the beneficiary enjoys the advantage of the asset's immobilization, an amount of money which rests completely in the possession of the promissory party, even if the sale does not take place. Specialized literature considers that the beneficiary could ask for a partial restitution of the indemnity, if this is established in relation to the actual period during which the asset is immobilized, while its value should be reduced if the beneficiary gave up in advance to his option right[31].

As seen before, when a unilateral promise of sale is concluded, the beneficiary does not give his consent to buy. He has an option right which must be exerted within a certain term. If the promise is accepted within the option term, the sale ends in that specific moment[32], except for the cases in which the nature of the asset representing the object of the promise imposes the compliance with the authentic form for the validity of the contract.

The option right enjoyed by the beneficiary is a subjective right, subject to the statute of limitations, having a restricted existence and a legal prerogative meant to change the situation emerged with the convention of the parties[33].

If the beneficiary will decide to purchase the asset but the promissory party will refuse the sale, also transgressing his obligation taken, the contract shall not take place, while the beneficiary will be entitled to compensation damage, according to the rules applying to the duty to do.

2.3.1.2. The effects of the promise when the option ends

The end of the option represents the manifestation of the beneficiary's will, made within the option term, to buy the asset. As an effect of the end of the option, the unilateral promise of sale produces full effects; the non-retractable will of the promissory party to sell meets the will of the beneficiary to buy, constituting the valid sale contract. The end of the option represents the consent for the sale contract, having the effect of perfecting the projected sale. As a consequence, when the beneficiary expresses his option, the property right transfer upon the promised asset takes place, except for the situations in which the parties postpone the transfer until a subsequent moment. In most of the cases, this situation is determined by the need to comply with the formalities required by law as a condition itself for concluding the contract; yet, an incomplete payment of the price can also lead to the postponement of the property right transfer, the promissory party being directly interested in receiving the price at the value established by the parties convention.

For a contract to be validly concluded, when the option ends, the beneficiary needs to have full power of exercise, but not also the promissory party, who had the capacity to make provisions when the promise was made, date at which he also agreed to the sale.

[30] For more details, see Ioana Ionescu, *quoted works,* pp. 179 – 188.
[31] Ioana Ionescu, *quoted works,* p. 190.
[32] D. Chirică,*Contracte speciale civile şi comerciale. Vânzarea. I,*Rosetti Publ. House, Bucharest, 2005, p.20
[33] Ioana Ionescu, *quoted works,* p. 191.

The projected sale shall be concluded only if the option is expressed within the option term established within the unilateral promise of sale; the expiry of this term shall impose a new agreement to the parties for this matter.

The end of the option must be pure and simple, not affected by other manners, capable to express a firm and precise will to conclude the sale exactly in the terms and conditions provided for by the promise.

The option can be ended personally by the beneficiary or by his legal representative, after which it shall be notified to the promissory party, or to his legal representative, according to the case.

Having a consensual character, the end of the option is not conditioned by a particular form, except for the cases in which the parties established otherwise or the law imposes such a requirement for the validity of the contract. Consequently, the acceptance of the promise can be both clear and tacit, resulting from certain acts which clearly express the manifestation of will, for purchasing the asset. In this case are applied as well the provisions of article 1196 paragraph (2) of the Civil Code, according to which: “The silence or inaction of the receiver does not mean acceptance unless when it results from the law, from the parties agreement, from the practices established between these, from customs or from other circumstances”.

The tacit acceptance does not produce effects when the law demands a written form for the final contract, as it results from the provisions of article 1668 corroborated with art. 1278 paragraph (5) of the Civil Code, which impose for the acceptance statement to be concluded in the form provided for by law for the contract projected to be concluded.

Moreover, if according to law the authentic form *ad validitatem* is required for the valid alienation of the promised asset (as it happens with fields and constructions), article 1278 paragraph (5) of the Civil Code clearly stipulates that both the option pact and the acceptance statement must be concluded in the form requested by law for the final contract. Consequently, in these situations the end of the option must take a solemn form, meaning the authentic one.

