

THE OPTION AGREEMENT IN THE NEW ROMANIAN CIVIL CODE

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Abstract

The Romanian Civil Code of 2009 introduces a new legal construct in the Romanian legal system, i.e. the option agreement, mainly taken from French law. This paper aims at highlighting the differences between the option agreement and other legal constructs which constitute acts preceding the conclusion of a contract and have already been discussed in the Romanian literature. Thus, we intend to offer a comparative view with reference to the offer to contract, as well as the unilateral and bilateral promises, highlighting the similarities and, especially, the differences between such constructs. Finally, we wish to draw attention to some confusions to be avoided with the introduction of the option agreement in the New Romanian Civil Code, as well as to some omissions or regrettable errors that the legislator of 2009 has failed to notice in the text of the code.

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JEL Classification: *K12*

The New Civil Code (NCC)² introduces in the sphere of preparatory acts, besides the promise to contract, a legal construct unique to our country's legislation, i.e. the option agreement.

This construct, as regulated by the New Civil Code, is not an absolute novelty; it is inspired from the French (and not only) doctrinal and case law solutions and represents a recognition of some opinions expressed in the Romanian juridical literature³ which, at the time of their formulation, did not produce the necessary echo in order to become established as dominant views.

At the same time, the New Civil Code preserved the classic construct of the preliminary contract, as a bilateral promise to contract.

The option agreement is the bilateral legal act whereby a party, called *promissory*, expresses his or her consent to the conclusion of a contract whose content is accurately established, while providing the other party, *the beneficiary of the option*, with the right to accept or decline the conclusion of the contract, within a specified or ascertainable period of time.

The New Civil Code establishes the legal regime generally applicable to the option agreement in Article §1278 and subsequently stipulates, in Article §1668, a particular application of the option agreement in relation to the sales contract.

The option agreement is therefore a contract and not a unilateral act, as two wills are necessary for its valid conclusion. This follows from the wording of Article §1278 NCC, which states from the first thesis that “***when the parties agree*** (our emphasis) *that one of them remains bound to its own declaration of will, whereas the other may accept or refuse it, that declaration is considered a binding offer ...*”

By its conclusion, the option agreement produces two effects: on the one hand, for the promissory, the contract to which the agreement refers is half completed (as the party manifests irrevocably its wish to do so); on the other hand, for the beneficiary of the option, the right arises to choose freely whether or not to conclude the contract, within a period of time that is either

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² Law No. 278/2009, republished in the Official Journal of Romania, Part I, No. 505 of 15/07/2011.

³ See Dan Chiriță, *Tratat de drept civil. Contracte speciale. Vol. I. Vânzarea și schimbul [Treatise of Civil Law. Special Contracts. Volume I. Sale and Exchange]*, C.H. Beck, Bucharest, 2008, pp. 147-162; Juanita Goicovici, *Formarea progresivă a contractului [Progressive Formation of the Contract]*, Wolters Kluwer Publishing House, Bucharest, 2008, pp. 34-41.

established in advance by the parties, or shall be determined by the court, through presidential ordinance procedure.

As stated in the literature, two elements can be identified in the structure of the option agreement: **a)** an element that coincides with the offer and contains the essence of the intended act, including the promissory's consent, only lacking the beneficiary's consent to form a complete agreement and **b)** a second element, contractual by nature, consisting in an agreement between the two parties to maintain the proposal for a period of time.⁴

We have some reservations concerning the statements above, in regard to the first component, which contains not only "*the essential elements*" of the intended act, but, as required by paragraph 3 of Article §1278, **all the elements of the contract which the parties aim to conclude**. This is one of the essential differences compared to the offer, with which the option agreement could be easily confused. The differences, however, do not stop there: while the offer is a unilateral legal act, the option agreement is always a contract; when the option agreement regards a sale contract, the legislator provides for a perpetuity clause, which is essentially temporary, while the offer of sale could have no time limit.

Other legal constructs that might be confused with the option agreement are the unilateral and the bilateral promise to contract. There have been opinions in the Romanian juridical literature that stated that there would be no difference, from a legal perspective, between the unilateral promise of sale and the option agreement for the same contract, which would only differ in terms of their effects.⁵

In assessing the accuracy of this opinion, one should bear in mind that the Romanian legislator of 2009 acknowledges a new legal construct, called *Unilateral Promise*, which falls within the scope of unilateral legal acts, the *nomen juris* of Article §1327 NCC, whose first paragraph reads: "*The unilateral promise made with a binding intention irrespective of acceptance only binds the author.*"

The introduction of this new construct raises the question whether the concept of *unilateral promise* established in Article §1327 is not somehow confused with the notion of *unilateral promise to contract*, found, for example, in Article §1669 NCC on the unilateral promise of sale.

