SHORT STUDY ON THE ESSENTIAL ELEMENTS OF THE BILATERAL SALES PROMISE

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Abstract

As the bilateral contract promise is a civil convention, it must meet all the general conditions of validity of the contracts provided by art. 1179 of the Civil Code. Given the role of the preparatory contract that promises play in the formation of the final will to conclude another contract, they must also meet a number of specific conditions. Thus, there is a close relationship between the content of the promise and that of the foreshadowed final contract, the conditions of validity of the latter being found in the conditions of validity of the promise, or in other words the validity of the promised contract depends on the validity of the contract promise.

Given that the fulfillment of the conditions of validity of the promised contract is directly dependent on the fulfillment of the conditions of validity by the promise, it is important to establish those conditions, called essential elements, which must be found in the pre-contract for it to be considered valid by reference to the foreshadowed contract. There are also a number of elements related to the validity of the sales contract but they do not have to be fulfilled at the time of conclusion, and their existence sometimes justifies the very existence of the promise of sale.

Keywords: *art. 1182 alin. (2), art. 1279, art. 1669, promise of sale, conditions of validity, capacity, consent, cause, object, form.*

1. Introduction

The bilateral promise of sale must meet, first of all, all the general conditions of validity of the contract provided by art. 1179 of the Civil Code (consent, capacity, object and cause, and where the parties have provided, the form). We will deal with these issues in this paper only insofar as they have particular characteristics in relation to the bilateral promise of sale. In addition to these general conditions, the promise of sale must also meet a number of special conditions, which are closely linked to the role of preparatory contract with regard to the final will of the parties to conclude a contract of sale.

Therefore, there is an indissoluble relationship between the content of the promise and that of the foreshadowed contract, so that the validity of the final sale is conditioned by the validity of the concluded promise.[1]

However, it is precisely from this close connection between two conventions that the conditions for the validity of the contract must be found in the pre-contract in order to be considered valid from the perspective of the final foreshadowed contract. In the legal literature, these conditions have been called essential elements. For example, if the parties conclude an agreement by which they only agree to negotiate in the future the essential elements of a contract, then the concluded act has the nature of a negotiation agreement. The difference between this and a promise is particularly important because only the promise of sale can be enforced [art. 1669 para. (1) and art. 1279 para. (3) Civil Code].

These essential elements that the promise must fulfill, find their legal basis in general in the sufficient agreement regulated by art. 1182 para. (2) of the Civil Code, which stipulates that "it is sufficient for the parties to agree on the essential elements of the contract, even if they leave some secondary elements to be agreed later or entrust their determination to another person". Also, the difference between essential and non-essential elements[2] derives from the content of art. 1279 para. (1) of the Civil Code which refers to all those elements of the promised contract in the absence of which the promise could not be fulfilled. It follows from the cited text that the terms of the pre-contract must be sufficient for the performance of the promised contract, and it is no longer necessary for the parties to conclude a new agreement of wills on the essential elements of the contract. Although the law refers to the execution of the promise, we appreciate that it clearly refers to the conclusion of the promised contract, which is the very purpose of the execution of the obligations arising from the promise.

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[1] I.F. Popa, *Promisiunile unilaterale şi bilaterale de contract. Promisiunile unilaterale şi sinalagmatice de înstrăinare imobiliară*, in Revista română de drept privat no. 5/2013, pp. 114 et seq.

[2] Since only the essential conditions must be fulfilled by promise, while the non-essential elements may be missing, we will refer throughout the paper to both categories as elements, essential and non-essential, given that the non-essential ones would be inappropriate to meet. we call conditions.

In addition to those conditions of validity which are essential elements, certain clauses may be inserted in the promise of sale to establish the agreement of the parties on additional matters.[3] We will name these in the following non-essential elements and by way of example we mention that being represented by the *penalty clause, the waiver clause, the arvuna, the inalienability clause, the formalities for exercising the preemption, the condition that the property is in the civil circuit, the possible authorization[4], obtaining a condition document for concluding the promised contract[5], obtaining a loan by the promising-buyer, the existence of numerous conditions imposed for the notarial completion of the sale even under the sanction of absolute nullity[6], obtaining the consent of the holder of the voluntary temporary inalienability*[7], formalities for the exercise of preemption[8].

Therefore, in addition to the conditions of validity of the contract, which are essential elements, the parties may also agree on clauses to sanctify their agreement on additional matters. We include them in two categories: accessory clauses (inalienability clause, revocation clause, termination clause, penalty clause, arvuna) and anticipatory clauses (advance payment clause, advance deployment and use clause promised, the anticipatory clause to allow the promising buyer to build on the land subject to the bilateral promise of sale)[9].

Thus, the parties to the bilateral promise of sale may stipulate, by their agreement of will, a series of clauses that are anticipatory in nature, because by these the parties to the contract establish, even by the promise of sale, that they will execute a series of future sales. of sales-specific services. Of course, with such a clause inserted in the promise of sale, there will not be even the transfer effect of ownership that will take place only at the conclusion of the contract of sale. Thus, by handing over the real estate that is the object of the promise, the property itself is not transferred, but only a right of use.

Given that these anticipatory clauses do not have an independent existence, but exist only in the context of concluding a pre-contract between the parties, they will cease to apply when the promise of sale is revoked either by agreement of the parties or by the forms provided by law. Consequently, the services performed will no longer have a legal basis, so they will have to be reimbursed. Therefore, until the conclusion of the promised contract, the services performed on the basis of the anticipatory clauses are temporary and reversible, and will be finalized only at the time of the conclusion of the final contract of sale promised.

2. Content

As the promise of sale is a civil agreement, it is subject, as we have shown, to the rules and principles of common law governing the conclusion of contracts.

The conditions of validity, substance, or essential elements of the bilateral promise of sale are those provided by art. 1179 of the Civil Code with application to the specific pattern of the sale promise are the following: the capacity to contract, lawful and moral cause, the consent on the essential elements of the sale, the special conditions that the object must meet, in terms of determining the price and the good sold.

2.1. Capacity

The general rules on the ability to contract are also applicable to the conclusion of contract promises, but the rules are adapted to the nature of the promised contract[10]. If it is in the sphere of acts of conservation/administration that do not harm it or of acts of disposition of low value, for its conclusion it is necessary the restricted exercise capacity [art. 41 para. (3) Civil Code]. However, if the conclusion of an agreement that falls into the category of acts of disposition is foreseen, for the conclusion of the promise the conditions regarding the approval/ authorization provided by law must be fulfilled (art. 41-42 Civil Code).

Although by the synallagmatic promise of sale the parties do not arise real rights, but only obligations to make, in terms of capacity, this contract must be assimilated to the acts of disposition, especially due to the patrimonial importance it has for the promiser. It can lead to the loss of property through the forced

[3] D. Chirică, *Tratat de drept civil. Contracte speciale*, vol. I, *Vânzarea şi schimbul*, C.H. Beck Publishing House, Bucharest 2008, pp. 182 et seq.

