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Discussions Pertaining to the Legal Nature of the Pact of Option

Diana Geanina Ionaș

Law School, Transylvania University of Brasov, Romania
diana_ionas@yahoo.com

ABSTRACT: A contract can be concluded by accepting, without reservation, a certain offer to contract or it can be preceded by negotiations. Within these negotiations, the parties can conclude certain agreements known as preliminary contracts. Among these, we will approach the pact of option, which represents a legal figure new to the Romanian judicial system, but not considered an innovation as it is of Italian inspiration. The regulation of this institution is deficient in the Romanian system of law, generating extensive discussions in doctrine pertaining to its legal nature. Because it influences the legal enforcement means of this institution, this paper presents a study of the evolution and legal nature of the pact of option from a historical and comparative perspective, considering the law, jurisprudence and the Romanian, Italian and French doctrine.

KEYWORDS: negotiations, contract, legal nature, compared law

1. Introduction

According to Article 1182 of the Romanian Civil Code, a contract is concluded by negotiations by the parties or by accepting, without reservations, an offer to contract. Depending on how they are formed, the Romanian lawmaker distinguishes between contracts concluded immediately and contracts preceded by negotiations. The concept of negotiation is intimately connected to the concept of communication, and "it represents a social-human process by which we obtain something that we desire from another person, in exchange for satisfying a need which belongs to our partner in negotiation" (Almășan 2013, 2). The purpose of the negotiation is to conclude the final contract. To reach this goal, the parties can conclude, during their negotiations, certain agreements, also called preliminary contracts, which, in turn, are divided in preparatory contracts and anticipative contracts (Stoica 2023, 12).

Among the preparatory contracts, we must mention the pact of option, a new contract in the Romanian legal background, which was only regulated at the time the Civil Code was changed in 2011. Although it was regulated at the time the Civil Code was changed in 2011, this institution is not an innovation of the Romanian lawmaker, but it is inspired by Italian law. It was passed in Romanian law "with all the good and the bad", namely that, at the time it was legally regulated, all doctrinarian controversy pertaining to its legal nature became an issue. This controversy determined us to seek certain answers in French doctrine and in French law, which were both sources of inspiration for most European laws, including the Italian and the Romanian ones. As a result of this research, we noticed that the new French law does not mention the pact of option, but the unilateral promise to enter into a contract, with the content and effects specific to a pact of option. Given the controversy pertaining to the pact of option, this paper aims to perform an analysis and establish the legal nature of this institution, a necessary endeavor in order to correctly enforce this institution in practice. In achieving this endeavor, we must perform a historical and comparative approach of this institution, and, to this end, we performed a study of Italian and French jurisprudence and law, which were both sources of inspiration for the Romanian lawmaker.

Within this paper, we will define the pact of option, thus making up for the national legislative void and we will establish the legal nature of this institution by analyzing the opinions expressed by internal and international doctrine in relation to other legally regulated institutions, all from a comparative perspective.

2. The definition and legal regulation of the pact of option

In Romanian law, to facilitate legal operations, first, the praetor, and then jurisprudence and imperial Roman law have regulated conventions that generated obligations; these were not considered contracts and were called *pacta vestita* (Molcuț 174).

Roman law was the influence and basis of the French Civil Code. The first French Civil Code, known as the Napoleon Code, was passed after the French Revolution of 1804. By the provisions of this code, contracts were formed spontaneously, as the pre-contractual phase was unconceivable. As a result of the social and economic evolution, it was adapted to the new realities, so as by Ordinance no 2016-131 of February 10th, 2016, for the reform of the law of contracts the general regime and proof of obligations, as ratified by Law no 16 of Law no 2018-287 of April 20th, 2018, has performed the great French reform.

The reformed French Civil Code of 2016 does not regulate the notion of the pact of option. However, Article 1124 of the French Civil Code states, "the unilateral promise is the contract by which one of the parties, the prominent, provides the other party, called the beneficiary, a right of choice for the conclusion of a contract, whose elements are essential and determined, as the only thing missing is the beneficiary's agreement. The contract concluded with a third party who was aware of the existence of the pact, in violation of the unilateral promise, is void".

