

The Legal Regime of the Bilateral Promise to Sell

PhD. student **Gabriela TEODORU**¹

Abstract

A legal instrument recognized only in doctrine and jurisprudence as an expression of the principle of contractual freedom, the bilateral promise of sale was, for the first time, legally regulated by the current Civil Code. The economic and social dynamics determined the concern of the legislator with a view to reforming the Romanian legal system, and with the entry into force of the new Civil Code, contract promises acquired the long-awaited legislative consecration, and their legal regime was established. By means of the synalagmatic promise of sale, the parties foreshadow the content of the final contract, which is intended to give the parties the certainty that none of them will abandon the intention of concluding the expected contract. The practical utility of bilateral promises resides in the fact that it enables the exercise of the coercive force of the state by issuing a court decision that takes the place of the contract in the event that one of the parties has not fulfilled its assumed obligations. In the current context of an accelerated real estate development, the promise to sell is the most used legal instrument in the relations between real estate developers and future owners. The present study brings into focus the current legal regime of the promise to sell for a full understanding of the effects of this preparatory contract and the legal possibilities available to enforce such a contract.

Keywords: bilateral promise of sale, preparatory contracts, decision that takes the place of an authentic act, anticipatory clauses.

JEL Classification: K11, K12, K15

DOI: 10.62768/PLPA/2025/14/1/07

Please cite this article as:

Teodoru, Gabriela, „The Legal Regime of the Bilateral Promise to Sell”, *Perspectives of Law and Public Administration* 14, no. 1 (March 2025): 118-135.

Article History

Received: 17 September 2024
Revised: 12 November 2024
Accepted: 13 February 2025

1. Preliminaries. Bilateral promise to sell – legislative evolution

The bilateral promise, although recognized by the doctrine, was little used in the period immediately following the appearance of the Civil Code from 1864. The legal institution of the antecontract found its applicability especially in the period following the Second World War, a situation generated by the legislative changes that imposed a series of conditions on the sale of real estate. Thus, in a first stage, the sale of real estate - land and buildings - could only be done in authentic form *ad validitatem* and with administrative authorization². The lack of a legal culture, but also

¹ Gabriela Teodoru - Doctoral School of Law, Bucharest University of Economic Studies, Romania, avocat_dimofte@yahoo.com.

² Dan Chirică: "Consequences of post-revolutionary legislative changes on the circulation of private property" in *Dreptul* no. 6/1991 p. 23.

the need for a quick conclusion of sales contracts, determined the appearance in practice of some situations in which the parties concluded so-called real estate sales contracts, without having the administrative authorization and in the form of conventions under private signature. Due to the fact that non-compliance with the conditions imposed by the law in the case of the alienation of real estate attracted the nullity of the contracts thus concluded, it was admitted both in the specialty literature and in jurisprudence that these conventions were in fact synalagmatic promises to conclude a valid contract in the future, capable of achieving transfer of the real right³. In this sense, in order to avoid postponing of this moment by one of the parties, art.12 of Decree no. 144/1958⁴ established the possibility for the other party to request the pronouncement of a court decision that will take the place of a genuine property transfer act. In a second stage, through the adoption of Laws no. 58/1974 and no. 59/1974, all lands, regardless of their location, were removed from the civil circuit, being able to be acquired only through legal inheritance.

So, during the period when Law no. 58/1974 and Law no. 59/1974 were in force, it was not possible to conclude sales contracts for land, but only for constructions. That's why, during the period indicated, the courts notified with legal actions on the basis of art. 12 of Decree no. 144/1958, in case of admission and the pronouncement of a decision that would take the place of an authentic act of alienation of the construction, ordered the transfer to the state ownership of the related territory.

As a result of the abrogation of Decree no. 144/1958 and Law no. 58/1974, after 1989, numerous legal issues were raised, related to the validity of conventions and the abrogation of the text of the law which provided that the courts could pronounce decisions, which will take the place of an authentic act of alienation⁵.

The judicial practice after 1989 was quasi-unanimous in recognizing the validity of pre-contracts for the sale of land, regardless of the time of the conclusion of the respective pre-contract and the location of the land⁶, as well as the possibility of the interested parties to obtain court decisions by which these pre-contracts are enforced, the action in question being qualified as an action in realization of the right, and the decision constituting rights⁷.

Starting from the reality that a pre-contract, by which the parties have committed themselves to establishing a real right over a real estate in the future, gives rise to the obligation to conclude the assumed contract, the court had the possibility to pronounce a decision that would take place by authentic act of sale, even under the conditions of the repeal of art. 12 of Decree no. 144/1958.

No legal provision sanctioned the agreements regarding the promise to sell

³ Aurelian Ionașcu, Mircea Mureșan, Mircea Costin, Constantin Surdu, *The contribution of judicial practice to the development of the principles of Romanian civil law*, Ed. Academy of the R.S.R. Bucharest, 1973, p. 106.

⁴ Decree no. 144/1958 regarding the regulation of construction, repair and demolition authorizations, as well as those related to the alienation and division of land with or without constructions.

⁵ Ioan Adam, *The legal regime of the acquisition and alienation of real estate*, Bucharest, Ed. New Europe, 1996, p. 197.

⁶ Supreme Court of Justice, civil section, Decision no. 1448/1993 in Law no. 7/1994 p. 76.

⁷ Eugen Chelaru, *Juridical circulation of land*, Ed. All Beck, Bucharest, 1993, p. 273.

and, respectively, to buy, which did not have the effect of transferring the property right, but gave rise only to the obligation of the parties to conclude the agreement, under the terms of the law.

The entry into force of the current Civil Code marked the legislative consecration of the synalagmatic promise of sale.

2. Bilateral promise to sell: concept, legal nature and legal characteristics

By such a promise is meant that contractual agreement of will by which the parties mutually assume the obligation to conclude between themselves in the future, a certain sales contract establishing its essential content⁸. Through this contract, the promisor-seller undertakes to sell, and the other party, the promisor-buyer, undertakes to buy a certain good at a determined price, the contract to be perfected in the future.