[4] In the case of the sale of goods owned by the Romanian Orthodox Church, the approval of the bishop is required, according to the Statute on the organization and functioning of the Romanian Orthodox Church.

[5] For example, obtaining the urbanism certificate or the building permit, under the conditions of art. 6 of Law no. 50/1991 regarding the authorization of the execution of construction works and art. 28-34 of Law no. 350/2001 on spatial planning and urbanism.

[6] For example, obtaining the certificate issued by the owners association, the tax certificate or the energy performance certificate.

[7] I.F. Popa, *op. cit.*, p. 123.

[8] Examples are: the general norms of the Civil Code regarding the procedure applicable to the exercise of the right of preemption, to the right of preemption of a conventional nature (art. 1730-1740); the right of pre-emption of the co-owners and neighbors for the sale of forest lands (art. 1746 Civil Code); the right of preemption for the sale of real estate that are qualified as historical monuments [art. 4 para. (4)-(9) of Law no. 422/2001 on the protection of historical monuments]; the right of preemption in case of public sale of privately owned goods, classified in the treasury (art. 36 of Law no. 182/2000 on the protection of the national mobile cultural heritage).

[9] I. Ionescu, *Antecontractul de vânzare-cumpărare*, Hamangiu Publishing House, Bucharest, 2012, p. 277.

[10] I.F. Popa, *op. cit.*, p. 124.

execution of the promise of alienation or it can generate the obligation to damages (see art. 1669 of the Civil Code, for the promise of sale).

In the case of a bilateral promise to sell, the disposition must be fulfilled in the case of the promising-seller reported both at the time of the conclusion of the promise, but also at the time of the conclusion of the promised contract. As for the promising buyer from a synallagmatic promise of sale, he must have full capacity to contract, because the acquisition for consideration must be assimilated to the dispositions. Thus, the bilateral promise of sale is, also from the perspective of the promisor-acquirer, an act of disposition, since it does not fall within the scope of conservation/administration acts or small acts that the minor can conclude alone [according to art. 41 para. (3) and art. 42 para. (1) Civil Code][11].

As regards the condition of capacity, a distinction must be made according to the date on which the promise is concluded. If this is prior to the entry into force of the Civil Code of 2009, October 1, 2012, then the previous regulations become applicable[12].

Thus, prior to the Civil Code of 2009, the sale-purchase promise could be validly concluded only by persons with full capacity to exercise, *i.e.* by adults (except for prohibitions). Minors aged 14-18, with a limited capacity to exercise, could not validly conclude a pre-contract unless they were assisted by their legal guardians (parents or guardians). Minors under 14 years of age, as well as adults placed under interdiction, being deprived of the capacity to exercise, could conclude such an act only by their representation by the legal guardian.

If the pre-contract promised to conclude in the future a sale-purchase contract regarding the alienation of a building belonging to an incapable person, in the doctrine there were contrary opinions regarding the necessity of the existence of the prior approval of the guardianship authority.

According to an author[13], the provisions of art. 129 para. (2) Family Code they did not apply and, consequently, the prior consent of the guardianship authority was not required for the conclusion of the pre-contract. In support of this opinion, the author pointed out that the pre-contract is not an act of alienation and does not produce any translational effect of ownership, but only generates obligations to do, for which the law does not require any prior consent. Also, the acts of firm real estate alienation, concluded without obtaining the approval of the tutelary authority, were sanctioned according to art. 129 para. (3) Family Code only with relative nullity, so that the convention could meet the conditions of validity by subsequently obtaining the consent required by law or confirming the act by the alienating minor, after acquiring the full capacity to exercise it. Therefore, it would be redundant to sanction a promise of a contract with absolute nullity, while the conclusion of the contract itself, a real act of disposition, would be a relative nullity in the absence of the consent of the guardianship authority.

In support of the opposite view[14], it was argued that the need for prior consent of the guardianship authority is a measure to protect the minor or prohibited from acts that could harm his interests. Thus, the approval is provided both for the protection of the incapable person in his relations with third parties and for those he has with his legal guardians. [art. 105 para. (3) in conjunction with art. 129 para. (2) Family Code].

The same author considers that, although the pre-contract does not have a transfer of ownership effect, it may ultimately lead to this effect, so the incapable person will be obliged to fulfill the promise, otherwise his contractual liability may be incurred and if the maturity of the obligation to the contract would have been temporarily placed after the acquisition of full capacity, the protection of the guardianship authority could no longer be exercised, so that an obligation assumed during the minority could be enforced.

In the light of the new Civil Code, the situation regarding the issue described above is similar, with the difference that it is now necessary the approval, endorsement and authorization of legal acts of the minor by several institutions designated by law.

Thus, the property of a minor who has not reached the age of 14 is administered in good faith by his guardian. On the other hand, the goods acquired by the minor free of charge are not subject to administration unless the testator or donor has stipulated otherwise, these goods being administered by the curator or by the person designated by the act of disposition or, as the case may be, appointed by the court of guardianship (art. 142 Civil Code).

The guardian concludes on behalf of the minor his acts, except those of preservation or disposition of small value and which are executed on the day they were concluded. Also, if the minor has reached the age of 14, he has a limited capacity to exercise and can conclude legal acts, personally, but with the prior consent of the guardian, and in some cases the law requires a double or even triple approval, requiring the opinion Council and court authorization.

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[11] However, as regards the unilateral promise of alienation, it is not a condition that the beneficiary has the capacity to exercise at the time of the conclusion of the promise, his capacity must be fulfilled at the time of the conclusion of the promised contract.

[12] I. Ionescu, *Antecontractul de vânzare-cumpărare*, Hamangiu, Publishing House, Bucharest, 2012, p. 238.

[13] M. Mureşan, *Condiţiile validităţii antecontractului*, in Studia Universitatis Babeş Bolyai, Jurisprudentia 1/1988, p. 64.

[14] D. Chirică, *Antecontractul în teoria şi practica dreptului civil*, Centrul de ştiinţe sociale, Cluj-Napoca, pp. 83-87.

There are acts that can be concluded by the guardian without any prior consent, as follows: conservation acts, as they are always beneficial to the one who concludes them, the prerogative to harvest the fruits, collection of receivables resulting from movable values, acts of disposition of degraded goods, depositing and extracting income that does not exceed the simple care of the minor, and ordinary gifts taking into account the material condition of the child. The approval of the Family Council is necessary for the guardian for issues related to the person of the minor, except those of a current nature, the participation in a meeting with the parents at school. In addition to the Council's opinion, the guardian also needs the authorization of the guardianship court, in case of concluding an act of mortgage, encumbrance, division, if the minor would renounce the patrimonial rights, when acts beyond simple administration are to be concluded[15]. Violation of these legal provisions entails the express relative nullity [art. 144 para. (2) and (3) Civil Code].

Also affected by relative nullity are legal acts concluded between the guardian or the spouse, a direct relative or the guardian's siblings, on the one hand, and the minor, on the other hand, except for the sale of the minor's property to an auction of these persons who have a real guarantee on these goods or who have the quality of co-owner together with the minor (art. 147 Civil Code).