The Napoleon Civil Code has influenced most European laws. Under its influence, by the Royal Decree of March 16th, 1942-XX, number 262, the Italian Civil Code was passed, a code which is in force until nowadays. As it is of a more recent date, it contains express provisions pertaining to the pre-contractual phase of concluding a contract and negotiations. Within these negotiations, the Italian Civil Code, expressly regulates the pact of option, in Article 1331 of the Italian Civil Code, under the name "Opzione" and states, "when the parties agree that one of them is connected to his statement and the other is entitled to accept or refuse this statement, the declaration of the first party is considered an irrevocable proposition to the purposes stated in Article 1329 (1). If a term was not established for the acceptance of the offer, such a term can be established by a judge".

In Romanian law, the first Civil Code, passed on November 26th, 1864, under the profound influence of the revolutionary Napoleon Code, did not regulate the pre-contractual phase or the pact of option. The 1864 Civil Code was in force until 2009, when the current Civil Code was passed. Responding to the new social realities, it expressly regulates the pact of option in Article 1278 of the Romanian Civil Code and Article 1668 of the Romanian Civil Code. Thus, according to Article 1278 of the Romanian Civil Code: "when the parties agree that one of them should stay connected to its own statement of will and the other party can accept or refuse this statement, such a statement is considered an irrevocable offer and causes the effect stated in Article 1191. If the parties did not agree on a term for the acceptance of the offer, such a term could be established by the court of law, with the citation of the parties. The pact of option must contain all the elements of the contract which the parties aim to conclude that it can be concluded by the simple acceptance of the beneficiary of the right choice. The contract is concluded by exercising the option, namely by accepting the declaration of will of the other party, under the conditions

agreed upon in the pact. Both the pact of option and the declaration of acceptance must be concluded under the form stated by law for the contract which the parties aimed to conclude".

Article 1668 of the Romanian Civil Code regulates a variety of the pact of option and states that, in case the pact of option pertains to a sale contract over an individual, pre-determined good, between the time the pact is concluded and the time the option is exercised, or the term of exercise is expired, the good must be preserved. When the pact pertains to tabular rights, the right of option is noted in the cadastral registry. This right is officially deleted if there is no declaration of acceptance by the other party until the expiration of the term." As we take a comparative look, we cannot help but notice that the provisions of our internal law and those of French and Italian law show similarities between the pact of option regulated by the Romanian Civil Code and the unilateral promise of sale, regulated by the reformed French Civil Code of 2016 or the option regulated by the Italian Civil Code. In other words, each of the laws we have analyzed regulates the same institution, but under different names.

Also, given the legal provisions, we notice that, in Romanian law, there is no legal definition of this contract, as the Civil Code only regulates the content and means of formation. The Romanian lawmaker's choice can be explained by the fact that the new Romanian law is, in part, of Italian inspiration and, in another part, of French inspiration. The Old Italian Civil Code of 1942 does not define the pact of option. Also, at the time the Romanian Civil Code was passed, The Napoleon Code was still in force in France and, as we have previously shown, this code did not regulate the pre-contractual phase. These are all arguments which can justify the lack of a legal definition of the pact of preference in the Romanian Civil Code. As a result, it is the task of national doctrine to define the pact of option, seen as "the most advanced form of preparatory contracts" (Popa 2018, 203). By seeing the provision of the French Civil Code, which expressly defines the unilateral promise of sale, the pact of option can be defined as the contract by which a party, the promitent, expresses his irrevocable consent to conclude a contract with the other party, the beneficiary, for a predetermined duration of time, in case the latter will decide to conclude the contract (Pop, Popa and Vidu 2015, 68). It is a preparatory contract concluded in the phase of pre-contractual negotiations and entails "a hybrid contract mechanism for the promitent in the pre-contractual phase and for the beneficiary" as, by concluding the pact, the promitent anticipately and irrevocably expresses his consent for the conclusion of the contract with the beneficiary, who maintains the right to rescind the option.