Although it is a genuine contract, to emphasize the relationship in which it is with the future sale contract, whose main elements it foreshadows, the bilateral promise is often found in doctrine and jurisprudence under the name of antecontract of sale, a term borrowed from German law⁹.

Also known as advance contract, pre-contract, preliminary contract, provisional contract, preparatory contract, prior contract, the preliminary sales contract did not have a legislative consecration until the entry into force of the current Civil Code.

The Civil Code provides in the first paragraph of art. 1.279 *The promise to contract*, the fact that the promise to contract must contain all those clauses of the promised contract, without which the parties could not execute the promise and art. 1669 with the marginal disclaimer - The promise to sell and the promise to buy provides in paragraph 1: "When one of the parties who concluded a bilateral promise to sell refuses, unjustifiably, to conclude the promised contract, the other party may request the court the pronouncement of a decision to take place of the contract, if all other validity conditions are met."

Among the reasons that determine the conclusion of the preliminary contract of sale, we mention as an example: the speed of the operation, the avoidance of notary stamp duties, the impossibility of paying the price in full, the land is not yet in the property of the promisor-seller, in which case he is obliged to procure it, the state of indivisibility, the non-issue of the property title, the desire of the promising seller to own the land in question for another period, the impossibility of concluding the contract in the form provided by law¹⁰, etc.

The rights and obligations arising from the pre-contract are part of the patrimony of the parties and are susceptible of transmission to other persons. Thus, the

⁸ Mircea Costin, Mircea Mureșan, Victor Ursa, *Civil Law Dictionary*, Scientific and Pedagogical Publishing House, Bucharest, 1980, p. 36-37.

⁹ Constantin Paveleanu, *Theory of antecontracts* - PhD Thesis, Craiova 1941.

¹⁰ Traian Dârjan, „Antecontract of sale-purchase” in *Dreptul* no. 3/2000 p. 56; Also see Singh, Indervir. (2022). „The Choice of Contract-enforcement Institutions”: A Review. *Journal of Interdisciplinary Economics*, 0(0). <https://doi.org/10.1177/02601079221083477>.

right of the prospective buyer can be transmitted by acts between the living, by the assignment of a receivable or by inheritance. Instead, the obligation of the promisor-seller is transmitted only through inheritance (*mortis causa*), because our legislation does not recognize the assignment of debt.

The bilateral promise to sell is similar to a number of other legal institutions but differs from them in many respects. Thus:

a) The bilateral promise of sale differs from the promised contract by its content and effects: the promise gives rise to an obligation to do (to conclude the promised contract in the future) while the promised contract gives rise to the obligation to give (to convey the property right). They also differ in terms of substance and form that must be fulfilled at the time of their conclusion: the promise is concluded consensually, while the promised contract is sometimes concluded in a solemn form. On the other hand, at the conclusion of the promised contract, the seller must be the owner of the sold good, while at the conclusion of the promise, the promisor seller may not be the owner yet.

b) The bilateral promise to sell is distinguished by its synalagmatic character from the unilateral promise to contract. If, in the case of a unilateral promise only the promisor undertakes to consent in the future to the conclusion of the final sale when the beneficiary opts in the same direction, in the case of a bilateral promise, both parties firmly commit themselves to conclude a sales contract in the future whose elements are already predetermined¹¹.

c) The bilateral promise to sell is radically different from the offer to sell, the latter being a unilateral manifestation of will without being a unilateral legal act¹² and even less bilateral.

d) The bilateral promise to sell differs from the preference agreement (conventional preemption) by which the promisor does not oblige himself to sell but only obliges himself, if he decides to sell the good, to prefer the buyer with whom he concluded the pact (at equal price and under equal conditions).

e) The bilateral promise of sale differs from a firm contract under condition, because the fulfillment of the condition validates the contract with retroactive effect, while the conclusion of the contract promised through an ante-contract of sale will produce effects only for the future.

f) The bilateral promise of sale differs from the promise to obtain the ratification of an act, because through the pre-contract one promises one's own consent to the conclusion of the promised future contract, while through the promise to obtain the ratification of an act one only promises the actual fact of convincing another to consent to the conclusion or ratification of an act.

The particularities of the ante-contract of sale have led to the opinion that the

¹¹ Cristina Nicoleta Muscă, *Preparatory contracts in the Civil Code*, <https://www.juridice.ro/706311/contractele-preparatorii-in-codul-civil.html>, published on 15.02.2021. Also see Schwenzer, Ingeborg, and Edgardo Muñoz, *Global Sales and Contract Law*, 2nd edn. (2022; online edn, Oxford Academic), <https://doi.org/10.1093/law/9780198871255.001.0001>.

¹² Constantin Stătescu, Corneliu Bărsan, *Civil law. The general theory of obligations*. All Educational Publishing House, Bucharest, 1998, p. 32 et seq.

legal act of the promise of sale reduces the rights of the previous holder: it begins to detach the right from its subject. Through this act, the alienator chooses his successor or at least a possible successor.

The pre-contract has the following legal characteristics: it is a onerous, synalagmatic, commutative contract, usually with *uno icto* execution and consensual.

a. The pre-contract is a contract with onerous title. The existence of mutual obligations, evaluable in money, makes the pre-contract a onerous contract. The pre-contract foreshadows the essential elements of the future sales contract upon the conclusion of which the parties have committed themselves, especially those related to the good to be sold and its price, sometimes taking place an anticipated execution of these clauses by handing over the good and paying the price (full or partial).

b. The pre-contract is a synalagmatic contract. The obligations of the promisor - seller and those of the promisor - buyer are mutual and interdependent, each constituting the cause of the other. The rules specific to synalagmatic contracts are thus applicable, there is the possibility of resolution for non-performance and the party that declares itself ready to fulfill its obligations will be able to oppose the exception of non-performance to the party, which, although it has not fulfilled its own obligations, demands the performance of the contract.

c. The pre-contract is a commutative contract. The extent of the obligations to which the parties commit themselves is known since the conclusion of the pre-contract. The specific obligation of this convention consists in participating in the subsequent conclusion of the property transfer contract, giving consent for this purpose and fulfilling any other formality provided by law.

d. The pre-contract is usually a contract with *uno icto* execution.