In an attempt to answer this problem, two possible explanations could be provided: **1.** Keeping French law as a source of inspiration, where the unilateral promise to contract is also called option agreement and actually represents the same legal construct,⁶ the Civil Code of 2009 aimed to adopt the same solution, in the sense of renouncing the notion of unilateral promise to contract, as it was known in the literature of our country, and replacing it with that of option agreement, leaving *unilateral promise* to refer exclusively to the unilateral legal act referred to in Article §1327, **or 2.** Out of a regrettable error, the Romanian legislator uses the same name for two different notions.

We believe that the latter explanation is the most plausible. The confusion is not new, since in the Civil Code of Charles II from 1940, the phrase "unilateral promise" was used to mean, in fact, as shown in the literature, a type of unilateral legal act, i.e. *the unilateral commitment*. This was defined as the unilateral expression of will that has the effect of creating obligations upon its author; in other words, the unilateral commitment is the unilateral act that

⁴ See Florin Moțiu, *Contractele speciale în noul Cod civil [Special Contracts in the New Civil Code]*, Universul Juridic Publishing House, Bucharest, 2011, p. 26.

⁵ Florin Moțiu, cited work, p. 27; in this respect, also see Liviu Stănculescu in Gabriel Boroș, Liviu Stănculescu, *Instituții de drept civil în reglementarea noului Cod civil [Institutions of Civil Law in the Regulation of the New Civil Code]*, Hamangiu Publishing House, Bucharest, 2012, p. 337-338.

⁶ See in this respect the provisions of Article 1589 of the French Civil Code regarding the contract of sale.

gives rise to civil obligations and thus differs from the unilateral act, which is not binding in the technical sense of the term.⁷ Although, at first glance, the phrase “unilateral commitment” seems tautological because commitment can only belong to one party, it aims at emphasizing the double unilateral nature of the legal operation: on the one hand, the act is unilateral because it has a sole author and, on the other hand, the obligation is unilateral because it only binds the author of the act. Therefore, one cannot equate *the unilateral commitment* with *the unilateral contract*.⁸

For all these reasons, we believe that there remain the distinct concepts of: *unilateral promise to contract*, as it was known until the entry into force of the New Romanian Civil Code, *option agreement*, newly introduced by Article §1278 NCC, and *unilateral commitment* in the sense of Article §1327 NCC, which is currently referred to by the *nomen juris* of “unilateral promise,” an unfortunate choice from our point of view.

Under these conditions, we do not agree with the expressed view confusing *the option agreement* with *the unilateral promise to contract*. Differences can be found starting from the very moment of verifying the existence requirements of the two legal acts. Thus, whereas the promissory of the option agreement is required to fulfil the requirement of legal competence for the conclusion of a disposition act only at the time of expressing the consent for the production of the act, in the case of the unilateral promise (as well as in case of the offer and the bilateral promise), the requirement of legal competence should be fulfilled both at the conclusion of the act, and at the conclusion of the final act. As far as the beneficiary of the option is concerned, the substantive issue of competence must be met when accepting the option, a solution that should also be maintained for the beneficiary of the unilateral promise to contract. If, however, the option agreement provided for the payment of compensation for freezing the property, it is necessary that the beneficiary of the option be competent when such payment is made⁹.

The two institutions also differ in terms of legal capacity in the sense that, as regards the unilateral promise, in the event of the death of the promissory, the obligation to conclude the contract in the future (an obligation of *facere*) is transmitted to the heirs, whereas the death of the person who irrevocably manifested his or her will through the option agreement does not raise the question of successional transmission because, as noted above, for that person the contract is half concluded.

Another important difference between the two types of acts is the formal requirement necessary for their validity. Thus, while Article §1278 (5) provides that “*both the option agreement and the acceptance statement must be concluded in the manner prescribed by law for the contract which the parties aim to conclude*,” the unilateral promise, as it does not produce the specific effects of the act to be signed (for example, translative effects in the case of sale), is subject to the principle of mutual consent.

This preparatory contract for the beneficiary of the promise has the virtual potentiality to be found in any type of contracts, but is most frequently found in the case of sale contracts.¹⁰ The Belgian juridical literature raised the issue of the legitimacy of the option agreement. In other words, is it possible to conclude such an agreement preceding the conclusion of any contract, or are there certain legal acts incompatible with the option agreement? Foreign literature showed that option agreements (unilateral promises in Belgian and French law) are, in principle, allowed at any time, except in those situations where the solemnity imposed by law is necessary because

⁷ Marieta Avram, *Actul unilateral în dreptul privat [The Unilateral Act in Private Law]*, Hamangiu Publishing House, Bucharest, 2006, p. 19.