The pact of option is a new tool in the Romanian civil background, created as a response to the increase in civil relations within a society that is in permanent evolution and change and as an answer to the need to secure civil relations. The formation of the contract no longer occurs instantaneously, as the parties need time to think, or they cannot be in the same place at the same time. This is why the lawmaker created this mechanism that allows for the formation of the contract in two phases. However, the contradictory legal regulation and the confusing national doctrine prevent the correct enforcement of the pact of option. This is why, in the following section, we will attempt to establish the legal nature of the pact of option in relation to the laws and jurisprudence of Italy and France.

2.1. Is the pact of option on offer?

Article 1331 of the Italian Civil Code states that the promitent's declaration, contained in a pact of option, is considered an irrevocable proposition. The Italian lawmaker assimilates the pact of option with an irrevocable offer; this approach has generated a series of discussions in Italian doctrine and jurisprudence, as the majority opinion expresses the fact that, despite the unfortunate phrasing of the legal text, there is no equality between the two institutions. The difference

between the two comes from the fact that the offer is a unilateral act, whereas the pact of option represents a contract (Divizia 2009, 1699-1713 or Corte d'Appello Milano, Sezione Lavoro civile, Sentenza 2 settembre 2019, n. 908); for this reason, it was stated that the offer and the pact of option are two *quoad naturam* institutions, different but similar *quoad effectum* (Tamburino 1954, 36). Italian doctrine has appreciated that the promitent's declaration, contained in a pact of option, can be considered as an irrevocable offer only if it pertains to the inefficiency of revocation and the efficiency of the promise, even in case of death or incapacity of the promitent (Lanzafame 25).

In his endeavor to modernize civil national law, the Romanian lawmaker was inspired by European laws and one of the sources of inspiration was the Italian civil law. Thus, in Article 1278 of the Romanian Civil Code, the Romanian lawmaker expressly states the fact that the declaration of will of the promitent, contained in a pact of option, is considered an irrevocable offer and produces the effects stated in Article 1191 of the Romanian Civil Code regarding the irrevocable offer. By ignoring the criticism phrased by Italian doctrine, the Romanian lawmaker undertook the provisions of Article 1331 of the Italian Civil Code and suggested that the pact of option would have the legal nature of an offer.

The offer represents, in accordance with Article 1188 first alignment of the Romanian Civil Code, a proposition which contains sufficient elements for the formation of the contract and expresses the intention of the offeror to oblige in case the offer is accepted by the recipient. Through this, "the issuer makes known to third parties his intention to enter into a contract and the essential conditions of the contract" (Pop, Popa and Vidu 2015, 68). What is specific to the offer, is its unilateral character, so as it entails, in accordance with Article 1324 of the Romanian Civil Code, "the sole manifestation of will of its author". As it is a unilateral act, it does not create obligations and it does not oblige the offeror under a contract.

The pact of option is a contract concluded in the pre-contractual phase of negotiations, by which a party, the prominent, states his express, anticipated an irrevocable consent for the conclusion of the contract and the beneficiary reserves his right to accept or refuse the conclusion of the contract. In order to be valid, in accordance with Article 1278 third alignment of the Romanian Civil Code, the pact of options must contain all elements of the contract which the parties aim to conclude, so as it can be concluded by the simple acceptance of the beneficiary of the option. What is specific to the pact of option is the fact that it is the result of two legal wills which meet, that of the prominent and that of the beneficiary, who agree that, under a certain term, the beneficiary would accept or refuse the conclusion of the contract whose clauses were negotiated within the content of the pact. Both the prominent and the beneficiary are deprived of the possibility to unilaterally change the essential elements of contract. Thus, the pact of option is a bilateral legal act, whose elements are not exclusively established by the offeror, but they are negotiated by both parties (Ciutacu and Sarchizian 2012, pct. 3.2.); this provides an original character and the specifics of this legal instrument (Guillemard S., 1993, 162; for contrary opinion, see Demolombe, 1870, n° 65).