The obligation specific to the pre-contract of sale consists in participating in the subsequent conclusion of the promised contract, giving consent for this purpose and fulfilling any other formality provided by law and it is executed by a single act. However, when the parties have included in the pre-contract specific obligations of the promised contract that they have executed, it can be stated that the respective agreement is with successive execution.

e. The pre-contract is a consensual contract. An expression of contractual freedom, in our civil law, the pre-contract is governed by the principle of consensualism.

That is why the bilateral promise of sale is validly concluded by the simple manifestation of will of the parties, it not being necessary for it to be accompanied by a certain form. It is not required that the bilateral promise of sale be concluded in the authentic form provided for the sales contract (in certain situations) because it is not confused with the latter, according to which it has a distinct configuration.

The pre-contract can be concluded in writing or verbally. However, the written form is necessary for the subsequent exploitation of the pre-contract in case one of the parties refuses its voluntary execution¹³.

¹³ Francisc Deak, Stanciu Cărpenu, *Civil law. Special contracts. Copyright. The right of inheritance*, University from Bucharest, 1983, p. 57.

3. Essential conditions for the validity of the bilateral promise of sale

The promise of sale is subject to the rules and principles governing the conclusion of civil contracts by common law. Therefore, it must meet all those essential conditions for the validity of an agreement when concluding it, namely: capacity to contract; the valid consent of the obliging party; a definite object; a legitimate cause.

However, the specific particularities of the promise of sale in relation to other civil agreements, also determine a series of particularities regarding the substantive conditions of its validity.

The bilateral promise of sale can be validly concluded, like any civil agreement, only by persons with full legal capacity, i.e. by persons of legal age, except for those placed under guardianship. Since the bilateral promise of sale does not transfer the property of the good, we can talk about the special ability to sell or buy only at the moment of the definitive conclusion of the promised contract and which produces translational effects from the moment of its conclusion.

The consent of the parties to the promise is, as a rule, related to the conclusion of a sales contract in the future and does not have the effect of transfer of ownership, for the transfer of the ownership a new consent is required, the latter being the one that coincides with the actual conclusion of the contract that is the object of the promise¹⁴.

The object of the bilateral promise of sale consists in the mutual obligation assumed by the parties to conclude a sale contract in the future regarding a determined individual asset. The bilateral promise of sale must refer to the conclusion of a specific contract in the future, understanding by this that the parties must establish, in the preliminary contract, the essential elements of the promised contract, i.e. at least its nature (sale), the object of that contract (good at which refers) and the price. An ante-contract that would not specify these elements, would be hit with absolute nullity, due to the indeterminate character of the object of the promise.

The ante-contract must refer to a promised contract possible both in fact and in law. Thus, an ante-contract regarding the future conclusion of the sale contract of an asset removed from the civil circuit is absolutely null.

An interesting problem related to the subject of the ante-contract of sale has arisen in practice regarding the validity of the promise to *sell the good of another*. There is no legal provision that provides that the promise to sell an asset made by a non-owner would be void, because the non-owner has the possibility to buy the asset offered for sale from the owner (in reality the asset to which the promise to sell refers) and then be able to complete the promised sale.

Similarly, it is possible and validly concluded the promise to sell an asset that is in *co-proprietorship*, assumed by only one of the co-owners, following that if, after the property separation, the promised asset will fall into the lot of the promisor, he

¹⁴ Ioan Popa, *Civil contracts. From theory to practice*, Universul Juridic Publishing House, Bucharest, 2020, p. 87.

will complete the promised contract, and otherwise also him - alone to answer to the promisor - acquirer for the non-fulfillment of the alienation obligation assumed.

In this sense, judicial practice emphasized not only the obligation of the promising seller, in relation to the co-heirs, to exit from the co-proprietorship, but also the correlative right of the beneficiary of the promise to demand, as a creditor, through indirect action, the establishment of the quality of exclusive owner of the alienating promisor over the promised asset, moreover, even a creditor of the promisor-buyer (beneficiary of the pre-contract) was recognized the right to demand, also by way of oblique action in the place of his debtor (creditor of the promisor-seller), the latter's exit from the co-proprietorship¹⁵.

Returning to the mutual obligation assumed by the parties to conclude a sales contract in the future, this does not only refer to the duty of the parties to subsequently give their consent for the conclusion of the sales contract, but also to the performance of any other necessary operations in this purpose, such as obtaining any authorizations, fulfilling the formalities for exercising the right of pre-emption, presenting the act to the public notary for authentication, as the case may be¹⁶. These operations are accessory obligations whose existence is based on the provisions of art. 1272 paragraph 1 of the Civil Code, according to which the contract obliges not only to what is expressly stipulated, but also to all the consequences that the established practices between the parties, customs, law or equity, give to the contract, according to its nature.

Regarding the cause of the convention, no special particularities in the matter of ante-contracts have been reported in the judicial practice or in the legal literature, so the rules of common law will be applied. Consequently, the bilateral promise of sale based on an illegal or immoral cause, or on a false cause, will be null and void, just like any other civil agreement.

The bilateral promise of sale can be concluded under a private signature, it can be attested by a lawyer or it can be concluded in authentic form at the notary public. The High Court of Cassation and Justice ruled that in the interpretation and application of art. 1279 paragraph (3) sentence I and art. 1669 para. (1) Civil Code, the authentic form is not mandatory when concluding the promise to sell an immovable property, in order to pronounce a decision that will take the place of an authentic act¹⁷.

The promise to conclude a contract with the object of ownership of the property can be noted in the land register, if the promisor is registered in the land register as the owner of the right that is the object of the promise, and the pre-contract,

¹⁵ The Supreme Court, civil section, Decision no. 1405 of June 30, 1983 in *Revista Romana de Drept* no. 5/1984 p. 55.

¹⁶ Mircea Mureșan, *Civil contracts. Vol I. The sale-purchase agreement*, Ed. Cardiac Lex, 1996, p. 75.