⁸ *Idem*, p. 21-22.

⁹ François Terré, Philippe Simler, Yves Lequette, *Droit civil. Les obligations*, Editions Dalloz, Paris, 2009, p. 200.

¹⁰ Liviu Pop, *Tratat de drept civil. Obligațiile. Volumul II: Contractul [Treatise of Civil Law. Obligations. Volume II: The Contract]*, Universul Juridic Publishing House, Bucharest, 2009, p. 219.

of the gravity of the act or to safeguard the freedom of consent of one of the parties. Thus, marriage and donation would be incompatible with the option agreement, but not the mortgage contract.¹¹ At the same time, the same Belgian author also shows that, whereas real acts may be preceded by an option agreement, this possibility does not exist for gift handover.¹² In principle, we believe that the opinions expressed can also be applied in our domestic law, with the observation that real contracts require, for their valid conclusion, in addition to the manifestation of will from the beneficiary of the option as to the consent given to conclude the act, the material transfer of the property that is the subject of the obligation.

The option agreement gives rise to an obligation only for one of the parties, namely to maintain the declaration of will to contract for the entire duration of a period of time specified by the parties and, in the absence of express provision thereof, within a period of time to be established by the court. Although the legislator uses the phrase “**the parties agree**,” we consider that this is not a reason to interpret Article §1278 NCC as recognizing the existence of a bilateral promise to contract, but should be regarded in the sense of contract, a bilateral act, as opposed to the unilateral promise, set out in Article §1327 NCC, which is the manifestation of the will of one party, a unilateral act and a source of civil obligations.

Therefore, the option agreement is based on a concord of wills that is designed to establish the promissory's commitment, with the latter firmly undertaking to conclude the contract from his or her point of view and having already given the consent, while the beneficiary agrees only to be given the option to contract or not, but not to conclude the contract.¹³ The contract shall be concluded once the beneficiary accepts the option, provided he or she does so within the period of time provided by the promissory.

From the above, it appears that the effects of the agreement consist in the promissory's obligation to maintain the offer throughout the duration of the option period, without the possibility of revocation.¹⁴ Indeed, this is why the new code confers to the contractor's obligation the effects produced by the offer, as specified in Article §1191 NCC.

Thus, integrating the offer to contract in the preparatory contract, the promissory voluntarily waives the possibility to change his mind about the contract during the validity period of the promise, when the conclusion of the final contract is out of their hands and passes to the beneficiary of the agreement – holder of a potestative right of option.¹⁵ This right of option, in its positive form, is the subject of a unilateral legal act, which represents the manifestation of will from the beneficiary of the option, which is thus different from the option agreement but complements it, leading to the conclusion of the contract intended by the parties.

As regards the beneficiary's right, as shown above, it is a right of option and its legal nature forms the subject of controversy in the Romanian and foreign legal literature.

The majority view considers that what was called before a unilateral promise to contract gives rise to a unilateral obligation relation, which includes the promissory's obligation to conclude the promised contract and the beneficiary's right to choose between accepting and not accepting the conclusion of that contract, within the period of time set by the parties. Then, this was an obligation to do, which, in case of failure to comply, resulted in the beneficiary's right to claim damages.¹⁶

¹¹ Patrick Wéry, *Droit des obligations. Volume I. Théorie générale du contrat*, Editions Larcier, Bruxelles, 2010, p. 175.

¹² *Ibidem*.

¹³ Dan Chirică, cited work, p. 147.

¹⁴ Liviu Pop, cited work, p. 222.

¹⁵ Juanita Goicovici, cited work, p. 34.

¹⁶ Francisk Deak, *Tratat de drept civil. Contracte speciale [Treatise of Civil Law. Special Contracts]*, Universul Juridic Publishing House, Bucharest, 2001, p. 24.

It was also shown that, unlike the offer to contract, which is a unilateral manifestation of the proponent's will, the unilateral promise to contract is an actual contract, i.e. an agreement of will that generates a unilateral contractual obligation to do, and that both the promissory's obligation and the beneficiary's right could be subject to transmission between living persons or due to death,¹⁷ unless they were *intuitu personae*.