Regarding third party opposability, the offer is a legal act which is not subject to registration in the cadastral registry. In opposition, according to Article 1668 second alignment of the Romanian Civil Code, the pact of preference pertaining to any immobile good can be noted in the cadastral register. The notation will be performed in accordance with Article 902 second alignment, 12th point of the Romanian Civil Code with the purpose of opposability, on request of the beneficiary. In order for the notation to be admissible, the prominent must be registered in the cadastral registry as the holder of the right which is object of the pact of option, and he must also state the term for the exercise of choice.

The distinction between the pact of option and the offer is important from at least two points of view. On the one hand, the offer provides the offeror with the obligation to maintain it until the expiration of the term, or, in case the offer does not stipulate a specific term, for a reasonable time; in case of the pact of option, if the parties did not agree on a certain term for the acceptance, it can be established by the court of law with citation of the parties. On the other hand, if the offer is rescinded by the offeror before the term expires, the contract can no longer be concluded, as there is no agreement of will; in case the recipient of the offer suffered a prejudice because of this rescind, under the form of an illicit extra contractual deed, the offeror's liability can by engaged under the conditions of tort liability (Popescu and Anca 1968, 73). If the promitent of a pact of option rescinds his offer before the term agreed upon with the beneficiary expires, it represents an execution of contractual obligation, which will entail contractual liability. As it is a form of contractual liability, the promitent's guilt is presumed and his liability will be engaged within the limits of repairing the prejudice caused to the other party.

Given all these issues, it is obvious that the pact of option cannot be confused with an offer. The pact of option has a complex legal nature, by reuniting both an offer to enter a contract and the accessory convention by which the beneficiary becomes the creditor of a right of choice over the conclusion or non-conclusion of a contract (Lula 1998, 43 et seq.). The pact of option must be seen as the legal support which contains, on the one hand, the offer of the prominent by which he expresses his anticipated and irrevocable agreement to enter into a contract and, on the other hand, the right of option of the beneficiary. What the lawmaker wanted to point out at the time this institution was regulated, was the fact that the effects of the offer contained in the pact of option, are assimilated with those of an irrevocable offer.

Before the great reform of 2016, French law made no distinction between the offer and the promise to enter into a contract. As there was no legal regulation, the promitent's obligation, assumed within the context of a promise, was merely an obligation to do which could have been rescinded by the promitent at any moment, under the sanction of paying damages.

The French jurisprudence stated that the official rescind of the offer by the promitent within the term of choice, excludes any agreement of mutual wills to sale and acquire (Cass. 3 civ., nr. 91-10199, 1993, 115). The ordinance of February 10th, 2016, codifies the unilateral promises whose regime was previously described by jurisprudence.

In the content of Article 1124 of the French Civil Code, it is expressly regulated that the unilateral promise is a contract by which a party, the prominent, grants the other party, the beneficiary, the right of choice for the conclusion of a contract, whose essential elements are pre-determined, thus lacking only the beneficiary's agreement. By going against previous jurisprudence, the French lawmaker regulated the forced execution of the promised contract. Thus, Article 1124 second alignment of the Civil Code states that "the revocation of a promise within the term of choice does not prevent the formation of the promised contract". By this option, the French lawmaker legally regulated the contractual nature of the unilateral promise, a fact which was unanimously accepted by doctrine (Mekki 2015) and jurisprudence.

2.2. Is the pact of option a unilateral promise to contract?

The Italian Civil Code regulates the pact of option distinctively, as a contract specific to the phase of negotiation; this issue is regulated by Italian jurisprudence (Cass., civ. sez. II, 2017, n. 28762) and undoubtedly by doctrine.

The French Civil Code does not regulate the notion of the pact of option. In the French Civil Code, the elements specific to the pact of option are found in the unilateral promise to enter into a contract, which does not leave room for any controversy pertaining to its legal nature.

However, in specialty literature, the legal nature of the pact of option is controversial. A large part of doctrine claimed that the pact of option is no more than a unilateral promise of sale (Tița-Nicolescu 2017, 51) or, at most, a more energetic variety of the unilateral promise to enter into a contract (Ionescu 2012, 108 or Goicovici 2012, 108). This opinion is under criticism for several reasons.