¹⁷ High Court of Cassation and Justice Decision no. 23/2017 of April 3, 2017 regarding the resolution of the following legal issue: "the method of interpretation of the provisions of art. 1.279 para. (3) the third sentence of the Civil Code, respectively if the authentic form is mandatory when concluding the promise of sale-purchase of an immovable property, in order to issue a decision that will take the place of an authentic act". published in the Official Gazette of Romania, Part I, no. 365 of May 17, 2017.

under the penalty of rejection of the request for notation, provides the term in which the contract is to be concluded. The notation can be made at any time within the term stipulated in the pre-contract for its execution, but not later than 6 months after its expiration, in this sense being the provisions of art. 906 of the Civil Code. The promise may be deleted from the land register, if the entitled person has not asked the court to pronounce a decision that will take the place of the contract, within 6 months from the passing of the deadline set for its conclusion.

4. Content of the bilateral promise of sale

The clauses of the ante-contract of sale can be classified into three categories: essential and indispensable clauses, accessory clauses and anticipatory clauses.

The essential and indispensable clauses of the ante-contract of sale:

a) Mutual promise to conclude the sale contract in the future. It constitutes the most important and the most specific and defining clause of the ante-contract of sale. Pursuant to this clause, each of the parties to the ante-contract of sale assumes the civil legal obligation towards the other to consent in the future, to the conclusion of the promised contract under conditions of legality and efficiency. The obligation to conclude the sale contract as well as the correlative right of the other promisor to claim the conclusion of that contract are transferable through succession. Moreover, this right can be transmitted through legal documents *inter vivos* (through the assignment of a receivable), admitting for example that the prospective buyer, in turn, can promise a third party the sale of the property that he had undertaken to buy, the situation in that the new promising buyer will be entitled to sue the first promising seller by asking him to conclude the promised contract directly with him.

b) Determination of the essential content of the promised contract. This clause presupposes that in the ante-contract of sale the parties agree on the essential elements of the promised contract. First of all, the parties must determine exactly the *nature* of the contract that they mutually promise to conclude: in our case a sale, otherwise the promise of sale is absolutely null. Second, the parties must determine *the object* of the promised contract, i.e. the good or the goods on which the sale contract will bear. And with regard to the object of the promised contract, its non-indication in the ante-contract also constitutes a clause of absolute nullity, and the ambiguity of its determination constitutes an error-obstacle likely to prevent the valid formation of the promise. Also, through the concluded pre-contract, the parties must also determine *the price* at which they agree to conclude the promised sale contract, because even in the absence of the price, the promised contract cannot be concluded, and the synalagmatic promise to conclude it is meaningless and, therefore, not valid.

c) Assuming the obligation to do everything necessary to be able to validly conclude the promised contract. Most of the time, the parties resort to the conclusion of a promise of sale due to the fact that at the moment they cannot validly conclude the desired contract as some (or all) of the conditions to which the law binds its valid conclusion have not yet been met. Thus, through the obligation assumed by the parties to subsequently conclude the promised contract, they also oblige themselves to

perform all the necessary operations to make it possible to conclude it. Many times the parties omit to include express clauses in this sense in the pre-contract, obliging themselves only to conclude in the future, under the law, the promised contract. However, the absence of express clauses does not equate to the absence from the pre-contract of the assumption clause itself.

The accessory clauses of the ante-contract of sale are analyzed below.

The parties concluding a synallagmatic promise of sale can also agree on additional clauses to the essential ones, clauses intended to guarantee their execution, and otherwise to ensure the pecuniary sanction of the party guilty of non-execution and the compensation of the other party prejudiced by the failure to fulfill the main obligations assumed. Such are the penal clauses and the *arvuna* clause. Sometimes the accessory clauses are agreed by the parties to the pre-contract in order to reserve the right to unilaterally cancel the commitment regarding the conclusion of the promised contract, in certain cases and conditions such as the termination clauses and *lex commissoria*.

The penal clause is an accessory agreement by which the parties to a main contract establish, by prior assessment, the amount of compensatory damages (or moratoriums) that will be owed by the party at fault, in case of non-execution of the obligation assumed by the main contract. In addition to the function of conventional anticipated assessment of damages, the penal clause fulfills a function of guaranteeing the execution of the natural obligation as well as a function of sanctioning the debtor. Judicial practice has consistently admitted the possibility of stipulating a penal clause in the content of a preliminary sales contract.

Regulated by the Civil Code art. 1544 - 1545 the *arvuna* consists of an amount of money (or other fungible goods) that one of the parties gives to the other on the occasion of concluding a contract or pre-contract, following that in the event of non-performance of the contract due to the fault of one of the parties, it will lose the amount given, respectively to return twice the amount received. Just like the penal clause, the *arvuna* clause predetermines, conventionally, the amount of compensation owed by the guilty party for failure to fulfill the main obligation, thus fulfilling the function of guaranteeing the in-kind execution of the obligation. Judicial practice has admitted the possibility of stipulating an *arvuna* clause to guarantee the fulfillment of the obligation to contract assumed through a preliminary sales contract.

Any *arvuna* (deposit) clause is in its essence, a penal clause fulfilling its functions, or these functions are equally compatible not only with the sales contract, but also with the ante-contract by which the conclusion of such a contract is promised.

Through the termination clause, the contracting parties reserve the right to change their mind and to terminate or terminate unilaterally, within a certain term and/or under certain conditions, the main agreement between them. Possible, in principle, in any contract, for the termination clause to be valid, it must be agreed in such a way that it does not constitute, in reality, a purely potestative condition for one of the parties, such a condition attracting the nullity of the entire agreement that it affects.

The parties must provide the terms or conditions in which they understand to

reserve the right of unilateral termination, in the practice of pre-contracts of sale, such a clause is often combined with a penal clause or an arvuna clause¹⁸. The creditor who has agreed to grant his debtor such a clause of disclaimer will no longer have the right to ask the court to oblige the debtor to conclude the promised contract, but will have to be satisfied with the resolution of the preliminary contract and the receipt of the agreed amount of money as an arvuna or penalty clause, or with damages and compensatory interests established by the court.

A resolatory clause is that accessory agreement by which the parties to a main contract stipulate its resolution in case of non-fulfillment of the obligation of one of them. This clause can also be applied to the preliminary sales contract. However, nothing prevents the parties from stipulating in express terms such a resolatory clause, under common law conditions.