When the consent of the parties is not given in the form requested by law for the validity of the projected contract, is applied the rule regarding the conversion of the legal act and, in the absence of a contrary stipulation, the ending of the option by the beneficiary will not have the conclusion of the sale as effect, but will represent, together with the manifestation of will by the promissory party, a bilateral promise of sale. In fact, the legal literature preceding the new Civil Code, treated conversion as a legal rule, which removed the enforcement of the principle *quod nullum est, nulum producit efectum*[34].

3. Conclusions

Initially acknowledged only by the legal literature and practice, the unilateral promise of sale/purchase is recently acknowledged also in the legislative field. It appears as a result of an agreement of wills, but must not be mistaken with the actual sale. The unilateral promise of sale/purchase is a unilateral contract, an autonomous institution, with a power recognized by the lawmaker as being the same as the bilateral promise, since both can be subject to forced execution in identical conditions. The current scientific work has been elaborated in principal on the basis of the new legislative texts which define an original institution, totally different from the sale contract and other contractual techniques meant to shape it. The current work does not go through all the theoretical and practical aspects regarding the unilateral promise in the field of sales contract, but we have tried to present a couple of novelty elements which the Civil Code provides to this institution.

Taking into account the legislative provisions, but also the opinions stated in the legal literature, we can conclude that the unilateral promise of sale/purchase represents a genuine contractual technique which favors the circulation of assets and economic activity.

References:

- Anghel, Doina, Comentariile Codului civil. Contractul de vânzare și contractul de schimb, Hamangiu Publ. House, Bucharest, 2012;
- Belu Magdo, Monna – Lisa, Contractul de vânzare în noul Cod civil, Hamangiu Publ. House, Bucharest, 2014;
- Boroi, G., Drept civil. Partea generală, Hamangiu Publ. House, Bucharest, 2008;
- Chirică, D., Contracte speciale civile și comerciale. Vânzarea. I, Rosetti Publ. House, Bucharest, 2005;
- Chirică, D., Drept civil. Contracte speciale, Lumina Lex Publ. House, Bucharest, 1997;
- Deak, Francisc, Tratat de drept civil. Contracte speciale, ACTAMI Publ. House, Bucharest, 1999;
- Dumitrache, Bogdan, Pactul de opțiune, între deziderat și soluție disponibilă pentru practicieni, in the proceedings Liber Amicorum Liviu Pop. Reforma dreptului privat român în contextul federalismului juridic European, Editors Dan Andrei Popescu, Ionuț-Florin Popa, Universul Juridic Publ. House, Bucharest, 2015;
- Ionescu, Ioana, Antecontractul de vânzare-cumpărare, Hamangiu Publ. House, Bucharest, 2012;

[34] G. Boroi, *Drept civil. Partea generală,* Hamangiu Publ. House, Bucharest, 2008, p.336.

- Piperea, Gheorghe, Introducere in dreptul contractelor profesionale, C.H. Beck Publ. House, Bucharest, 2011;
- Pop, Liviu, Popa, Ionuț – Florian, Vidu, Stelian Ioan, Curs de drept civil. Obligațiile, Universul Juridic Publ. House, Bucharest, 2015;
- Perju, Pavel, Practic judiciară civilă. Comentată și adnotată, Continent XXI Publ. House, Bucharest, 1999;
- Stănciulescu, Liviu, Nemeş, Vasile, Dreptul contractelor civile şi comerciale, în reglementarea noului Cod civil. Hamangiu Publ. House, Bucharest, 2013;
- Stoica, Valeriu, Drept civil. Drepturile reale principale, 2 edition, C.H. Beck Publ. House, Bucharest, 2013;
- Turcu, Ion, Noul Cod civil republicat, Cartea a V-a. Despre obligații art. 1164 – 1649, 2nd edition, C.H. Beck Publ. House, Bucharest, 2011;
- Țambulea, Alina Gabriela, Vânzarea. Hotărâri care țin loc de contract. Comentarii și jurisprudență, Hamangiu Publ. House, Bucharest, 2013;
- Vasilescu, Paul, Drept civil. Obligații, în reglementarea noului Cod civil, Hamangiu Publ. House, Bucharest, 2012.