From the point of view of legal regulation, we notice that the contemporary lawmaker expressly regulated the institution of the pact of option, distinctively from any other preparatory contracts. The unilateral promise of sale does not have an express legal regulation, however there are numerous texts in the Romanian Civil Code which particularly refer to this institution, such as Article 1279 of the Romanian Civil Code which states that "the promise to enter into a contract must contain all the clauses of the promised contract, in lack thereof, the parties would be unable to execute the promise" or Article 1669 third alignment of the Romanian Civil Code, which states that "the provisions of the 1st and 2nd alignment are correspondingly applied in case of the unilateral promise of sale or acquire" or the fourth alignment of the same article, which states that "in case of the unilateral promise of sale of a pre-determined good, if, the holder sells the good before the promise was executed, the obligation of the promitent is considered extinct".

The distinction between the two institutions is maintained and underlined by the lawmaker in the matter of provisions pertaining to cadastral registration. Thus, in the content of Article 906 fourth alignment of the Romanian Civil Code it is expressly stated that "the provisions of the present article, pertaining to the promise to enter into a contract, are applied, by similarity, to the pacts of option noted in the cadastral registry".

Regarding the capacity of the parties, in case of the unilateral promise to enter into a contract, both the promitent and the beneficiary must have capacity at the time the unilateral promise is concluded, but also as the time they conclude the promised contract. In case of the pact of option, it is only required that the promitent has capacity at the time he concludes the pact of option, for, at that time, he has already expressed definitive consent which he can no longer revisit. The conclusion of the contract will occur by the simple acceptance of the beneficiary under the form of the unilateral act. In case of the pact of option, the efficiency of the promised contract is appreciated in relation to the promitent on the day of the promise (Malaurie, Aynes and Gautier 2009, 69). The beneficiary must meet the conditions pertaining to capacity both at the time of unilateral promise is concluded and at the time the promised contract is concluded.

In regard to the formal validity conditions, according to Article 1278 of the Romanian Civil Code "both the pact of option and the declaration of acceptance must be concluded under the form stated by law for the contract which the parties aim to conclude". In other words, in case the law states *ad validitatem* a certain form, then both the pact of option and the subsequent declaration of acceptance by the beneficiary must be concluded under the form required by law. In regard to the unilateral promise to enter into a contract, national jurisprudence (I.C.C.J., The joint judges for solving matters of law, dec. no. 23/2017, Official Gazzete no. 365/2017) appreciated that its validity is not subject to meeting the formal conditions, even if the promised contract would be subject to such conditions. The rule is justified by the fact that the unilateral promise does not give rise to the obligation of concluding a future contract as promised.

In regard to the forming mechanism of the contract, specific to the pact of option is the fact that the contract is considered concluded by the simple acceptance of the beneficiary, without the need for other formalities. In this case, the conclusion of the contract occurs in two stages: the first is represented by the pact of option, which contains the irrevocable commitment of the prominent to enter into a contract, whereas the second stage is represented by the acceptance of the beneficiary, which strengthens the contract, providing effects for the future. As opposed to

this, the unilateral promise gives rise to the obligation of a future conclusion of the promised contract This is why the conclusion of the contract preceded by a unilateral promise occurs in 3 stages: the first stages the conclusion of the promise to enter into a contract, the second stage is the acceptance of option, and the third stages the effective conclusion of the promised contract.

As for the effects over the obligations of the promitent, his obligation is firm and his consent for the conclusion of the contract with the beneficiary, is irrevocable. Article 1191 of the Romanian Civil Code, which applies to the pact of option, expressly states that the revocation of an irrevocable offer does not produce any effect. Within the term of option, the promitent has only one obligation, namely the obligation to abstain from doing. The obligation to abstain is expressly stated in Article 1688 first alignment of the Romanian Civil Code and entails the interdiction of the prominent to sell the good which is object of the pact, between the date the pact is concluded and the date the option is exercised. As opposed to this, in case of the promise to enter into a contract, it gives rise to two obligations for the promitent, namely an obligation to do, in the content of which is the obligation to conclude the promised contract within the stipulated term and under the conditions agreed upon, and an obligation to abstain from doing, in the context of which is the obligation of the promitent that within the promised term, he does not conclude any other contract with a third party pertaining to the promised good.

