

CONSIDERATIONS ON THE OPTION PACT RELATED TO THE SALES-PURCHASING CONTRACT

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Abstract

The option pact of the sales-purchasing contract is a version of the common law option pact. The option pact on the sales-purchasing contract is a contract whereby one of the parties makes an irrefutable offer to sell to the other party, called beneficiary, who can either accept or deny it within a certain period of time. The option exercise by the beneficiary in accepting the sales offer forms the final sale only beginning with the option exercise date. The formation of the sales-purchasing contract does not retroactively go through the day of the option pact because at that time the beneficiary did not agree to purchase the asset but only agreed with the other party to become the holder of a right of option. From the option exercise date to the acceptance of the offer of sale, the beneficiary is also hired.

For example, in the case of the option pact for the sale of a particular individual asset, the beneficiary becomes the owner of the property right and has to pay its price.

Keywords: *option pact, contract, a declaration of will, irrefutable offer, option term, beneficiary.*

JEL Classification: [K 11, K 12]

1. The common law option pact. General issues.

The option pact (R.E.D. 1996, p. 738)¹ is a new institution of the Romanian private law, regulated for the first time by the new Civil Code under art. 1278 of the Civil Code.

Our Legislator has inspired from art. 1331 paragraph 1 of the Italian Civil Code according to which in case the parties agree that one of the parties must remain bound by their own declaration, whereas the other has the option to either accept or not the declaration of the first party, this shall be considered an irrefutable proposal the effects of which are provided under art. 1329 paragraph 1 (Popa, 2014, p. 73). As a consequence, under an almost identical formulation, art. 1278 paragraph 1 of the Romanian Civil Code provides that *"in case the parties agree that one shall remain bound by its own declaration of will, whereas the other can either accept or refuse it, the declaration is considered an irrefutable offer producing the effects provided under art. 1191"*².

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¹ From an etymological point of view, the word "pact" comes from the Latin language, from the word "pactum", which means understanding (written) between two parties, agreement, convention.

² Based on art. 1191 of the civil Code "(1) The offer is irrefutable as soon its author agrees to maintain it for a certain period of time. The offer is likewise irrefutable, as long as it can be

Although the declaration of will in question is considered an "irrefutable offer", the option pact is a *contract* (Zamșa, 2012, p. 1344), namely a bilateral legal deed. Indeed, in compliance with the provisions of art.1278 paragraph 1 of the Civil Code, the "*parties agree*", which means that they reach a will agreement, a deal, an understanding, which forms/is a contract. The parties agree that one of them should be bound (forced) by their own declaration of will (this launches the irrefutable offer). The other party—the beneficiary— accepts the other party's agreement, *with no obligation of their part whatsoever to accept the offer*. The beneficiary agrees with the other party that he/she (the beneficiary) be the holder of an option right, respectively the right to accept or refuse the offer, within a certain deadline. Therefore, the option pact is a contract, as it requires/supposes the consent of both parties and has as objective *the establishment of the contract to offer* (Urs, 2015, p. 47).

On the other hand, the option pact is, as a principle, a *unilateral contract* as only one of the parties agrees to be bound, respectively the party making the irrefutable offer. The Beneficiary undertakes no obligation whatsoever at the moment of the pact conclusion (sometimes the beneficiary may agree to the payment of a certain amount of money, representing the price of the option right, hypothesis in which the pact is a *synallagmatic contract*). Following the conclusion of the pact, during a certain period of time, he/she may freely accept or reject the proposed offer. Only if the offer is accepted the contract will be concluded by the parties and therefore obligations may arise in its charge.

We specify that the common law option pact, regulated by art. 1278 of the Civil Code, is a wide notion, which includes all option pacts referring to various contracts. For example, the option pact in the case of the sales-purchasing contract, the option pact in the case of the renting contract, the donation contract etc., which are versions of the common law option pact.

a) The legal nature of the option pact.

According to the Romanian legal literature, the majority's opinion appreciates that the option pact is a *version of the unilateral promise to contract* (Pop, Popa&Vidu, 2012, p. 95-96) or a *special unilateral promise to contract* (Zamșa, 2012, p. 1344) (the authors expressing their opinion on the profoundly controversial individuality of this legal figure versus that of the unilateral promise to contract). Moreover, according to another opinion, the unilateral promise and the option pact are one and the same thing (Chirică, 2008, 148-149).

In our opinion, the option pact is not identical with the unilateral promise to contract, respectively is not the same thing. The option pact, the same as the unilateral promise to contract, is a *preceding or preparing contract* (Popa, 2012, p.135) as it precedes and prepares the conclusion of the

considered as such based on the parties' agreement, on the practices among them, on negotiations, on the offer content and on customs.