In conclusion, the completion of a promise of sale, although not a transfer of ownership effect, falls outside the scope of the administrative acts, precisely because it is a preparatory act for the final sale, so the agreement on the good sold and the price must be given by the parties with full capacity to exercise or who meet all the conditions required for the guardian to represent the minor or regarding the consent of the guardian, as well as those relating to the authorization of the guardianship court and the approval of the family council.

2.2. Consent

The general conditions of validity of the consent are provided by art. 1204 et seq. of the Civil Code and must be respected even at the conclusion of the bilateral promise of sale. Thus, the consent must come from a person of discernment, be expressed with the intention of producing legal effects, be externalized and not be altered by any defect in consent.

In addition to the general conditions of validity of the consent, in the framework of the promises of the contract, the agreement of will of the parties concerns the future conclusion of a contract. Specifically, when the parties agree to the conclusion of the promise, they do not undertake to conclude the pre-contract, but only agree to reiterate this agreement at the time of the conclusion of the final contract. Therefore, the consent of the parties to the conclusion of the contract, which is the subject of the promise, will have to be given at a future time, and at the stage of the promise the parties only agree that in the future they will reiterate this agreement.

As for the content of the consent in the case of the promise of sale, it must refer to the good sold and the agreed price, two elements that we will analyze in the subsection dedicated to the object of the promise of sale.

A discussion can be made about the defect in the consent of the lesion. The party whose consent has been vitiated by the lesion may, at his choice, request the cancellation of the contract or the reduction of his obligations with the amount of damages to which he would be entitled [art. 1221 para. (1)]. Also, the action for annulment is admissible, only if the lesion exceeds half of the value it had, at the time of concluding the contract, the service promised or performed by the injured party, and the disproportion must persist until the date of the request for cancellation [art. 1221 para. (2)].

The question arises as to whether the defect in the consent of the lesion in this context also applies to the promise or only to the final contract. At first sight, art. 1222 of the Civil Code would also cover the promise, not only the final contract, because it expressly refers to "the service promised or performed by the injured party". However, we are of the opinion that the text refers to certain services which have not yet been performed, but which arise from the final contract and not from a promise. The regulation provided by the Civil Code for lesion does not expressly or implicitly exclude the application of the provisions regarding this defect of consent regarding the promise of a contract.

If the conclusion of the bilateral promise of sale takes place by legal or conventional representation, the validity of the consent at the conclusion of the pre-contract will be analyzed in the person of the representative, and not of the represented person who either expressed his consent at the conclusion of the mandate contract or is legally represented at the conclusion of the promise. The mandate contract, by which the agent is empowered to conclude a bilateral promise of sale, in the name and on behalf of the principal, may be concluded by a privately signed document in all cases, including when the promise concerns a sale for which validity is required authentic form[16].

[15] E. Sârghi, *A fi sau a nu fi tutore? Aceasta este întrebarea*, www.juridice.ro, accessed at 19 March 2022.

[16] By Decision no. 23/2017 regarding the examination of the formulated notification, regarding the pronouncing of a preliminary decision, HCCJ ordered that "in the interpretation and application of the provisions of art. 1279 para. (3) first sentence and art. 1669 para. (1) of the Civil

A particular situation regarding the consent is the hypothesis of the contract of sale of a real estate struck by absolute nullity, for the lack of the authentic form, which based on the principle of conversion of the legal act, regulated by art. 1260 of the Civil Code, is valid as a synallagmatic promise for sale. According to art. 1260 para. (1) of the Civil Code "a contract struck by absolute nullity will nevertheless produce the effects of the legal act for which the substantive and formal conditions provided by law are fulfilled". However, the conversion does not operate according to para. (1) if the intention to exclude the application of the conversion is stipulated in the contract annulled or arises, unequivocally, from the purposes pursued by the parties at the date of conclusion of the contract. In this scenario, the consent of the parties was expressly given for a sale, but by virtue of the principle of conversion of the legal act, the agreement of the parties is valid for a bilateral promise of sale. For this purpose, it is necessary that the act struck by nullity include the constitutive elements of the legal act in which it is to be converted, respectively the promise of sale. On the other hand, according to art. 1260 para. (2) of the Civil Code, it is necessary that the parties have not expressly excluded the application of the conversion, which must result from the null sales contract, or that it must unequivocally result from the purposes pursued by the parties at the date of conclusion of the contract, that they excluded, this time indirectly, the application of the principle of conversion of the legal act.

The new Civil Code provides, as a measure to safeguard the effects of the legal act in art. 1213 of the Civil Code, in case of vitiation of the consent of one of the parties by mistake, the possibility of adapting the contract. This new institution assumes that the party who was not in error, in order to avoid the annulment by the other party of the act, has the possibility to execute the contract or to declare himself ready to execute it, in the manner in which it was understood by to the erroneous party.

With regard to the defect of consent of fraud, the basis for sanctioning malicious reluctance is the obligation to inform that exists in the preparatory phase of signing the contract, and this is based on the obligation of good faith. Because the grief through reluctance provided by art. 1214 of the Civil Code, to represent a defect of consent, it must emanate from the other party, or from the representative, agent or manager of the affairs of the other party and bear on a determining element for the conclusion of the contract.

The hypothesis of omitting some essential information for concluding the contract appeared in the legal practice when, for example, a promising seller who knew that under the land he intends to alienate there is a natural gas distribution network, water, etc., a circumstance that made impossible to pour a foundation (without diversion works that require, in addition to large investments, a lot of opinions and approvals), he failed to inform the potential buyer about it, knowing that he wants to build a house on this terrain. In a similar situation, if at the signing of the sale promise, the promising buyer informs the promising seller that he wants to build a boarding house or hotel on the land that is the subject of the promise, but he hides the fact that a project is already started on a neighboring parcel for opening a slaughterhouse or livestock farm, etc. In these cases, the promising buyer may request the annulment of the promise of sale under fraud by reluctance, proving that the seller did not inform him of these matters, which he could not have known as a result of normal diligence and which if they had been known he would no longer be contracted[17].

A question that arises, in the case of fraud, predominantly in the situation of fraud by reluctance is whether the error must be excusable. This problem usually occurs in situations where with certain diligence the promising buyer could have known the topographic positioning of the building and the fact that under it passes a natural gas distribution network. In this analysis, the importance of the bad faith of the perpetrator must also be weighed, who can achieve malicious reluctance through direct actions. Thus, although the promising buyer explained very clearly, even insistently, that he wanted to build a construction with a foundation on the land that is the subject of the promise, the promising seller totally denied the existence of impediments such as a natural gas network that crosses the land. Furthermore, a clause was included in the promise by which the promising seller guarantees that the land is not encumbered by natural gas networks, water networks or electrical cables. In other words, it is debatable whether the error does not become excusable, precisely in the context of the deliberate exercise of malicious maneuvers against the contractual partner, manifested, among other things, by the contractual assumption of the absence of encumbrance of high voltage lines, natural gas networks or water networks.