In regard to the inalienable clause of the good which is object of the contract, we see that, in the matter of the pact of option, inalienability is expressly stated in the content of Article 1688 first alignment of the Romanian Civil Code. In case of the unilateral promise to enter into a contract, as it gives rise to the obligation to conclude the promised contract in the future, the provisions of Article 627 fourth alignment of the Romanian Civil Code apply, according to which the inalienability clause is presumed. Given all these reasons, doctrine (Macovei and Gheorghiu in Baias, Chelaru, Constantinovici and Macovei - coord. 2021, 2037) appreciated that, in case of the unilateral promise to enter into a contract, the lawmaker did not consider an irrevocable consent of the promitent, who can dispose of the good in violation of the promise.

For all these reasons, the pact of option cannot be confused with the unilateral promise to enter into a contract, as they are two distinctive legal figures, with specific effects and mechanisms (Urs 2013, 101-120).

2.3. Is the pact of option affected by a condition?

Regarding the legal nature of the pact of option, we can ask the question of whether the beneficiary's right of option can constitute a suspensive condition on which the efficiency of the contract depends on. The pact of option provides the beneficiary with a right of choice, thus, for a certain amount of time, he enjoys contractual exclusivity. By exercising the right of choice, the beneficiary of the pact expresses his consent for the conclusion of the promised contract. Consent is an essential element of contract, and therefore, it cannot be transformed into a condition. The condition is that certain mean of the civil legal act that depends on a future and uncertain event, on which the efficiency of the obligation depends. According to Article 1400 of the Romanian Civil Code, the condition is suspensive when the efficiency of the obligation depends on its fulfillment. If we were to accept the idea that the pact of option would be a convention affected by a suspensive condition, namely the manifestation of the beneficiary's consent, then achievement of the condition, namely the acceptance of the beneficiary, would lead to the retroactive conclusion of the contract from the time the pact of option was concluded; such an approach would be contrary to the provisions of Article 1268 fourth alignment of the Romanian Civil Code. Also, if we were to accept the idea that the pact of option is a contract affected by suspensive condition, then, in case it would pertain to tabular rights, it would have to be

temporarily registered in the cadastral registry, according to the provisions of Article 898 first alignment of the Romanian Civil Code. However, Article 1668 first alignment of the Romanian Civil Code and Article 902 second alignment, 12th point of the Romanian Civil Code, state that the pact of option is subject to notation in the cadastral registry.

On the other hand, according to Article 1403 of the Romanian Civil Code, the obligation contracted under suspensive condition which depends exclusively on the will of the debtor causes no effect. This provision could lead to the conclusion that the pact of option which provides the beneficiary with a right of choice depending exclusively on his will, could be annulled. In this case, we are in the presence of a potestative right. The potestative character cannot be questioned as, within the term of the pact of option, one of the parties acquires the right to exercise choice in relation to an irrevocable offer, thus generating a new legal situation. This is specific to potestative rights. Given these aspects, the pact of option cannot be confused with a contract affected by a condition, as the potestative character must be seen "from the perspective of a right or obligation and not a condition – means of the civil legal act" (Ilie 2023, 265, 270).

3. Conclusions

The pact of option is a preparatory contract concluded in the phase of negotiations, which prefigures the final contract. The creation of this legal tool answers the need to ensure the possibility of remotely concluding contracts, as well as the need to ensure the beneficiary has a certain amount of time during which he enjoys contractual exclusivity and can decide in regard to the conclusion of the contract. The purpose of regulating the pact of option is to ensure the legal security of contractual relations in a market that is in permanent change.

In this paper, we have shown that the pact of option is, by its contractual character, an individual legal figure, distinctive from the offer and the unilateral promise to enter into a contract. It can prove to be a useful tool, by the effects it produces, thus enhancing the remote conclusion of contracts. In order to be valorized, we believe that a revision of the legal provisions in force is needed, eliminating doctrine controversy and allowing for a correct enforcement in practice.

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