(2) The declaration of an irrevocable offer cancellation produces no effect".

promised contract. Despite all this, the option pact does not identify itself with the unilateral promise to contract, as they are distinct contracts. It is a matter proved by the fact that the option pact enjoys a distinct regulation under art. 1278 of the Civil Code, as long as the promise to contract is regulated by art. 1279 of the civil code. As for the matter of the sales-purchasing contract itself, the option pact of the sales-purchasing contract is regulated under the selling contract, the option pact of the sales contract being regulated under art. 1668 of the Civil Code, while the selling promise and the purchasing promise are regulated under art. 1669, which demonstrates that, in the opinion of our legislator, the two contracts are not identical. Likewise, art. 902 paragraph 2 pct. 12 of the Civil Code provides as which identifies them as separate contracts.

Finally, the clear difference of legal regime and effects, enforceable upon the option pact and upon the unilateral promise to contract³, proves the fact that, by our civil law, the two contracts are distinct legal figures. Therefore, we can conclude that under the present Romanian private law, *preparatory contracts are of two kinds: the promise to contract and the option pact.*

b) Content and form of the option pact.

Based on art. 1278 paragraph 3 of the Civil Code., the option pact must contain all the elements of the contract which the parties desire to enter, so as it can be concluded by the mere acceptance of the option beneficiary. For example, the option pact in the case of a sales contract must identify the good which is to be sold and its price.

Likewise, by virtue of the provisions of art. 1278 para. 5 of the Civil Code the option pact and the beneficiary's acceptance declaration as well must be entered in the form provided by the law in the case of the contract which the parties desire to enter.

Given such observation, in case the sales contract which the parties desire to enter must be concluded under authenticated form, the option pact and the acceptance declaration must be also concluded in authenticated form. Otherwise, if the option pact in the case of the selling contract fails to fulfill the required formal conditions, the contract shall be therefore void as an option pact, and is to be converted into a unilateral selling promise, if all the requirements of its validation are met (Dincă, 2013, p. 58) (art. 1260 paragraph 1 of the civil code.). And if the beneficiary's acceptance fails to meet the sales contract

³ For example, in the case of the option pact, the party launching the irrefutable contracting offer expresses its agreement on the execution of the designed contract, thus being a final consent. Subsequently, the party no longer has to give a new consent or agreement to the conclusion of the contract. Instead, in the case of the unilateral promise of contracting, the promissory party did not express their consent even at the execution of the contract, but only promised to conclude the contract pursued in the future. Subsequently, in order to execute/conclude the promised contract, the promissory party must give a new consent or agreement. There are other differences of legal status and effects as well, but their detailed analysis would go beyond the scope and purpose of the present study.

formal requirements, it can be converted into the acceptance of a sinalagmatic selling promise. That is the reason why it was appreciated, subsequent to the option pact informal acceptance, the beneficiary may be bound by the promissory party to enter the sales contract based on the regulations of the selling promise, by mentioning that the promissory seller's performance had already been executed (Dincă, 2013, p. 58).

c) Conclusion of the drafted contract.

By virtue of art.1278 paragraph 4 of the civil Code, the contract desired by the parties enters by the execution of the beneficiary's option, namely by the acceptance of the declaration of will by the other party, under the terms agreed on in the pact.

From a technical - legal point of view, the projected contract is formed in two stages: the first stage is represented by the conclusion of the option pact, and the second stage is the beneficiary's declaration of acceptance, which marks the conclusion of the promised contract (Zamșa, 2012, p. 1245).

The beneficiary's declaration of acceptance must be made within the *acceptance time limit* (the option term) set by the parties or by the court, which has the legal nature of a *withdrawal period* of the beneficiary's right of option (Dincă, 2013, p. 58).

The offer acceptance declaration is a unilateral legal deed of the beneficiary, who must be a person able to pass such declaration at that certain point (Magdo, 2014, p.99-100).

d) The beneficiary's option right.

The option pact beneficiary is the holder of *apotestative right* (Dincă, 2013, p. 58). According to the French legal literature in reality, the Beneficiary's option right is a *potestative right* (Malaurie Ph, 2009, 69).

We share the latter opinion because the beneficiary's right is a *mere potestative right*, which gives him the choice between accepting or refusing the irrefutable offer. By virtue of this right, the beneficiary may, through his unilateral manifestation of will, form the designed contract (Dincă, 2013, p. 58).

2. The option pact related to the sales contract.

The option pact related to the sales contract is a version of the option pact.