It follows from the situation described above that the parties included in both the pre-contract a clause according to which the promising seller guaranteed that the building in question did not contain high voltage lines, natural gas networks or water networks to prevent construction. Consequently, by this provision the parties attributed to the sold good an essential quality, that of being buildable, in the absence of which the

Code, the authentic form is not obligatory at the conclusion of the promise of sale of a real estate, in order to pronounce a decision to take the place of an authentic deed".

[17] I. Ionescu, *Antecontractul de vânzare-cumpărare*, Hamangiu Publishing House, Bucharest, 2012, p. 245.

contract would not have been concluded, as provided by art. 1207 para. (2) point 2 of the Civil Code, the error thus having a determining character.

However, the question arises whether the cancellation of the contract can be requested by the party whose consent was vitiated by fraud and when the error in which it was found was not essential [art. 1214 para. (2) Civil Code]. The text can be read in the sense that the cancellation of the contract for fraud can also take place when the error concerns other elements of the contract than those considered essential [provided by art. 1207 para. (2) Civil Code], but only if it has a determining character (the contract would not have been concluded in the absence of fraud). In other words, art. 1214 para. (2) Civil Code it has no other purpose than to extend the sphere of the elements on which the error may be induced, without, however, establishing any derogation from the decisive character which the deceit must have in the volitional process leading to the conclusion of the contract.

There was also the opinion that the text should be interpreted in the sense that the fraud can lead to the cancellation of the contract even when the error caused was not decisive for the conclusion of the legal act, hence it can aspects indifferent to the consent formation process. We cannot agree with such an approach, because the conditions of the error of consent must be met even if it is caused by fraud. In other words, the fact that the error is a caused one does not change its content in order to represent a defect of consent, especially in the absence of an express provision of the legislator.

Another provision that may be incidental in case of vitiation of the consent at the conclusion of a promise of sale is the one provided in art. 1217 of the Civil Code, according to which it is assimilated to violence and the threat of a contracting party with the exercise of a right, if the fear was instilled in it in order to obtain unfair advantages. Thus, the adult, with full capacity to exercise, is recognized the possibility of promoting the action for annulment for lesion of a civil legal act, provided that the lesion exceeds half the value of the service to which he was obliged or executed. In this case, as in the case of the error, the possibility of adapting the contract was established, the court notified with the annulment being able to maintain it if the other party agrees to a reduction of its claim or to an increase of its obligation. to the injured. For the action for annulment for lesion, the legislator has established a special limitation period of one year, which begins to run from the conclusion of the contract.

In the event of a bilateral promise of sale, the lesion will be analyzed at the time of concluding the final contract of sale, at which time the balance of the parties' performance is relevant, even if they have been previously established by signing the promise. The justification for this solution lies in the fact that the contractual imbalance and the possible damage to the patrimony of one of the parties, actually occurs at the moment of the transfer of the property right over the good and of the payment of the price, and not at the conclusion of the promise.

2.3. The object of the promise

The object of the promise, in the sense of the object of the contract, is the conclusion of the future contract [see art. 1225 para. (1) Civil Code]. Furthermore, the object of the promisor's obligation (as defined by art. 1226 of the Civil Code) is represented by the promisor's commitment to reiterate his consent on the occasion of concluding the promised contract.

The general conditions of the object of the contract are provided by art. 1226-1234 of the Civil Code, and the object of the pre-contract consists in the conduct or performance to which the active subject is entitled and to which the passive subject of the established legal relationship between the parties is held, respectively the future conclusion of the promised sales contract. As in the case of any convention, its object must be determined or determinable, be possible, be in the civil circuit, be lawful and moral, and be a personal act of the debtor.

The promise must be aimed primarily at concluding a specific agreement in the future, and the parties must identify from this preparatory point the essential elements of the foreshadowed contract, from the point of view of the validity of the object. These essential elements are represented by the derivative object of the promised contract of sale, respectively the good to be the object of the sale, and the price agreed by the parties for concluding the agreement. If these elements are not individualized by the parties, the promise will be affected by absolute nullity as it does not provide for specific or at least determinable object.[18]. Therefore, in the promise of sale, the object of the obligation is represented by the promised good and price. There are a number of questions about these two elements that have generated discussion over time, so we'll look at them in turn below.

The existence of the good at the time of the conclusion of the promise. Although it is imperative that the parties establish the object of the contract by promise, it does not have to exist at the time of the conclusion of the promise. For example, the promise may include the conclusion of a future contract that is not possible at the time the pre-contract is concluded,

[18] M. Mureşan, *Clauzele esenţiale şi indispensabile ale antecontractului şi clauzele sale accesorii în dinamica relaţiilor sociale reglementate de lege, oglindită în teoria şi practica dreptului*, Center of social sciences, Cluj-Napoca University, 1988, pp. 102-103.

and it is only necessary that it be able to take place at the time of the pre-contract. This is one of the practical advantages of concluding a contract promise, the fact that the parties may agree to conclude agreements on factual and legal situations that have not yet been born, such as concluding a promise to sell a building that has not yet been built (art. 1227 of the Civil Code) or on a real estate that is subject to temporary inalienability, and the parties agree that the completion of the sale will take place after the expiration of the interdiction on alienation.

When should the good be in the civil circuit? A first question is whether the promised good must be in the civil circuit at the time of the conclusion of the promise. This dilemma arises from reading art. 1229 of the Civil Code stipulates that "only the goods that are in the civil circuit can be the object of a contractual service". Any contractual performance in connection with a good that is not in the civil circuit would be prohibited, including the conclusion of a promise to sell.

With regard to the contract of sale, there is no doubt that the prohibition provided by art. 1229 of the Civil Code is applicable to him. Thus, at the moment of completing the promised sale, the good that is the object of the sale must be in the civil circuit, under the sanction of the absolute nullity of the contract aspect regulated by art. 1657 of the Civil Code, which provides that "any property may be sold freely, unless the sale is prohibited or restricted by law or by convention or will."

We believe that such a ban cannot exist in the case of the promise because we can imagine hypotheses in which a good is not yet in the civil circuit, but will enter the future, so this is the very purpose of delaying the final contract, the reason for concluding the promise. The situation is similar to that of future assets which, in the absence of a contrary legal provision, may be the subject of a convention. (art. 1228 Civil Code). The same is true of the example given above, when the parties enter into a bilateral promise of sale in respect of an asset over which there is a prohibition on legal or conventional alienation. If the time for which the parties foresaw the conclusion of the contract of sale is subsequent to the expiry of the prohibition on alienation, then the promise is perfectly valid from this point of view.

In conclusion, we appreciate that the prohibition provided by art. 1229 of the Civil Code, regarding the promises of sale, must be in the sense that the service agreed by the parties, consisting of the obligation to give or transfer the ownership of the property, is a future benefit, so that its character illicit from the perspective of art. 1229 of the Civil Code, must be established in relation to the time established by the parties for the conclusion of the final sale.