In terms of preliminary contracts, each of the contracting parties is simultaneously a creditor and a debtor, each of them being entitled to request the resolution of the contract when the other party does not fulfill its assumed obligation, but - in principle - only on the condition that it itself has fulfilled (or be ready to fulfill) its own correlative obligations.

However, judicial practice and legal literature have highlighted situations in which the pre-sale contract can be terminated by resolution, even if both promising parties are at fault for not executing it¹⁹.

Anticipatory clauses of the ante-contract of sale are analyzed below.

The specialty literature²⁰ has admitted that it is possible for the parties concluding the preliminary sales contract to agree, at the same time, to perform in fact, in advance, some of the specific obligations of the promised contract, which is to be perfected later.

Of course, it is not the case that, based on a clause of the ante-contract, the actual property transfer effect specific to the promised alienation contract is produced in advance. But, without transferring the right of ownership over a building to which the agreement of the parties refers, it is not in the least contrary to the law for the promisor-seller to transfer, in advance, to the promisor-acquirer the actual possession and use of the asset, and the promisor-acquirer to admit, in advance, a sum of money on account of the price of that good.

Promising, mutually, the conclusion of the sales contract in the future, the parties agree in most cases, that a part of the stipulated price should already be paid to the promising seller. Sometimes, in the pre-contract, the parties provide for more complex ways of paying the rest of the price in the future, in one or more installments staggered over time. This anticipatory clause does not pose any special legal problems, because being a question of sums of money, they pass, from the very

¹⁸ Mircea Mureșan, *Dynamics of social relations regulated by law reflected in the theory and practice of law*, vol. I, Cluj-Napoca 1988, p. 120.

¹⁹ Valeriu Stoica, „Aspects regarding the resolution of the promise of sale and purchase in a particular case”, *Legal studies and researches* no. 3/1987 p. 230-234.

²⁰ Mircea Mureșan, „Consequences of the abrogation of law no. 58/1974 on preliminary real estate rental contracts”, *Dreptul* no. 7-8/1991, p. 93.

moment of their payment, into the property of the promisor-seller, who is to bear the risk of their possible accidental loss and in the event of failure to complete the promised sale, he is to return an amount of money equal to that received.

Frequently encountered in pre-contracts for the sale of real estate is the clause regarding the transfer of the real estate to the actual possession and use of the promisor-buyer. But this anticipated handover of the real estate does not have the meaning of an act of actual execution of the obligation to hand over that will arise from the promised contract, but has the meaning of the execution of the obligation arising from the anticipatory clause agreed by the parties in the pre-contract.

Therefore, the real estate remains, legally, in the property of the promisor-seller who continues to bear the risk of accidental destruction of the asset. At the same time, the promising seller remains bound by the obligations legally incumbent on the owner (payment of taxes, insurance premiums).

The beneficiary of the pre-contract, put in actual possession of the building to which the promise to contract refers, has a true subjective civil right that gives him the attribute of use, but not as a real right of use title but as a *precarious title*; this right is opposable both to the owner and to third parties (successors, co-owners)²¹. This right of use is not provided by a special legislation but is regulated only by the agreement of the parties and enjoys protection only to the extent that this agreement can be considered not to contravene the legal order or the rules of social convention.

In the judicial practice and in the specialty literature, the question of the legal regime of the fruits of the goods owned by those who have committed themselves under a pre-sale contract has often been raised. The solution of keeping the fruits by the promisor who in fact took possession of the property based on an anticipatory clause was unanimously accepted, either on the grounds that "from the pre-contract, the agreement of the parties results that one will benefit from the use of the amount paid, and the other will collect the fruits until the date of the action in the resolution of the pre-contract"²², or on the grounds that the person "who receives the good can be characterized as a bona fide possessor", being "assumed that the parties agreed that one should collect the fruits and the other should benefit from the amount paid"²³.

The preliminary sales contracts can also include a clause by which the owner (promisor-seller) can grant the beneficiary (promisor-acquirer) not only the right to already, in fact, use the land that was to be alienated, but also the right to build on this land. Until the completion of the promised contract, the prospective buyer owns the land with a precarious usufruct title and the new construction with an owner title (superficies).

²¹ Mircea Mureșan, *Dynamics of social relations regulated by law reflected in the theory and practice of law*, vol. II, Cluj-Napoca, 1989-1990, p.17.

²² Francisc Deak, Stanciu Cărpenu, *Civil law. Special contracts. Copyright. The right of inheritance* University of Bucharest, 1983, p.56.

²³ Ioan Mișuță, *Repertoire of judicial practice in civil matters 1980-1985*, Scientific and Encyclopedic Publishing House, Bucharest, 1985, p. 90.

5. Effects of the bilateral promise of sale

The bilateral promise of sale enjoys the binding force of any contract, the future conclusion of the sale contract not being a mere faculty for the parties. In the absence of any accessory clauses in this sense, it cannot be terminated by the unilateral will of one of the parties and its culpable non-execution will attract contractual liability.

If one of the parties no longer willingly consents to the conclusion of the sales contract, the party that has fulfilled its obligations, upon request, will be able to obtain a court decision to recognize the sale pursuant to the provisions of art. 1.279 para. (3) thesis I and art. 1,669 para. (1), (2) and (3) Civil Code or may request execution by equivalent by obliging the defendant to damages under the provisions of art. 1.279 para. (2).

Obtaining a decision that takes the place of a sales contract ensures the forced execution of the obligation to do, legally assumed by the promise of sale, and does not lend the legal nature of the sales contract. Through the decision pronounced by the court, it is capitalized the right of the creditor (promisor-buyer) to obtain in kind the execution of the obligation to conclude the contract capable of transferring the right of ownership, assumed by the debtor (promisor-seller); the court decision cannot be confused with the contract of sale, in the sense of negotium.

Any of the contracting parties may request the resolution of the preliminary contract, if the requirements of art. 1549 - 1554 of the Civil Code are met. As a result of the resolution, the parties will be restored to their previous situation, the promisor-seller being obliged to return the price received and the promisor-buyer to hand over the land, to the extent that there was an anticipated execution of these clauses from the pre-contract.