The option pact related to the sales contract is a contract by which one of the parties makes an irrefutable sales offer to the other party, identified as *beneficiary*, who may either accept or refuse it, within a certain deadline.

As far as the option pact related to the sales contract is concerned, the sales execution (perfecting) follows two stages:

- the first stage is represented by the execution/conclusion of the option pact, when the party author of the irrefutable sales offer expresses their consent for the sales of the good, which is a permanent, final consent (Deak, Popescu, 2017, p. 63); from their point of view, the sale is as finalized, there is nothing else to do subsequent to the conclusion of the pact;

- the second stage is represented by the beneficiary's declaration of acceptance, in the sense of purchasing the good, date on which the sales is considered closed⁴;beginning with that moment,the beneficiary becomes a purchaser of the good, whereas the one having launched the sales offer become a seller.

As it can be noticed, apart from the legal differences, what distinguishes the option pactrelated to the sale contract from the unilateral sales promise is the sales formation mechanism. In the case of the option pact, the sale ends simply by accepting the sales offer by the beneficiary. As for the unilateral sales promise, if the beneficiary decides to purchase the good, the sale does not end with the mere manifestation of the beneficiary's will to this effect (Gheorghiu, 2012, p. 1755).In such situation the parties have to reiterate their consent and conclude the sales contract. And this because the consent given to the promise differs from the consent given to the sale, the latter is given precisely for the execution of the obligation assumed by the former (Dincă, 2013, p. 51).

The exercise of the option by the beneficiary, in the sense of accepting the sales offer, is definitively selling from the date on which the optionis exercised (Pop, Popa&Vidu, 2012, p. 96). The formation of the sales contract does not retroactively go through the day of the option pact because at that time the beneficiary did not agree to buy the asset but only agreed with the other party to become the holder of a right of option (to accept or refuse the offer of sale).

From the option exercise date in the meaning of accepting the offer of sale, the beneficiary is also hired. For example, in the case of the option pact for the sale of a determined individual asset, the beneficiary becomes the owner of the property right and has to pay the price.

In case the beneficiary refuses the sales offer from the other party, the designed contract cannot be finalized. Likewise, in case the beneficiary keeps silent for the entire period of the option term, he cannot be considered to have accepted the offer, as the declaration of acceptance implies a manifestation of express will.

Subsequent to the conclusion of the sales contract the parties, become seller and respectively purchase/buyer, must execute this contract. In case the parties fail to meet the undertaken obligations, their contractual liability will be committed. For example, the entitled party may request the court to rescind the contract of sale and to grant corresponding damagesinterests.

By virtue of the provisions of art.1668paragraph 1 of the Civil Code, as for the option pactrelated to a contract entered for the sale of a particular individual asset, between the pact conclusion date and the option exercising date, as the case may be, the expiry of the option term cannot be available for

⁴Based on article 1278 paragraph 4 "the contract is finalized by exercising the option in the sense of the Beneficiary's acceptance of the declaration of will of the other party under the terms agreed under the pact ".

the object that is the object of the pact/covenant. We are in the presence of a *legal clause of inalienability* (Deak, Popescu, 2012, p. 66) with regard to the determined individual asset which forms the object of the option pact.

In case the good in question has been sold to a tierce before the expiry of the option deadline, for the violation of the inalienability clause of the good, the party who has placed the sales offer will be contractually liable to the beneficiary, the latter having the right to demand the resolution of the option pact with damages. In case the beneficiary's right of option is opposed to the tierce purchaser (for example, the beneficiary's right of option has been noted in the land register or the third party is informed of the option pact from other sources), the beneficiary may request the cancellation of the sales contract concluded between the party which has made the offer for the sale of the good and the third acquirer (Article 1668 paragraph 1 of the Civil Code corroborated with Article 629 paragraph 2 of the Civil Code.) (Deak, Popescu, 2012, p. 59). Furthermore, the beneficiary may request the court to terminate the sales contract concluded with the third party for fraud or unlawful cause, by way of a Paulian action or an action for the ascertainment of the absolute nullity for an unlawful cause.

On the other hand, even though the good has been sold to a tierce before the expiry of the option deadline, the sales forms between the parties of the option pact as a *sale of another person's good* (Urs, 2015, p. 53), with all the consequences which it entails.

Moreover, as long as the pact has as object tabular rights, the option right is *registered in the land register* (art.1668 paragraph 2 of the Civil Code).

The option right is extinguished ex officio in case before the expiry of the option term, no declaration of exercise of the option has been filed, accompanied by the proof of its communication to the other party (Art.1668 paragraph 3 of the Civil Code).

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