It should be noted that the object, respectively the promised good, must be in the civil circuit on the effective date of the transfer of ownership, which is usually the date of conclusion of the contract[19], being applicable the law in force at the time of concluding the contract of sale, as an application of the principle *tempus regit actum*, solution legally imposed by art. 6 para. (5) of the Civil Code according to which the provisions of the new law apply to all acts concluded after its entry into force. This solution is also in accordance with the Constitutional Court`s opinion in the content of Decision no. 755/2014[20].

The doctrine also expressed the opinion that the law in force at the time of concluding the pre-contract must be taken into account[21], so it is important that the good is in the civil circuit at the date of its completion, even if at the time of sale it was declared inalienable. The author states that the effects of legal acts concluded under the rule of a law can only produce the effects provided by the law in force at the date of their conclusion [art. 6 para. (2) Civil Code and art. 3-5 L.P.A.]. On the other hand, since the parties have entered into sales promises, it is natural for them to be granted that right, even if the law has changed in that regard, and the recognition of that right is a matter of legal predictability and the principle of legal certainty.

The above opinion is based on legally correct arguments, but which lead to the exact opposite conclusion. Thus, the fact that the law in force at the date of its conclusion is applicable to the pre-contract, [art. 6 para. (2) Civil Code] only means that the new law will not be retroactive to it. Instead, for the sales

[19] According to art. 1674 Civil Code: "The transfer of the property, except for the cases provided by law or if the will of the parties does not result otherwise, the property is transferred by right to the buyer from the moment of concluding the contract, even if the good has not been handed over or the price has not been paid yet."

[20] Published in the Official Gazette of Romania no. 101 of February 9, 2015. In paragraph no. 29 of the said decision, the Constitutional Court held that "(...) it is in principle that the legislator may derogate from the principle of immediate application of the new law, given that, as the Constitutional Court has consistently held, the principle of application and the principle of survival of the old law are of legal origin, not constitutional, the legislator having the possibility to derogate from them, in certain particular situations (see, in this sense, Decision no. 90 of 1 June 1999, published in the Official Gazette of Romania, Part I, no. 489 of 11 October 1999, Decision no. 228 of 13 March 2007, published in the Official Gazette of Romania, Part I, no. 283 of 27 April 2007, Decision no. 1671 of December 15, 2009, published in the Official Gazette of Romania, Part I, no. 118 of February 23, 2010, or Decision no. 192 of April 3, 2014, published in the Official Gazette of Romania, Part I, no. 492 of July 2, 2014), but the derogating norm must not contradict the constitutional provisions, in this case the principle of equal rights, because otherwise it will give rise to unfair situations whose legal qualification may be limited to privileges or discrimination expressly prohibited even by art. 16 para. (1) of the Constitution.

[21] I.F. Popa, *Promisiunile unilaterale și sinalagmatice de înstrăinare imobiliară*, in Revista Română de Drept Privat no. 5/2013, pp. 157-158.

contract concluded after the entry into force of the new law, it will be applied [art. 6 para. (5) Civil Code]. However, the law in force at the date of concluding the pre-contract cannot be applied to the projected sales contract, if at the time of its completion a new law is in force. This reasoning also seems to us applicable in the case of the good in the civil circuit at the date of signing the promise of sale, which at the date set for the conclusion of the sale is no longer in the civil circuit.

The solution proposed by the above-mentioned author in the sense that if the good was in the civil circuit at the time of concluding the promise of sale and subsequently, by the effect of a legal provision, was taken out of the civil circuit, the right acquired by the promisor must be in accordance with the law in force at the conclusion of the promise, it is difficult to accept. This argument of the need to recognize the right acquired by the promisor-buyer by pre-contract, in the context discussed, may constitute a desideratum at most or possibly a proposal of *lege ferenda*. In reality, by promise the promisor-buyer acquires only a right of claim, consisting in the commitment given by the promisor seller that he will reiterate his consent at the time set for the conclusion of the final sale.

The loss of the good after the end of the promise. In the event of the loss of the good between the moment of concluding the promise and the moment of concluding the prefigured contract, then the promise of sale will expire, and will be applicable the rules of common law in the matter of contractual remedies. Thus, as a result of the loss of the good, the obligation assumed by the promisor-seller will become impossible to execute, and since this impossibility is final and absolute, the contract will be terminated by law, being applicable the rules on contract risk [art. 1557 para. (2) Civil Code].

Ownership of the good at the conclusion of the promise and completion of the sale. It is not a condition that the promisor-seller be the owner of the good that is the object of the promise at the time of the conclusion of the promise. It is sufficient for the property to be acquired by the date of the conclusion of the promised contract. I lead to this solution several legal provisions of the Civil Code.

According to art. 1227 of the Civil Code, "the contract is valid even if, at the time of its conclusion, one of the parties is unable to perform its obligation, unless otherwise provided by law." Also, in the absence of a contrary legal provision, the contracts may apply to future assets (art. 1228 correlated with art. 1658 Civil Code).

Furthermore, according to art. 1230 Civil Code, ”Unless otherwise provided by law, the goods of a third party may be the subject of a benefit, the debtor being obliged to procure and transmit them to the creditor or, as the case may be, to obtain the consent of the third party. In the event of default, the debtor shall be liable for any damage caused." This text must be correlated with the provisions of art. 1683 of the Civil Code which regulates the sale of another's property[22]. If the good that is the object of the promise of sale is not in the patrimony of the promisor-seller he must acquire it until the moment established by the parties for the completion of the contract of sale.

With regard to the conclusion of the final contract of sale, at that time the promisor-seller must be the owner of the good which is the subject of the promise. Otherwise, the promising buyer will be able to resort to the remedies provided by art. 1516 para. (2) Civil Code at the disposal of the creditor. Thus, he will be able either to request enforcement by equivalent, in the form of compensatory damages, or to request the resolution of the promise, with possible damages.

A particular discussion concerns the possibility of the parties to conclude a sale of another's property (art. 1683 Civil Code). In this case, the parties entered into a valid promise regarding a good that did not belong to the promisor-seller at that time, nor on the date set for the conclusion of the contract of sale. If the promisor-seller wanted to forcefully execute the concluded promise, by obtaining a decision to take the place of the sale, he would run into an impediment. In order to obtain the forced execution of the promise in this form (see art. 1669 referred to in art. 1279 of the Civil Code), one of the conditions that must be met is that the promising seller be the owner of the good that is the object of the promise[23]. Therefore, the promise is valid, as we have shown before, but it cannot be enforced in

[22] D. Chirică, *Vânzarea bunului altuia, între vechea şi noua reglementare a Codului civil*, in In honorem Ion Deleanu. Culegere de studii, Universul Juridic Publishing House, Bucharest, 2013, pp. 70 et seq.; R. Dincă, *Contractele speciale în noul Cod civil. Note de curs*, Universul Juridic Publishing House, Bucharest, 2013, pp. 104 and so on; G. Gheorghiu, the comment below art. 1683 Civil Code, in Fl.A Baias, E. Chelaru, R. Constatinovici, I Macovei (coord.), *Noul Cod civil. Comentariu pe articole, art. 1-2664*, C.H. Beck Publishing House, Bucharest, 2012, pp. 1757 et seq.