With the legislative establishment of the option agreement by the New Civil Code, as regards the legal nature of the beneficiary's right of option, the literature embraced the previously minority opinion that this right should be included in the category of potestative rights. In other words, until the option is accepted, this represents a simple personal right or, better said, the power to contract by a unilateral act, which is called potestative right.¹⁸ This right is not real, since it confers no right on property, nor does it concern a debt, since it does not correspond to a personal obligation of the promissory, but simply affords the beneficiary the power to master a legal situation under which he or she has the right to opt unilaterally between accepting the option (with the consequence of perfecting the sale) and not accepting it, without for the promissory, placed in a submissive position from this point of view, to be able to contest it in any way.¹⁹ In other words, the promissory cannot unilaterally block the sale where the beneficiary wishes to buy – not because he or she is bound by a so-called “obligation to do,” but based on the binding force of the manifestation of will, which must be respected.²⁰

As regards the period of time during which the offer made by the agreement cannot be withdrawn, this must be clearly set out and, in the absence of such a clause, the interested party may request the court to rule, by presidential ordinance, summoning the parties.

The option agreement can be concluded for a fixed period of time, in which case the option right is subject to a contractual term, be it extinctive or suspensive, or for an indefinite period of time – not in the sense of perpetuity, but in the absence of an express stipulation on the length of the period.²¹ In the latter case, the promissory's commitment could be set a deadline by the judge, by presidential ordinance procedure, summoning the parties, as set out in Article §1278 (2) NCC. However, we believe that the court could rule on the matter through this procedure only within the general statute of limitation period of 3 years, a solution also embraced by the French practice and literature.

Since a contract, the option agreement must meet all the requirements for the valid conclusion thereof. In principle, it is a consensual agreement; however, if, for the validity of the agreement undertaken by the promissory, the law stipulates certain formal conditions, both the declaration of will of the committer, and the acceptance will have to take that form. As for the competence required of the parties, since this a two-phase contract, the promissory must have competence at the time of the offer (we refer here to both the general competence to contract, and to any special disabilities, set out for certain contracts), and the beneficiary must have the competence to undertake at the time when the option is accepted – and thus the contract is concluded.

It is not relevant, in principle, how the acceptance is formulated, unless the law establishes an *ad validitatem* form for concluding the contract related to which the promissory's obligation was created. In French law it was considered, for example, that the wish to accept the

¹⁷ Tudor R. Popescu, Petre Anca, *Teoria generală a obligațiilor [The General Theory of Obligations]*, Scientific Publishing House, Bucharest, 1968, pp. 79-81.

¹⁸ Philippe Malaurie, Laurent Aynés, Philippe Stoffel-Munck, *Drept civil. Obligațiile [Civil Law. Obligations]*, Wolters Kluwer Publishing House, Bucharest, 2009, p. 236.

¹⁹ Dan Chirică, cited work, p. 157, and the works referred to in footnote 4.

²⁰ Juanita Goicovici, cited work, p. 36.

²¹ *Idem*, p. 35.

offer is unequivocally manifested through the payment, in instalments, of the price established in the promise, with the last instalment paid within the period of acceptance.²²

Although this possibility is not specifically mentioned, we believe that nothing precludes the parties from establishing, as the price of the option agreement, especially in the case of sales contracts, an allowance for freezing the property. Thus, the beneficiary shall be required to pay a certain amount of money in return for the exclusivity the promissory offers him during the option period. This allowance is not a penalty clause because, in order to claim it, the promissory is not required to prove the existence of damage,²³ and is not a forfeiture clause, which is a price of unilateral forfeit of an assumed legal obligation.²⁴

As regards the nature of the option agreement including such an allowance, French case law has shown that: we still refer to a unilateral contract if the freezing allowance value is not too high compared to the value of the property and the length of the option (for example, ten percent of the sale price²⁵); the beneficiary continues to enjoy actual freedom of choice; the agreement becomes a bilateral promise to contract if, because of its importance, the allowance seriously alters the beneficiary's freedom of choice and there is in fact no option right.²⁶

Should the option be accepted, the freezing allowance shall be included in the contract price if the parties have thus agreed; otherwise, the money remains as the promissory's gain. We do not believe that the provisions of Article §1670 NCC also apply to the option agreement, as they refer strictly to the (unilateral or bilateral) Promise of Sale.²⁷

An interesting problem arises when the promissory fails to fulfil the obligation undertaken within the option period established by the parties themselves by negotiations and signs a similar contract with another person. The problem is particularly sensitive in the case of an option agreement regarding a sales contract if the person who has undertaken the obligation sells the property to a third party.