As I have already stated, in the event of a terminated contract, the parties are entitled to collect and keep the fruits of the respective real estate, to use the amount of money paid as the price and to benefit from any interest generated by this amount by virtue of the fact that by paying the price and taking over the immovable, the parties have implicitly understood, to assign to each other the right to benefit from the natural or civil fruits of the assets actually owned by each.

As an effect of the preliminary sale contract, the right to claim the conclusion of the sale contract under the agreed conditions will arise in the property of the promisor-buyer. If the pre-contract also provided for the early delivery of the good, the promisor-buyer acquires the right to claim its delivery, as well as the right to collect its fruits. All these are *claim rights*²⁴.

In the legal literature, the opinion was stated that the pre-contract would also give rise to an obligation not to do, i.e. not to conclude acts of disposition in favor of third parties, regarding the promised asset, by which to thwart the conclusion of the sales contract with the promisor -buyer. The penalty for breaching such an obligation would give the promisor-buyer the right to request the cancellation of the subsequent

²⁴ Eugen Chelaru, *Juridical circulation of land*, Ed. AllBeck, Bucharest, 1993, p. 233.

act of alienation²⁵. However, the arguments brought in support of this statement were vehemently contested²⁶.

Thus, according to the mentioned opinion, the obligation not to do assumed by the promisor-seller pre-exists the moment of concluding the act with the third party acquirer, having the legal force of a legal prohibition (art. 1270 Civil Code), so its violation has the meaning of non-compliance with an essential condition regarding the conclusion of the promised contract. A series of objections can be brought to this statement that are difficult to overcome.

Nullity is by definition that civil law sanction that deprives the legal act of the effects contrary to the legal norms enacted for its valid conclusion. Whether it is absolute nullity, which protects general interests, or relative nullity, which protects private interests, nullity sanctions the violation of legal provisions and not the non-compliance with prohibitions established by the parties by contract. The existence of such a prohibition can only be imposed on the parties to the contract with the same power as the law, according to art. 1270 Civil Code, but not to the third party acquirer, to whom the preliminary contract is not opposable, by virtue of the principle of relativity of the effects of the contract²⁷. On the other hand, even if there were a cause of relative nullity, it could only be invoked by the contracting parties, exceptions to this rule not being allowed unless they are expressly decreed by the legislator (eg the right of pre-emption).

In another opinion that has been embraced by the majority of authors (and at the same time difficult to reject) the synalagmatic promise to sell does not give rise to an erga omnes opposable real right, but only to an obligation to perform in the charge of the promisor-seller, and thus does not bring no infringement of the rights of the third party acquirer in good faith²⁸.

The right of claim of the prospective buyer does not give him the right to follow, which is specific only to real rights, so that he will lose in the conflict with the real right acquired by the third party buyer from the sale contract.

As the good leaves the property of the promisor-seller, it becomes impossible to execute the pre-contract and the promisor-buyer will have the right to claim its resolution. Obviously, in such a situation, the contractual liability of the promisor-seller may also be engaged, the promisor-buyer being able to claim damages.

The situation is different when the sale was made to a third party, the seller seeking to defraud the right of the promisor-buyer and the buyer being complicit in this fraud. This complicity exists when the seller concludes the sales contract in order to make himself unable to fulfill the obligations assumed by the preliminary contract and the third party buyer accepts, knowingly, to support him by participating in the conclusion of the contract or when, under the same conditions, a simulated alienation

²⁵ Dumitru Andrei, Marieta Ronea Avram "Obligations of the promisor-seller and their enforcement" I, in *Dreptul* no. 3/1995 p. 26, 31.

²⁶ Bogdan Dumitrache "Obligations of the promisor-seller and their forced execution" II in *Dreptul* no. 3/1995 p. 32-36.

²⁷ Eugen Chelaru, *Juridical circulation of land*, Ed. All Beck, Bucharest, 1993, p. 235.

²⁸ Dan Chirică, *Civil law. Special contracts*, Ed. Lumina Lex Bucharest, 1997, p. 21.

contract is concluded.

The sale contract will not be considered valid, as a result of the incidence of the principle of fraud omnia corrumpit²⁹. The sanction is therefore absolute nullity (for illicit cause art. 1237 Civil Code), and as a result of the nullity, the good returns to the property of the promisor-seller.

In principle, the synalagmatic promise to contract in the future the alienation of a common property of the spouses is valid as such even if it is concluded only by one of the spouses, because the legal provisions (art. 364 of the Civil Code) require the express consent of both spouses only to the "alienation" and to the "encumbrance" of a common property and not to the simple promise to contract in the future, under legal conditions, alienation of that property. Although the pre-contract concluded by one of the spouses is valid, the promised sale contract will not be valid concluded by the promising spouse alone, nor will it be able to be supplemented by a court decision, because the court so notified is obliged to check under all aspects the legality of the concluded legal act, in question, including, therefore, under the aspect of the requirement that at the conclusion of the promised sale contract there should also be the express consent of the spouse who did not sign the preliminary contract³⁰.

Therefore, the pre-contract concluded by one of the spouses for the sale of a common real estate is not affected by (relative) nullity, but is valid, but it is *non-opposable* to the non-promising spouse who, as a "third party" - benefits from all the legal means of common law to defend his rights and interests in the matrimonial community. In return for the promising spouse, the pre-contract will produce all the legal effects that are his own, with the only particularity that the obligations arising from the pre-contract will be personal obligations of the spouse who assumed them. The promising spouse will also have the special obligation towards the promising buyer to obtain the express consent of the other, non-promising spouse, to the promised contract by the date of conclusion of the sale contract. Otherwise, the promising spouse will be the only one held by the contractual liability towards the promising buyer.

On the other hand, the High Court of Cassation and Justice ruled definitively³¹ on the fact that in the interpretation and application of the provisions of art. 1073 and art. 1077 of the Civil Code from 1864, art. 5 para. (2) from title X of Law no. 247/2005 regarding the reform in the fields of property and justice, as well as some adjacent measures, with subsequent amendments and additions, art. 1.279 para. (3) thesis I and art. 1,669 para. (1) of the Civil Code, in the situation where the promisor-seller has promised to sell the entire asset, although he does not have its exclusive

²⁹ Francisc Deak, *Treaty of civil law. Special contracts*, Ed. Actami, Bucharest, 1999, p. 26.