[23] This aspect, which was the subject of a non-unitary judicial practice, was definitively resolved by Decision no. 12/2015 regarding the examination of the appeal in the interest of the law formulated by the Board of the Suceava Court of Appeal regarding the admissibility of the action regarding the validation of the sale-purchase promise of a determined real estate, in case the promising-seller has only an ideal share from the property right over it. By this decision, HCCJ established that “In the interpretation and application of the provisions of art. 1073 and art. 1077 of the Civil Code of 1864, art. 5 para. (2) of title X of Law no. 247/2005 regarding the reform in the fields of property and justice, as well as some adjacent measures, with the subsequent modifications and completions, art. 1279 para. (3) thesis I and art. 1669 para. (1) of the Civil Code, in case the promisor-seller has promised to sell the entire building, although he does not have the quality of its sole owner, the promise of sale cannot be executed in kind in the form of a court decision to take the place of contract of sale for the whole property, without the agreement of the other co-owners.”

kind. The alternative would be for the parties to conclude a contract for the sale of the property of another, which will have all the consequences arising from its regulation, and we believe it will be impossible in real estate, given all the consequences of concluding a contract the ownership that will be acquired by the buyer at a future time that coincides with the acquisition by the seller. A crucial impediment to concluding such a contract, regarding a real estate, is even its registration in the land register, because it is difficult to conceive since the buyer has not actually acquired the property right, so the very object of registration is missing. The alternative would again presuppose an unprecedented fact, that a person who is not the owner of the property right should be registered in the land book of the building.

***The price*.** Another obligatory element to be determined by the promise of sale is the price that must be established in money, honestly and seriously, and to be determined or determinable [art. 1660 para. (1) and (2) of the Civil Code and art. 1665 Civil Code].

Thus, first of all, the price must be set in money, this requirement being the essence of the sale. Otherwise, the contract that the parties have foreseen will no longer be a sale, but possibly an exchange, a payment, a maintenance contract, a life annuity or another contract.

In order to be serious, the price must be set with the intention of being paid, not fictitiously. The price is serious when, in relation to the value of the promised good, it is obviously not too low, derisory, so that it cannot be a sufficient cause of the obligation assumed by the promising seller to transfer ownership of the good in the future. Thus, the sale is voidable when the price is so disproportionate to the value of the good that it is obvious that the parties did not want to consent to a sale (art. 1665 para. (2) Civil Code). These provisions, relating to the contract of sale, are also applicable to the promise of sale, and the sanction for non-compliance with them is relative nullity, as in the case of the promise of sale.

The price is fictitious when the parties do not intend to demand or pay it, respectively, from a secret act resulting in not being due. If the price is simulated or fictitious, the promise made by the parties will be void as a promise of sale, and may be valid as a promise of donation.

It is considered to have determined the price which is expressed in figures and without the possibility of being subsequently modified, if the promising buyer was able to actually know the amount he will have to pay for this title. Instead, it is an indeterminate price that has several elements of unknown or indeterminate value, such as when referring to a reasonable price, the market price, the price of the day. If the price determined or determinable is not a fixed price, but the parties agree that it may be subject to change, the criteria according to which it may be changed must be set out in the promise (see art. 1661 of the Civil Code).

In the absence of a price, the sale is struck by absolute nullity, because the obligation of the buyer has no object, and the obligation of the seller is void. However, the Civil Code establishes a number of ways to remedy a possible problem in connection with the determination of the price. Being applicable in the case of the sales contract, we appreciate that they are all the more valid for the pre-contract. Among these remedies we identify the situation in which the court may substitute the third party designated by the parties if he does not do his duty in order to establish the price, and the expert appointed by the court will indicate the price applicable to the sale [art. 1232 para. (2) and art. 1662 alin. (2) Civil Code]. In this case, if the price has not been determined within one year of the conclusion of the contract, the sale is void, unless the parties have agreed to another way of determining the price. We note that the text expressly refers to the sale, and not to the promise of sale, so that it could not be applied in the case of the pre-contract which will not be affected by nullity in this situation for lack of price determination[24].

Another remedy is the one related to determining the price between professionals. In this respect, if a contract concluded between professionals does not set the price or indicate a way to determine it, it is assumed that the parties have taken into account the price normally charged in that field for the same services performed under comparable conditions or, in the absence such a price, a reasonable price (art. 1233 Civil Code). Also, when, according to the contract, the price is determined by reference to a reference factor, and this factor does not exist, has ceased to exist or is no longer accessible, it is replaced, in the absence of a contrary agreement, by the nearest reference (art. 1234 Civil Code).

The application of the remedies regarding the determination of the price between professionals (art. 1233 Civil Code) and the establishment of the price by reference to a reference factor (art. 1234 Civil Code) must be done by correlating with the provisions of the regulation offered by the Civil Code. sale, referring to the lack of express determination of the price (art. 1664 of the Civil Code). According to the text of the law, the sale price is sufficiently determined if it can be determined according to the circumstances, and if the object of the contract is goods which the seller normally

[24] It was stated from this point of view that, compared to the existence of the analyzed remedies, the failure to determine the price will almost never lead to the nullity of the contract (see I.F. Popa, *op. cit.*, p. 126).

sells, it is presumed that the parties have taken into account the usual price. of the seller. The last paragraph of the rule provides that, unless otherwise stipulated, the sale of goods whose price is fixed on organized markets is presumed to have been concluded for the average price applied on the day of the contract on the market closest to the place of conclusion of the contract. this day was non-working, the last working day is taken into account.

2.4. The cause of the promise

Regarding this element of the contract, in the specialized literature or judicial practice, no specific problems of the contract promise have been identified so that the common law provisions of the Civil Code are applicable. However, we propose a brief analysis of the components of the cause from the perspective of the evolution of this condition in doctrine and jurisprudence and the punctuation of its conditions of validity in general and in relation to the promise of sale.

The cause (purpose) of the civil legal act is that general, substantive, necessary and valid condition which consists in the objective pursued by the conclusion of the civil legal act.[25] The cause together with the consent forms the legal will. The difference between the cause and the consent is that, while the consent refers to the decision to conclude the legal act, made public, the cause or purpose designates the reason for which the decision was taken[26].

In the system of the Civil Code from 1864, art. 966 which regulated the cause, referred only to the "cause of obligation", but in the doctrine and judicial practice, the existence of two components in the structure of the cause of the legal act was recognized: the immediate purpose and the mediated purpose.