We believe that this is the only manner in which the promissory can fail their obligation, since withdrawing the offer produces no effect, as set out by Article §1191 NCC and the refusal to conclude the contract after the beneficiary accepts the option is irrelevant, since the contract is considered concluded upon acceptance. In the latter case, the court, faced with the promissory's recalcitrance, can only find (and not decide upon) that the contract is fully concluded and can be enforced upon the request of the beneficiary, who had become party to the contract.²⁸

Under these conditions, there remains only the infringement by sale of the property that had been subject of the option agreement.

Two solutions have been proposed: thus, in a first opinion, the act of alienation would be, in principle, valid since the promissory transfers the property right belonging to him, whereas the option agreement has no translative effect. He or she will be obliged to pay compensation to the beneficiary, without affecting the property rights of the third party who bought the property. However, the third party lacks legal protection if, on the one hand, he or she concluded a translative contract of property aware of the existing agreement, in which case the act thus

²² French Court of Cassation, Civil Section, Decision of January 24, 1995, in *Code Civil*, Editions Dalloz, 2008, p. 1729.

²³ French Court of Cassation, Civil Section, Decision of December 5, 1995 and Decision of December 5, 1984 in *Code Civil*, Editions Dalloz, 2008, p. 1730.

²⁴ Henri Capitant, François Terré, Yves Lequette, *Les grands arrêts de la jurisprudence civile*, p. 461, cited Dan Chirică, cited work, p. 150.

²⁵ French Court of Cassation, Commercial Section, Decision of November 8, 1972, in Philippe Malaurie, Laurent Aynés, Philippe Stoffel-Munck, cited work, p. 237.

²⁶ *Ibidem*.

²⁷ To the contrary, see Liviu Stănculescu in Gabriel Boroi, Liviu Stănculescu, *op. cit.*, p. 338. The abovementioned author supports the identity between the option agreement and the unilateral promise to contract (sale), an opinion we do not embrace for the reasons given above.

²⁸ Juanita Goicovici, cited work, p. 36.

concluded becomes unenforceable against the beneficiary by admitting a *Paulian action*, or if, on the other hand, he or she acquired the property by a gratuitous act (also by admitting a rescinding action, without requiring proof of fraud collusion from the third party).²⁹

A second possible solution would be to annul the agreement concluded with the third party not based on an immoral cause, i.e. the buyer's complicity to fraud (which is hard to prove), but based on grounds related to the invalid genesis of the sale to the third party, as the promissory formally froze their property and cannot sell twice the property belonging to them.³⁰

By Article §1668 NCC, bearing the *nomen juris* **The option agreement on the contract of sale**, the Romanian legislator seems to embrace this second opinion, stating that "*between the conclusion date and the option exercise date or, where applicable, the expiry date of the option period, the property that is the subject of the agreement cannot be disposed of.*"³¹ In other words, we find ourselves before a conventional limitation of the property right, the Code establishing that there is an implied inalienability clause in any option agreement regarding a sales contract.

Thus, the motion to annul the agreement with the third party would be construed as an acceptance of the offer, in the absence of which the action would remain without one of the conditions for exercising it, namely the interest.

As regards the advisability of the motion to annul, the concern was expressed that the admission of such a motion would place the winning applicant in an obvious dilemma: once the sale is annulled, the promissory cannot be obliged to make a new offer for sale to the beneficiary and, should he or she make a new offer, there are no guarantees that the price would be set within reasonable limits.³² This would be more of a reason to consider that, when ruling on the annulment of the agreement with the third party, the court should also find that the contract is concluded as agreed between the promissory and the beneficiary, within the limits and conditions set initially.

There remains a question to be answered: what happens if the option agreement does not refer to a sales contract, but to any other contract, a possibility which cannot be excluded *de plano*. Shall we apply the special rules of the sales contract, thereby even permitting the annulment of the agreement with the third party?

At first glance, the affirmative answer would be the easy one, as offered by the provisions of the New Civil Code, Article §1168: "*Contracts that are not regulated by law fall under the provisions of this chapter and, should these not suffice, under the special rules relating to the contract most resembling it.*"

However, is the option agreement for any other contract a designated act or a non-designated one? Given that general provisions on the option agreement do exist, we do not believe that we find ourselves in the presence of atypical acts, so we cannot apply the provisions of Article §1168. Instead, we shall resort to the general rules on failure to fulfil an obligation, i.e. the provisions of Article §1516 and the following of the New Romanian Civil Code.

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²⁹ Dan Chirică, cited work, p. 161-162.

³⁰ Juanita Goicovici, cited work, p. 37.

³¹ The provisions of Article 1668 should not lead to the conclusion that the option agreement can only be met in the sales of real property, but that its effect, namely the establishment of a legal clause of perpetuity, is typical of these types of contracts.

³² Juanita Goicovici, cited work, p. 38.

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