³⁰ Mircea Mureșan, *Dynamics of social relations regulated by law reflected in the theory and practice of law*, vol II, 1989-1990, p. 103.

³¹ Decision no. 12/2015, published in the Official Gazette of Romania, Part I, no. 678 of September 7, 2015, regarding the examination of the appeal in the interest of the law formulated by the Board of Directors of the Suceava Court of Appeal regarding the admissibility of the action regarding the validation of the promise of sale-purchase of a certain immovable property, in the situation where the promisor-seller has only a share -ideal part of the right of ownership over it.

ownership, the promise to sell cannot be executed in kind in the form of a court decision that takes place of sales contract for the entire asset, in the absence of the consent of the other co-owners.

6. Execution of the bilateral promise of sale

The voluntary execution of the pre-contract implies the fulfillment of the obligations assumed by the promising parties voluntarily, the parties striving to obtain the satisfaction of the conditions required by law for the completion of the promised alienation and presenting themselves to the notary to conclude the authentic promised contract (if the authentic form is required to complete the promised contract).

If one of the parties refuses or neglects to fulfill its obligation to contract assumed by the preliminary contract of sale, the other party can use the legal means provided by the regulations regarding contractual liability and the forced execution of the assumed obligation.

If one of the parties no longer willingly consents to the conclusion of the sales contract, the party that has fulfilled its obligations, upon request, will be able to obtain a court decision to complete the sale pursuant to the provisions of art. 1.279 para. (3) thesis I and art. 1,669 para. (1), (2) and (3) Civil Code or may request execution by equivalent by obliging the defendant to damages under the provisions of art. 1.279 para. (2).

For the admissibility of the action in the pronouncement of the court decision that will take the place of an authentic document, the following *conditions* must be met:

- a) the existence of a valid bilateral promise of sale concluded;
- b) its proof under common law conditions;
- c) refusal of one of the parties to authenticate the act of alienation;
- d) the party has fulfilled the obligations assumed by the pre-contract;
- e) the promising seller must be the owner of the sold good, and the promising buyer must not be unable to acquire that good on the date of the judgment.

By meeting all these conditions, the action becomes admissible, pronouncing a court decision which supplements the debtor's consent to the conclusion of the promised contract in authentic form and which takes the place of an authentic notarial act.

In this case, by derogating from the rule of the declarative effect of court decisions, we are therefore dealing with a decision constituting rights, which, in essence, transforms the obligation to do into the obligation to give, specific to the sale, creating a new legal situation. The court decision undoubtedly itself constitutes a title of ownership similar to the one that the parties would have established by presenting themselves for the authentication of the act before the notary public.

Having a *personal* nature, the action by which the court is requested to enforce the pre-contract is *prescriptive* within a 6-month limitation period from the date on which the contract should have been concluded, according to art. 1,669 para. (2) Civil Code. If the good has been handed over but the sales contract has not yet

been concluded, the term established by the pre-contract has been exceeded, and the parties remain passive with regard to their rights (they do not request the pronouncement of a decision that takes the place of the contract, within the special limitation period of 6 months from the date established for signing the sales contract), in jurisprudence³² it is considered that *the promising seller has performed an act of tacit recognition of the obligations assumed by the contract*, which justifies the production of the interruptive effect of the prescription.

If the promisor-seller disposes of the good that forms the object of the promise, and the inalienability of the good has been made opposable under the conditions provided by art. 628 Civil Code, the promisor-buyer can request the cancellation of the deed of alienation concluded in violation of the inalienability clause, as in the case of the unilateral promise to sell. If the promised asset has been alienated, although the inalienability clause has been made opposable, the promisor-buyer can request the annulment of the deed of alienation concluded by the promisor-seller with the third party with the request for a judgment to take the place of the sales contract. If the inalienability clause has not been made opposable under the law, the deed of alienation concluded by the promisor-seller with the third party in good faith cannot be annulled, but the promisor-buyer is entitled to damages from the promisor-seller who breached his assumed obligations³³.

The exact execution of the obligation to do cannot be fulfilled when the conclusion of the sale contract has become impossible. The impossibility of executing the obligation to contract can be determined by various circumstances such as for example: the accidental loss of the good that is the object of the promised contract. If the loss of the asset is not attributable to any of the parties, the rule of common law applies: *res perit debitori* and therefore the promising seller will bear the risk of the contract being obliged to return the price (if he collected it in advance); removing the asset from the civil circuit.

If one of the parties, as a rule, the promising seller refuses to conclude the contract, i.e. to fulfill the assumed obligation, the promising buyer will be able to request the resolution of the pre-contract, the resolution of the promise with damages (pursuant to art. 1549 et seq. of the Civil Code) or damages (pursuant to art. 1279 para. 2 Civil Code), deriving from contractual civil liability, having the choice between these two possibilities.

This solution is based on the principle of contractual freedom, the parties being able to modify, extinguish or dissolve the contractual relationship they have concluded by mutual agreement. Thus, if one of the parties, refusing without any objective basis to perform in kind the assumed obligation, thus implicitly manifests its will to proceed with the resolution of the contract due to its fault, nothing can be opposed as the other party, if it finds this convenient solution, to waive his right to demand forced execution in kind and to accept that the obligation be abolished and the

³² Civil decision no. 2410/24.11.2015, High Court of Cassation and Justice - Second Civil Section.

³³ Francisc Deak, Lucian Mihai, Romeo Popescu, *Treaty of civil law. Special contracts. Vol. I. Sale and Exchange*, 5th edn. updated by Romeo Popescu, Ed. Universul Juridic, Bucharest, 2017, pp. 54-55.

parties restored to their previous situation³⁴. Even in the hypothesis in which the non-execution of the assumed obligation would be determined by objective obstacles, not imputable to its fault (and therefore could not be interpreted as a tacit acceptance of its resolution), the right of the other party to opt for the resolution of the pre-contract and return to the previous situation it could be denied on grounds derived from the principle of execution in kind. This principle aims at the exact execution of the assumed obligations, or, when a contractual obligation has not been exactly executed, only the creditor is in a position to assess whether its forced execution is still of interest.