The immediate purpose, bearing the name and purpose of the obligation, designates, in the case of bilateral synallagmatic acts, the mental representation or foreshadowing by each party of the other party's consideration. Thus, in this situation, "one party commits itself knowing that the other party commits itself, in turn"[27], which makes the reciprocity of benefits correspond to a reciprocity of causes. The immediate purpose is an abstract (objective) and invariable (uniform) element within a certain category of legal acts and, further, each species of legal acts subsumable to that category. The immediate goal is an abstract element because it is the result of a process of generalization and it is an invariable element because it does not change from one legal act to another.

The mediated purpose of the obligation, also called the purpose of the legal act, is that element of the cause which constitutes the determining reason for concluding the civil legal act[28], that is, in the so-called impulsive and decisive cause for which the act was effectively concluded and refers either to the characteristics of a benefit or to the qualities of a person. The difference between the immediate and the mediated purpose is given by the fact that the latter is concrete and variable from one species to another of civil legal acts, but also within the same species of civil acts, from one act to another. The mediated purpose is concrete, because each party seeks to obtain something else through the legal act (e.g. in case of concluding a sale, the buyer may aim to resell, rent, donate the purchased good, and the seller may pursue purposes as diverse as possible with the amount of money received as a price) and is variable precisely because it differs from one act to another given the individual and subjective purposes of its authors.

From the analysis of art. 966 and 968 of the Civil Code of 1864, we deduce that, although they do not expressly concern the mediated purpose of the contractual civil obligation, these texts do not exclude it, so that the judicial practice and the doctrine gradually incorporated in the notion of mediated, in particular in order to be able to control the lawful and moral character of civil conventions, in particular liberalities and unnamed contracts.[29]

In the New Civil Code, the cause has only one component, the mediated purpose. Thus, according to art. 1235 of the Civil Code, the cause is the reason that determines each party to conclude the contract. Therefore, in the New Civil Code we no longer find a bivalent character to the cause of the legal act, and the immediate purpose is confused in the new regulation with the very consent or object of the legal act.

In the pre-contract of sale, the immediate purpose, given its abstract and invariable nature, is always to foreshadow by each co-contractor the fact that the other party will perform the obligations assumed by the promise, respectively to make every effort to meet the necessary legal conditions. future conclusion of the sales contract.

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[25] M. Nicolae, *Drept civil. Teoria generală. Vol. II. Teoria drepturilor subiective civile*, Solomon Publishing House, Bucharest, 2018, p. 422; The cause or purpose has also been defined in civil law as "that element of the civil legal act which consists in the objective pursued at the conclusion of such an act" (Gh. Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil*, 9th ed., revised and added by M. Nicolae and P. Truşcă, Universul Juridic Publishing House, Bucharest, 2007, p. 167) or "the reason, the concrete purpose for which a legal act is concluded" (O. Ungureanu, C. Munteanu, *Drept civil. Partea generală în reglementarea noului Cod civil*, Universul Juridic Publishing House, Bucharest, 2013, p. 249).

[26] M. Nicolae, *op. cit.*, p. 426.

[27] Gh. Beleiu, *op. cit.*, p. 168.

[28] *Idem*, p. 169.

[29] M. Nicolae, *op. cit.*, p. 429.

As for the mediated purpose, the determining reason for concluding the promise, it coincides with that of the contract of sale, each of the promisors having a specific reason why they want to acquire ownership of the good, respectively the acquisition of the price, as shown in the general analysis of mediated purpose.

This identity between the mediated purpose of the promise and that of the final contract of sale is due to the legal nature of the pre-contract, which is a preparatory contract, a step in forming the legal will to conclude the final contract, by reference to which and only in relation to which, the determining motive of each of the co-contractors is appreciated. None of them seeks to conclude a mediated purpose of the legal act. The reasons why the parties delay the conclusion of the final contract are never an end in themselves for any of them, but only the means necessary to obtain the conclusion of the final act.

Therefore, in the structure of the legal will, made up, as we have shown, of consent and the cause of the legal act, during the formation of the final contract only the consent is that which varies in such a way as to lead to the progressive formation of the final contract. Thus, the parties begin by giving their consent to the conclusion of one or more preparatory contracts, each of which presupposes a separate consent depending on the nature of the preparatory act. However, throughout the negotiations and the preparatory contracts, the mediated cause remains the same, consisting for the buyer in the concrete destination he foreshadows for the use of the amount he will receive as a price, and for the seller, the actual destination of the good.

In order for the cause to be valid, it must be lawful and moral, and the sanction differs depending on which of these features is not met. For example, the absence of the cause entails the annulment of the civil legal act, unless the lack of cause arises from an error in the qualification of the legal act, in which case it will be reclassified and will produce the effects of another legal act [art. 1236 and art. 1238 para. (1) Civil Code]. We are of the opinion that, if there is an error on the cause from the perspective of one of the parties to the civil legal act, this error, materialized in a falsity of the cause, is only an actual absence of the cause. In other words, if one of the contractors is wrong about the cause, it is based on a cause that does not actually exist.

Instead, the existence of an immoral or unlawful cause results in the absolute nullity of the contract, provided that this purpose has been pursued by both parties or at least that the other party has known it or, as the case may be, should have known it. [art. 1238 para. (2) Civil Code][30].

The parties must not prove the cause and also they must not expressly provide it in the document proving the promise of sale, its existence and validity being relatively presumed (art. 1239 Civil Code).

2.5. The form of the bilateral promise to sell

In this respect, the most important aspect to emphasize is the prevalence of the principle of consensualism, so that the form *ad validitatem* is an exception to this rule (see art. 1240 of the Civil Code), being, as such, strictly interpreted (art. 10 Civil Code).

Therefore, the rule is that the authentic form is not necessary for the valid conclusion of the bilateral promise of sale, being sufficient the conclusion in written form, by document under private signature. There is only one exception to this rule, for the promises concluded between May 2 and July 19, 2013, when the pre-contracts for the sale of real estate were subject to the authentic form, under the sanction of absolute nullity of the act[31].

Apart from the form necessary for the promise of sale, there was in practice the problem of the need for the authentic form of the promise for the pronouncement of a decision that takes the place of the contract, when the respective contract must respect the authentic form, *ad validitatem*. This issue has generated a non-unitary judicial practice and started from the content of art. 1279 para. (3) Civil Code which allows the court to issue a decision to take the place of a contract, when the requirements of the law for its validity are met. Starting from this text, some courts have appreciated that whenever the application of art. 1279 Civil Code, which requires the fulfillment of all the conditions of validity of the promised contract, the action in pronouncing a decision that takes the place of a contract of sale for real estate subject to registration in the land register, can be admitted only if the pre-contract was concluded in authentic form. Other courts have held that the form of the authentic deed of promise to conclude the contract for the sale of a building is not necessary, the principle of consensualism being applicable.

In this regard, especially since during that period they published numerous studies that proposed arguments for one or the other of the two jurisprudential guidelines, we are content to specify that it is now

[30] M. Nicolae, *op. cit.*, p. 433.