If, based on the pre-contract, the buyer has paid in whole or in part, the price of the good to be sold, he can ask for the refund of the amounts paid. At the same time, according to art. 2386 point 2 of the Civil Code, the promising buyer benefits from a legal mortgage for the non-execution of the promise to contract with the object of a real estate registered in the land register, on that real estate, for the restitution of the amounts paid to his account.

The beneficiary of the promise cannot request the return of the price if the sale was not completed due to his fault, remaining obliged as long as the seller does not request the resolution of the pre-contract, to complete the alienation in the form required by law, not being entitled to refuse to fulfill the obligations he assumed nor to take advantage of his own fault³⁵.

In the judicial practice as well as in the specialized literature, the possibility of the resolution of an ante-contract in the case of *the fault of both parties* was also stated³⁶.

The action by which the resolution of the pre-contract is requested is a personal one, thus capitalizing the same right of claim arising from the contract. This action, unlike the one by which the party requests the pronouncement of a decision to take the place of the contract, prescriptive within 6 months from the date on which the contract had to be concluded, is prescriptive within the general term of 3 years, the provisions relating to the interruption of the limitation period and its suspension being incidental.

Bibliography

1. Adam, Ioan, *The legal regime of the acquisition and alienation of real estate*, Bucharest, Ed. New Europe, 1996.

³⁴ Aurelian Ionașcu, Mircea Mureșan, Mircea Costin, Constantin Surdu, *The contribution of judicial practice to the development of the principles of Romanian civil law*, Ed. Academy of the R.S.R Bucharest, 1973, p. 112.

³⁵ Aurelian Ionașcu, Mircea Mureșan, Mircea Costin, Constantin Surdu, *The contribution of judicial practice to the development of the principles of Romanian civil law*, Ed. Academy of the R.S.R Bucharest, 1973, p. 114.

³⁶ Supreme Court, Civil Section dec. no. 752/1985 in *Revista Română de Drept* no. 3/1986, p. 74; Valeriu Stoica, "Aspects regarding the resolution of the sale-purchase promise in a particular case" in *Legal Studies and Researches* no. 3/1987 p. 230-234; Dan Chirică, "The impossibility of executing the pre-sale-purchase contract in a special situation" in *Legal studies and researches* no. 2/1987 p.146-149.

2. Chelaru, Eugen, *Juridical circulation of land*, Ed. All Beck, Bucharest, 1993.
3. Chirică, Dan, "Consequences of post-revolutionary legislative changes on the circulation of private property" in *Dreptul* no. 6/1991.
4. Chirică, Dan, "The impossibility of executing the pre-sale-purchase contract in a special situation" in *Legal studies and researches* no. 2/1987.
5. Chirică, Dan, *Civil law. Special contracts*, Ed. Lumina Lex Bucharest, 1997.
6. Costin, Mircea, Mircea Mureșan & Victor Ursa, *Civil Law Dictionary*, Scientific and Pedagogical Publishing House, Bucharest, 1980.
7. Dârjan, Traian, „Antecontract of sale-purchase” in *Dreptul* no. 3/2000.
8. Deak, Francisc & Stanciu Cârpenaru, *Civil law. Special contracts. Copyright. The right of inheritance*, University from Bucharest, 1983.
9. Deak, Francisc, Lucian Mihai & Romeo Popescu, *Treaty of civil law. Special contracts. Vol. I. Sale and Exchange*, 5th edn. updated by Romeo Popescu, Ed. Universul Juridic, Bucharest, 2017.
10. Deak, Francisc, *Treaty of civil law. Special contracts*, Ed. Actami, Bucharest, 1999.
11. Dumitrache, Bogdan, "Obligations of the promisor-seller and their forced execution" II in *Dreptul* no. 3/1995.
12. Dumitru Andrei, Marieta Ronea Avram "Obligations of the promisor-seller and their enforcement" I, in *Dreptul* no. 3/1995.
13. Ionașcu, Aurelian, Mircea Mureșan, Mircea Costin & Constantin Surdu, *The contribution of judicial practice to the development of the principles of Romanian civil law*, Ed. Academy of the R.S.R Bucharest, 1973.
14. Mișuță, Ioan, *Repertoire of judicial practice in civil matters 1980-1985*, Scientific and Encyclopedic Publishing House, Bucharest, 1985.
15. Mureșan, Mircea, „Consequences of the abrogation of law no. 58/1974 on preliminary real estate rental contracts”, *Dreptul* no. 7-8/1991.
16. Mureșan, Mircea, *Civil contracts. Vol I. The sale-purchase agreement*, Ed. Cardiac Lex, 1996.
17. Mureșan, Mircea, *Dynamics of social relations regulated by law reflected in the theory and practice of law*, vol. I and II, Cluj-Napoca 1988 and 1990.
18. Muscă, Cristina Nicoleta, *Preparatory contracts in the Civil Code*, <https://www.juridice.ro/706311/contractele-preparatorii-in-codul-civil.html>, published on 15.02.2021.
19. Paveleanu, Constantin, *Theory of antecontracts* - PhD Thesis, Craiova 1941.
20. Popa, Ioan, *Civil contracts. From theory to practice*, Universul Juridic Publishing House, Bucharest, 2020.
21. Schwenzer, Ingeborg, and Edgardo Muñoz, *Global Sales and Contract Law*, 2nd edn. (2022; online edn, Oxford Academic), <https://doi.org/10.1093/law/9780198871255.01.0001>.
22. Singh, Indervir. (2022). „The Choice of Contract-enforcement Institutions”: A Review. *Journal of Interdisciplinary Economics*, 0(0). <https://doi.org/10.1177/02601079221083477>.
23. Stătescu, Constantin & Corneliu Bârsan, *Civil law. The general theory of obligations*. All Educational Publishing House, Bucharest, 1998.
24. Stoica, Valeriu, "Aspects regarding the resolution of the sale-purchase promise in a particular case" in *Legal Studies and Researches* no. 3/1987.