[31] This rule was established by art. VII[5] point 3 of Law no. 127/2013 on the approval of the GEO no. 121/2011 for the modification and completion of some normative acts, published in the Official Gazette of Romania, no. 246 of 29 April 2013, which provided that the promise to conclude a contract having as object the right of ownership over the building or another real right in connection with it and the deeds of attachment and detachment of the buildings registered in the land book shall be concluded in authentic form, under the sanction of absolute nullity. Shortly afterwards, this provision was expressly repealed by art. II of Law no. 221/2013 on the approval of the GEO no. 12/2013 for the regulation of some financial-fiscal measures and the extension of some terms and of modification and completion of some normative acts, published in the Official Gazette of Romania, no. 434 of July 17, 2013.

definitively established that the form does not fall into the category of essential conditions. In view of the legislator, [see art. 1279 para. (1) Civil Code] being established at present that a promise can be enforced in kind without the need for a certain form (namely the form of the promised contract). This aspect was clarified by Decision no. 23/03.04.2017 pronounced in the file no. 3996/1/2016, HCCJ– The panel for resolving some legal issues in civil matters, which established that: "in the interpretation and application of the provisions of art. 1279 para. (3) first sentence and art. 1669 para. (1) of the Civil Code, the authentic form is not obligatory at the conclusion of the promise of sale of a real estate, in order to pronounce a decision to take the place of an authentic act". In view of this decision, HCCJ noted that "the pre-contract is a non-transferable legal operation of property, which generates a contractual obligation to make, namely to conclude the intended contract, subject to enforcement in kind under the conditions of art. 1279 para. (3) first sentence. As a result, this legal act does not require an authentic form. Also, being two separate legal acts, the authentic form of the pre-contract does not ensure the authenticity of the contract of sale, the provisions enunciated above conditioning the pronouncement of a judgment in lieu of an authentic contract of sale fulfilling the requirements of validity, substantive and formal, of the final contract. On the other hand, if the legislature had intended, for preventive purposes, to provide the authentic form for the promise of sale, would have expressly established this condition of form, as in the case of the promise of donation, regulated by art. 1014 para. (1) of the Civil Code. According to this text of the law, «Under the sanction of absolute nullity, the promise of donation is subject to the authentic form»."

The issue of the form of the bilateral sales promise requires a complex analysis, but without consequences taking in consideration the content of the HCCJ Decision no. 23/03.04.2017, so we will not detail in this regard.

The considerations of the HCCJ Decision no. 23/03.04.2017 also deserve a detailed analysis, which exceeds the object of this study, which strictly refers to the conditions of validity of the bilateral promise of sale, an aspect that has never been the subject of controversy.

The dilemma arose only as to the possibility of forced execution in kind of the promise of a contract. However, even the authors who argued that in order for a judgment to take the place of a contract it was necessary for the promise of the contract to be concluded in authentic form, agreed that that form was only enforceable, the promise being validly concluded, but executed only voluntarily, and not through the mechanism provided by law for its forced execution in kind [art. 1279 correlated with art. 1669 of the Civil Code in case of sale].

3. Conclusions

The general conditions of validity of the contract provided by art. 1179 of the Civil Code (consent, capacity, object and cause and, where the parties have provided, the form) must also be fulfilled by the bilateral promise of sale.

Therefore, there is an indissoluble relationship between the content of the promise and that of the foreshadowed contract, so that the validity of the final sale is conditioned by the validity of the concluded promise.

In the case of a bilateral promise to sell, the disposition must be fulfilled in the case of the promising-seller reported both at the time of the conclusion of the promise, but also at the time of the conclusion of the promised contract. As for the promising buyer from a synallagmatic promise of sale, he must have full capacity to contract, because the acquisition for consideration must be assimilated to the dispositions. Thus, the bilateral promise of sale is, also from the perspective of the promisor-acquirer, an act of disposition, since it does not fall within the scope of conservation/administration acts or small acts that the minor can conclude alone.

In addition to the general conditions of validity of the consent, in the framework of the promises of the contract, the agreement of will of the parties concerns the future conclusion of a contract. Specifically, when the parties agree to the conclusion of the promise, they do not undertake to conclude the pre-contract, but only agree to reiterate this agreement at the time of the conclusion of the final contract. Therefore, the consent of the parties to the conclusion of the contract, which is the subject of the promise, will have to be given at a future time, and at the stage of the promise the parties only agree that in the future they will reiterate this agreement.

As to the content of the consent in the case of the promise of sale, it must relate to the good sold and the agreed price.

The general conditions of the object of the contract are provided by art. 1226-1234 of the Civil Code, and the object of the pre-contract consists in the conduct or performance to which the active subject is entitled and to which the passive subject of the established legal relationship between the parties is held, respectively the future conclusion of the promised sales contract. As in the case of any convention, its object must be determined or determinable, be possible, be in the civil circuit, be lawful and moral, and be a personal act of the debtor.

The promise must be aimed primarily at concluding a specific agreement in the future, and the parties must identify from this preparatory point the essential elements of the foreshadowed contract, from the point of view of the validity of the object. These essential elements are represented by the derivative object of the promised contract of sale, respectively the good to be the object of the sale, and the price agreed by the parties for concluding the agreement. If these elements are not individualized by the parties, the promise will be affected by absolute nullity as it does not provide for a specific or at least determinable object.

Regarding the cause of the promise, in the structure of the legal will, consisting of the consent and the cause of the legal act, during the formation of the final contract only the consent varies, so as to lead to the progressive formation of the final contract. Thus, the parties begin by giving their consent to the conclusion of one or more preparatory contracts, each of which presupposes a separate consent depending on the nature of the preparatory act. However, throughout the preparatory negotiations and contracts, the mediated cause remains the same, consisting, for the buyer, in the concrete destination he foreshadows for the use of the amount he will receive as a price, and for the seller, the actual destination of the good.

In order for the cause to be valid, it must be lawful and moral, and the sanction differs depending on which of these features is not met. For example, the absence of the cause entails the annulment of the civil legal act, unless the lack of cause arises from an error of qualification of the legal act, in which case it will be reclassified and will produce the effects of another legal act.

We are of the opinion that the absence of the cause, in the above hypothesis, is equivalent to its non-existence, because if there is an error on the cause from the perspective of one of the parties of the civil legal act, this error, materialized in a falsity of the cause, is only an absence of the cause. In other words, if one of the contractors is wrong about the cause, it is based on a cause that does not actually exist.

On the other hand, the existence of an immoral or unlawful cause results in the absolute nullity of the contract, provided that this purpose is intended to have been pursued by both parties or at least that the other party should have known him or, as the case may be, should have known him [art. 1238 para. (2) Civil Code].

The parties must not prove the cause nor expressly provide for it in the probative document of the promise of sale, its existence and its validity being relatively presumed (art. 1239 Civil Code).

Concerning the form of the promise of sale, we have shown that the authentic form is not necessary for its valid conclusion, being sufficient the conclusion in written form, by document under private signature. There is only one exception to this rule, for the promises concluded between May 2 and July 19, 2013, when the pre-contracts for the sale of real estate were subject to the authentic form, under the sanction of absolute nullity of the act.

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